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

AMENDED SUBMISSIONS OF THE ATTORNEY-GENERAL FOR THE STATE OF VICTORIA (INTERVENING)

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PARTS I, II AND III: CERTIFICATION & INTERVENTION

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

2. The Attorney-General for the State of Victoria (**Victoria**) intervenes pursuant to s 78A of the *Judiciary Act 1903* (Cth) in support of the first and second respondents.

PART IV: ARGUMENT

A. INTRODUCTION AND SUMMARY OF ARGUMENT

3. Mr Masson donated sperm to Ms Parsons for use in a fertilization procedure at a time when Ms Parsons was neither married nor in a de facto relationship. Child B was born as a result, and Mr Masson has acted as her social parent. Under ss 14(2) and (4) of the *Status of Children Act 1996* (NSW) Mr Masson was irrebuttably presumed not to be Child B's father. Section 60H of the *Family Law Act 1975* (Cth) makes provision in relation to children born as a result of artificial conception. It does not confer the status of parent on Mr Masson; nor does it provide that he is not a parent. Is Mr Masson properly to be regarded as a parent of Child B for the purposes of the *Family Law Act*?

4. Victoria contends that the answer is "no".

The State Act applies as part of the composite body of law

5. Victoria's primary submission is that s 14(2) of the NSW *Status of Children Act* is a law that establishes the status of a person independently of any proceedings in a court. It is not a law that is picked up and applied by s 79 of the *Judiciary Act 1903* (Cth); rather, it applies of its own force as part of the single composite body of law.

6. Further, s 14(2) is not inconsistent with the *Family Law Act*. It does not alter, impair or detract from the operation of the *Family Law Act*. The Commonwealth Parliament has not enacted any rule about the status of sperm donors as parents which conflicts with s 14(2); nor has the Commonwealth Parliament purported to regulate parental status exhaustively, to the exclusion of State law.

Alternatively: the State Act is picked up and applied by s 79 of the *Judiciary Act*

7. Alternatively, if s 14(2) is to be understood as a law directed to the exercise of jurisdiction, and so capable of being picked up and applied by s 79 of the *Judiciary Act*, then it is so picked up and applied. The operation of s 79 is not precluded, because Commonwealth law has not "otherwise provided".

Further alternative: the term "parent" in the *Family Law Act* does not include a sperm donor

8. In the further alternative, if the status of a person as a parent for the purposes of the *Family Law Act* is to be determined solely by reference to the provisions of that Act, and not by reference to State law either directly or pursuant to s 79, Mr Masson is not Child B's parent within the meaning of the general (and undefined) term "parent" as used in the *Family Law Act*.

9. The term "parent" as used in the *Family Law Act* does not encompass a sperm donor (whether or not he has acted as a social parent). The term "parent" as used in that Act is not directed to a question of fact. Rather, the term "parent" is directed to a person's legal status. That status may arise under the specific provisions of the *Family Law Act*; but if the *Family Law Act* does not make provision in relation to the status of parents in a particular case, a person's status as legal parent (or not) is to be resolved by reference to the general law — ie. the common law and/or applicable State law. Mr Masson was not a legal parent under the specific provisions of the *Family Law Act*, nor was he a legal parent as a matter of New South Wales law. Nor should he be regarded as a legal parent under the common law. The common law should be understood to recognise that a sperm donor is not a legal parent, particularly in light of the uniform legislative developments in the States and Territories, which have progressively, since the mid-1980s, excluded a sperm donor from having the status of parent.

10. Importantly, Victoria's submissions do not mean that the Family Court cannot ensure that the best interests of Child B are met, including where those interests are best served by her spending time with Mr Masson. The *Family Law Act* provides for the making of parenting orders, including orders that deal with whom a child spends time and communicates: see ss 64B, 64D. Sections 64C and 65C provide that a parenting order may be made in favour of a person who is not a parent of the child.

11. Thus, the Court had power to make a parenting order providing for Child B to spend time and communicate with Mr Masson, even though he is not Child B's legal parent. The Court also had power to make an order to the effect that Child B's residence not be moved to New Zealand if such a move was not in her best interests, even though Mr Masson is not Child B's legal parent.

12. However, such orders should **not** have been made on the basis that Mr Masson was Child B's legal parent. As the Full Court found, that error infected the exercise of the Court's jurisdiction at first instance.

13. Before elaborating on Victoria's arguments, it is necessary to set out some history concerning the development of the law relating to parentage and artificial conception.

B. THE DEVELOPMENT OF THE LAW CONCERNING PARENTAGE AND ARTIFICIAL CONCEPTION

B.1 STATUS OF CHILDREN LEGISLATION IN THE STATES

14. The colonies and the States have long regulated the legitimacy, status and welfare of children. As social and technological change occurred, so too did the laws of the States.

(1) During the 1970s, a number of States enacted new legislation in relation to the status of children,[1] with a focus on legitimacy and the maintenance of children, particularly those with respect to whom paternity was disputed. Those Acts also introduced certain presumptions in relation to children. For example, Victoria enacted a presumption to the effect that a child born to a woman during her marriage or within ten months after a marriage was dissolved was presumed to be the child of the woman and her husband.[2]

(2) During the 1980s, further amendments were made to legislation in all the States and Territories which reflected medical developments in relation to artificial conception. Initially these statutes primarily dealt with the status of children born to married women using assisted conception, but later they came to encompass lesbian couples and single women.

~~12.~~15. In 1984, sections 5 and 6 of the *Artificial Conception Act 1984* (NSW) were enacted. Together, those provisions had the effect that a sperm donor whose sperm was used in a successful artificial conception procedure undertaken by a married couple was not the father of the child, while the husband was irrebuttably presumed to be the father:

(1) Section 5(2) provided that where a married woman had undergone a fertilization procedure as a result of which she became pregnant, the husband was presumed for all purposes to be the father of the child. The presumption of law that arises by virtue of subsection (2) was said to be irrebuttable: see s 5(3).

(2) Section 6(1) provided that, where a woman became pregnant by means of artificial insemination, then "any man (not being, in the case of a married woman, her husband) who produced semen used for the artificial insemination or the

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1 See, eg, *Children (Equality of Status) Act 1976* (NSW); *Status of Children Act 1974* (Vic); *Family Relationships Act 1975* (SA); *Status of Children Act 1974* (Tas). Queensland was a little later: see *Status of Children Act 1978* (Qld).

2 *Status of Children Act 1974* (Vic), s 5.

procedure shall, for all purposes, be presumed not to have caused the pregnancy and not to be the father of any child born as a result of the pregnancy." Section 6(2) confirmed that this presumption of law was also irrebuttable.

~~13.~~16. In the second reading speech for the Bill that became the NSW *Artificial Conception Act*, the Minister relevantly said:[3]

> Another area of considerable concern is that **technically a donor could be sued for the maintenance** of any children conceived through the use of his semen. A donor is also entitled to apply to a court for the custody of, or access to, any such child. Difficulties occur also in relation to the laws of inheritance. **Because an AID child is the ex nuptial offspring of a donor, in certain circumstances the child may have a claim on the donor's estate** and would, for example, be entitled to a share under the Wills, Probate and Administration Act in the event of the donor dying intestate. There is no doubt that some of these difficulties are unlikely to arise because the circumstances of the child's birth are concealed, or because the donor's identity is protected. However, **needless anxiety and insecurity are created while the potential remains for these problems to surface**. ...
>
> The solutions offered by the bill to these problems are twofold. **First, a husband who consents to the artificial insemination of his wife with semen obtained from a man other than himself will irrebuttably be presumed to be the father of the child**. Second, the **legal links between donors and children conceived through the use of their semen are dissolved**. The result of these provisions is the removal of ex nuptial status and the conferral of the same rights, obligations and security enjoyed by those who are fortunate enough not to require this form of help to have children.

~~14.~~17. In 1996, the NSW *Status of Children Act* repealed the *Artificial Conception Act*. Section 14 of the *Status of Children Act* is the cognate provision to former ss 5 and 6 of the *Artificial Conception Act*. Section 14 continued in force the two irrebuttable presumptions enacted in 1984 in relation to the position of sperm donors. Section 14 also, from 2008, made provision in relation to same sex couples.[4]

~~15.~~18. During the 1980s, each of the State and Territory legislatures enacted provisions to similar effect to ss 5 and 6 of the NSW *Artificial Conception Act*, although two different drafting techniques were used.

~~16.~~19. The following enactments conclusively provided that a sperm donor was not the father of a child conceived through an artificial conception procedure if he was not the husband of the birth mother:

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3 New South Wales, *Parliamentary Debates*, Legislative Assembly, 24 November 1983, 3450-3451 (Mr Walker) (emphasis added).

4 See s 14(1A), inserted into the *Status of Children Act 1996* (NSW) by the *Miscellaneous Acts Amendment (Same Sex Relationships) Act 2008* (NSW).

(1) *Status of Children Amendment Act 1985* (Tas);[5]

(2) *Family Relationships Act Amendment Act 1984* (SA);[6]

(3) *Artificial Conception Act 1985* (WA);[7]

(4) *Artificial Conception Ordinance 1985* (ACT).[8]

~~17.~~20. The following enactments adopted the same approach in respect of married women whose husbands consented to the procedure, but provided that a sperm donor "has no rights and incurs no liabilities in respect of a child" born as the result of a relevant procedure in cases where the woman was unmarried or her husband did not consent:

(1) *Status of Children (Amendment) Act 1984* (Vic).[9]

(2) *Status of Children Amendment Act 1988* (Qld).[10]

(3) *Status of Children Amendment Act 1985* (NT).[11]

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5 Amending the *Status of Children Act 1974* (Tas). Section 10C(1) created the presumption that the husband of a birth mother was presumed to be the father of the child born as a result of a fertilization procedure; and s 10C(2) created the presumption that a sperm donor was not a father in circumstances where a woman underwent a fertilization procedure using the sperm of any man who was not her husband.

6 Amending the *Family Relationships Act 1975* (SA). Section 10D(1) provided that, where a woman became pregnant as a result of a fertilization procedure to which her husband consented, the husband was conclusively presumed to have caused the pregnancy and was the father of any child born as a result of the procedure. Section 10E(2) provided that a man other than the woman's husband who provided sperm for that procedure was conclusively presumed not to have caused the pregnancy, and was not the father of any child born as a result of that procedure.

7 Section 6(1) created a presumption that the husband of a birth mother was the father of a child born as a result of a fertilization procedure; s 7(2) created the presumption that the sperm donor was not the father.

8 Section 5(1) provided that the husband of a woman who gave birth to a child conceived through an artificial fertilization procedure to which the husband consented was conclusively presumed to be the father of the child, whilst the sperm donor was conclusively presumed not to be the father. Section 7 provided that sperm donors were also conclusively presumed not to be the father in circumstances where the birth mother was not married, or her husband did not consent.

9 Amending the *Status of Children Act 1974* (Vic). In respect of birth mothers in relationships at time of conception, ss 10C(2)(a), 10D(2)(a), 10E(2)(c) and 10E(2)(d)(i) provided that the husband of a birth mother was presumed to be the father and ss 10C(2)(b), 10D(2)(b), and 10E(2)(d)(ii) created the presumption that the sperm donor was presumed not to be the father (see also s 10E(2)(b) in relation to the donor of the ovum, also presumed not to be the mother). In relation to women not in a relationship at the time of conception, s 10F(1) provided that the sperm donor "has no rights and incurs no liabilities in respect of a child" born as the result of his sperm being used in an artificial insemination procedure.

10 Amending the *Status of Children Act 1978* (Qld). Sections 15, 16 and 17 of the Queensland Act created an irrebuttable presumption that a sperm donor was not the parent of a child where the child's mother was married and her husband consented to the procedure. Section 18 provided that, where a child conceived through the use of a sperm donor was born to an unmarried woman, the sperm donor "has no rights or liabilities in respect of [the] child".

11 Amending the *Status of Children Act 1978* (NT). Section 5D provided that, where a married woman became pregnant as a result of a fertilization procedure to which her husband consented,

~~18.~~21. In Victoria, the former s 10F of the *Status of Children Act* (which had adopted the second approach, above) was replaced by s 15 of the *Status of Children Act*.[12] Section 15 provides that where a woman without a partner becomes pregnant as the result of a procedure in which donated sperm is used, the man who produced the semen is "**presumed, for all purposes, not to be the father** of any child born as a result of the pregnancy, **whether or not the man is known to the woman**".

~~19.~~22. Later, these State and Territory provisions dealing with artificial conception were amended so as to expand their operation to circumstances where the birth mother was in a same-sex relationship at the time of conception.[13]

~~20.~~23. As can be seen from the above, since the 1980s provision has progressively been made in each of the States and Territories to the effect that, as a matter of law, a sperm donor is not the father of a child born as a result of artificial conception, unless he is also the domestic partner of the birth mother. That is so regardless of whether the birth mother was married or in a de facto relationship, or was single, at the time of conception.

~~15.~~24. In their current form, those laws are as follows:[14]

(1) *Status of Children Act 1974* (Vic), Parts II and III;

(2) *Status of Children Act 1974* (Tas), Part III;

(3) *Family Relationships Act 1975* (SA), Part 2A;

(4) *Status of Children Act 1978* (Qld), Part 3;

(5) *Status of Children Act 1978* (NT), Part IIIA;

(6) *Parentage Act 2004* (ACT), Part 2, Division 2.2; and

(7) *Artificial Conception Act 1985* (WA), s 7(2).

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the husband was presumed to be the father of the child, and a sperm donor other than the woman's husband was presumed not to be the father. These presumptions were irrebuttable. Section 5F provided that, where a woman was unmarried or her husband did not consent to the procedure, the sperm donor had no rights or liabilities in respect of any child born as a result.

12 Section 15 was introduced by the *Assisted Reproduction Treatment Act 2008* (Vic).

13 *Status of Children Act 1996* (NSW) s 14(1A); *Status of Children Act 1974* (Vic) s 13; *Status of Children Act 1978* (Qld) ss 19C, 19D, 19E; *Artificial Conception Act 1985* (WA) s 6A; *Status of Children Act 1974* (Tas) s 10C(1A); *Status of Children Act 1978* (NT) s 5DA; *Parentage Act 2004* (ACT) s 11; *Family Relationships Act 1975* (SA) s 10C(3a).

14 The Queensland and Northern Territory legislation continues to provide, in respect of unmarried women, that a sperm donor "has no rights or liabilities in respect of [the] child": ss 21(1), 22(2) and 23(4) of the *Status of Children Act 1978* (Qld) and s 5F of the *Status of Children Act 1978* (NT). In addition, three States provide for the status of a donor for the purposes of State law: *Status of Children Act 1974* (Tas), s 10C(2); *Family Relationships Act 1975* (SA), s 10C(4); *Artificial Conception Act 1985* (WA), s 7(2).

B.2 COMMONWEALTH REGULATION OF THE STATUS OF CHILDREN

16.25. The early regulation by the Commonwealth of the status of children sought to legitimate children born outside marriage: *Attorney-General for the State of Victoria v Commonwealth.*[15] Since the decision in that case, there can be no doubt that the Commonwealth possesses power to make laws regulating the rights and obligations of those who marry, including in relation to any children of the marriage. However, outside the touchstone of the marriage relationship, the Commonwealth's legislative power in relation to children is dependent upon the referral of power by the States.

1983: First Commonwealth provision dealing with assisted conception

17.26. The first provision in the *Family Law Act* dealing with assisted conception was s 5A, which was introduced by the *Family Law Amendment Act 1983* (Cth). Section 5A proceeded by reference to a medical procedure conducted during a marriage, this being the only source of Commonwealth power at that time. It provided for a child to be the child of a woman's husband if he had consented to the medical procedure, or if a State law deemed the child to be his child. Section 5A did not expressly provide that the child was not the child of the donor of the sperm, although that was arguably implied.

1987: The Commonwealth introduced s 60B, replacing s 5A

18.27. In 1986-87 four States referred power over ex-nuptial children to the Commonwealth.[16] Following that referral, s 60B (the predecessor to s 60H) was introduced into the *Family Law Act* by the *Family Law Amendment Act 1987* (Cth).

(1) Section 60B(1) dealt with married couples who conceived through artificial conception. It provided that if the couple had consented to the procedure, or if under a prescribed law of a State or Territory the child was the child of the couple, then the child was their child, regardless of biological parentage. Section 60B(4) provided for s 60B(1) to apply to *de facto* relationships.

(2) Section 60B(2) and (3) dealt with circumstances where artificial conception was used by a single woman. Those sub-sections operated by reference to prescribed laws of the States and Territories. Section 60B(2) rendered a child the child of the woman, and s 60B(3) rendered the child the child of a man, each regardless of biological connection.

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15 (1962) 107 CLR 529 (the ***Marriage Act Case***) at 554 (Kitto J), 564 (Taylor J), 602 (Owen J).

16 See *Commonwealth Powers (Family Law-Children) Act 1986* (NSW); *Commonwealth Powers (Family Law-Children) Act 1986* (Vic); *Commonwealth Powers (Family Law) Act 1986* (SA); *Commonwealth Powers (Family Law) Act 1987* (Tas).

19.28. Like its predecessor, s 5A, s 60B did not expressly provide that the child was not the child of the donor of the sperm or ovum, although again that was arguably implied.

1995: Further reform of the Family Law Act

20.29. The *Family Law Reform Act 1995* (Cth) introduced significant reforms. The new provisions shifted focus from parental rights to parental responsibility. The best interests of the child replaced the concept of the child's welfare. Provision was made for joint parenting, parenting orders, residence and contact. Section 60B was re-numbered s 60H. At that time, the recognition of parenthood for the partner of a woman who gave birth using assisted conception remained limited to heterosexual couples, and s 60H continued to be silent as to the parental status of the sperm donor.

2008: Amendment of s 60H to recognise same-sex partners as legal parents

21.30. In 2008 the *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008* (Cth) amended s 60H(1) so that it applied to make the partner of the birth mother a legal parent of the child, regardless of whether the partner was male or female. Section 60H(4) was repealed. Section 60H(1) was also amended in 2008 to make express provision, for the first time, to exclude a donor of genetic material from being a legal parent. In that regard, s 60H(1)(d) provided that "if a person other than the woman and the other intended parent provided genetic material—the child is not the child of that person". No similar exclusion was added to ss 60H(2) or 60H(3). Since that time, s 60H has been in its current form.

The construction of s 60H

22.31. Victoria submits that s 60H covers all the circumstances in which parental status is conferred upon persons with respect to children born as the result of artificial conception procedures, for the purposes of the *Family Law Act*. In this context, it may be a distraction to focus on the question whether s 60H is "exhaustive".[17] The proper question, when construing the provisions of the Act (before coming to questions of inconsistency in a s 109 sense) is whether s 60H makes **exclusive** or **inclusive** provision in relation to parenthood where a child is born as the result of an artificial conception procedure. Victoria submits that the provision is exclusive. In particular, this section is the only section in the *Family Law Act* that makes provision for who **is** a child's parent under the *Family Law Act* in circumstances where a single woman has used donated genetic material. The specific provision made in s 60H in respect of artificial conception evinces

17 Cf Third Respondent's Submissions at [36]; Commonwealth Attorney-General's Submissions at [23]–[35].

no intention that recourse may be had to the general term "parent" in order to divine other additional circumstances in which a person could also be the legal parent of a child born as the result of an artificial conception process.[18]

~~23.~~32. The Commonwealth contends, in support of the inclusive approach, that if s 60H is held to be exclusive in relation to parentage of children conceived using artificial conception, it is possible that, if the Commonwealth repealed those laws prescribed for the purpose of s 60H(2), a child would be left with no parents. First, it may be doubted that s 60H(2) has that effect. In any event, Victoria contends that, by reason of s 80 of the *Judiciary Act*, any lacuna would be filed by the common law as modified by the statute law of the relevant State. That would render the birth mother the child's legal parent; but would not render the donor a legal parent.

C. PRIMARY SUBMISSION: THE NSW *STATUS OF CHILDREN ACT* APPLIES AS PART OF THE COMPOSITE BODY OF LAW

~~24.~~33. Victoria's primary submission is that the NSW *Status of Children Act* applies of its own force to determine who is and is not a legal parent of Child B. The provisions of that Act are not picked up and applied as federal law by s 79 of the *Judiciary Act*.

C.1 THE NATURE OF S 14(2) OF THE NSW STATUS OF CHILDREN ACT

~~25.~~34. Section 79 does not pick up and apply all State laws that are to be applied in the exercise of federal jurisdiction. Rather, it operates to fill a gap in the applicable law arising as a consequence of the States' lack of power to regulate the exercise of federal jurisdiction. Thus, in *Rizeq v Western Australia* the Court distinguished between:

(1) on the one hand, the general corpus of State law, which establishes rights, privileges, powers, immunities, duties, disabilities, and liabilities;[19] and

(2) on the other hand, State laws that govern the exercise of jurisdiction by a court — ie. laws that determine the powers of a court, or are directed to how or in what circumstances those powers are to be exercised.[20]

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18 *Generalia specialibus non derogant* ("the specific overrides the general") and *expressum facit cessare tacitum* ("that which is expressed excludes that which is unspoken"). See *R v Wallis; Ex parte Employers Association of Wool Selling Brokers* (1949) 78 CLR 529 at 550 (Dixon J); *Refrigerated Express Lines (A'Asia) Pty Ltd v Australian Meat and Live-stock Corp* (1980) 29 ALR 333 at 347 (Deane J).

19 *Rizeq v Western Australia* (2017) 262 CLR 1 at 74 [204] (Edelman J); and see 24 [56] (Bell, Gageler, Keane, Nettle and Gordon JJ).

20 *Rizeq* (2017) 262 CLR 1 at 26 [61]-[63] (Bell, Gageler, Keane, Nettle and Gordon JJ).

26.35. Laws in the first category (together with Commonwealth laws and the common law) form part of a single though composite body of law,[21] and apply in federal jurisdiction as valid State laws unless and to the extent that they are rendered invalid by reason of inconsistency with Commonwealth laws.[22]

27.36. By contrast, by reason of the limitation on State legislative power that arises from Chapter III of the Constitution, State laws in the second category cannot govern an exercise of federal jurisdiction. Section 79 of the *Judiciary Act* is needed — and will operate — to pick up such laws, where applicable, except as otherwise provided by the Constitution or the laws of the Commonwealth.

28.37. Victoria contends that s 14(2) of the NSW *Status of Children Act* is a law in the first category, for the reasons given in the Appellant's Submissions at [51]-[57] and the Third Respondent's Submissions at [8]-[17]. In summary:

(1) Section 14(2) is directed to a person's status as a matter of law and is not by its text limited to judicial proceedings.

(2) The history of the section suggests that it was intended to have a broader operation, and was not intended to be limited to judicial proceedings.

(3) The section fixes parental status for a variety of other legislative schemes.

(4) The purpose of s 14(2) was to clarify parental status for children born as the result of artificial conception. It falls to be applied by various persons outside judicial proceedings, such as administrative decision-makers, including the Registrar of Births, Deaths and Marriages. It could also be applied in private settings, for example by a child care provider.

(5) Section 14(2) should not be understood as establishing a "statutory fiction"; but even if it is so understood, that does not mean that it applies only in the context of judicial proceedings.

29.38. As the appellant notes, this submission is not inconsistent with the decision of this Court in *R* v *Oregan; ex parte Oregan*.[23] There, Webb J (sitting alone) held that a State law concerning custody of children was picked up and applied by s 79 of the *Judiciary Act*. However, as Kiefel CJ noted in *Rizeq*, "the provision which his Honour identified as applicable was one which directed the court making an order with respect to custody to

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21 *Rizeq* (2017) 262 CLR 1 at 21-2 [48] (Bell, Gageler, Keane, Nettle and Gordon JJ).

22 *Rizeq* (2017) 262 CLR 1 at 41 [103] (Bell, Gageler, Keane, Nettle and Gordon JJ).

23 (1957) 97 CLR 323.

consider the interests of the child as paramount".[24] Section 14(2) is not a provision of that kind. It is not directed to the matters relevant to the making of orders by a court. It is directed to establishing, for a variety of purposes (including, but not limited to, court proceedings), whether a person has the legal status of "father" (ie parent).

C.2 SECTION 14(2) OF THE NSW *STATUS OF CHILDREN ACT* IS NOT INCONSISTENT WITH THE *FAMILY LAW ACT*

30.39. A State law cannot operate as part of the composite body of law if it is inoperative as a consequence of s 109 of the Constitution. It is thus necessary to assess whether s 14(2) of the NSW *Status of Children Act* is inconsistent with the *Family Law Act*. Victoria contends that there is no inconsistency: s 14(2) does not "alter, impair or detract from" the operation of the *Family Law Act*.

The test for inconsistency under s 109 of the Constitution

31.40. Different "tests" have been developed for the application of s 109:

(1) The first is to ask whether the State law would "alter, impair or detract from" the operation of the Commonwealth law.[25] If it would, the State law will be inconsistent with the Commonwealth law (referred to as "direct inconsistency").

(2) The second is to ask whether the Commonwealth law evinces an intention that it be a complete statement of the law governing a particular matter, in which case a State law that also regulates the same matter will be inconsistent with the Commonwealth law (referred to as "indirect inconsistency"). The "essential notion of indirect inconsistency is that the Commonwealth law contains an implicit negative proposition that nothing other than what it provides with respect to a particular subject matter is to be the subject of legislation".[26]

32.41. These approaches are "directed to the same end": namely, to determine "whether a 'real conflict' exists" between the laws under consideration.[27] Thus, it may be that in substance there is but one test: does the State law alter, impair or detract from the operation of the Commonwealth law, so as to reveal a real conflict?[28]

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24 *Rizeq* (2017) 262 CLR 1 at 17 [28]; also 37 [95] (Bell, Gageler, Keane, Nettle and Gordon JJ).

25 *Work Health Authority v Outback Ballooning Pty Ltd* (2019) 363 ALR 188 at 195-196 [32] (Kiefel CJ, Bell, Keane, Nettle, Gordon JJ).

26 *Outback Ballooning* (2019) 363 ALR 188 at 196 [330-[35] (Kiefel CJ, Bell, Keane, Nettle, Gordon JJ).

27 *Jemena Asset Management (3) Pty Ltd v Coinvest Ltd* (2011) 244 CLR 508 at 525 [42].

28 *Outback Ballooning* (2019) 363 ALR 188 at 204-205 [70] (Gageler J).

No inconsistency

33.42. Section 14(2) of the NSW *Status of Children Act* does not alter, impair or detract from Commonwealth law. There is no provision in the *Family Law Act* which requires that a man whose sperm is used in an artificial conception procedure which results in the birth of a child is to be treated as a legal parent of that child. Indeed, to the contrary:

(1) Section 60H(1)(d) of the *Family Law Act* makes explicit provision that a child who is born as the result of an artificial conception procedure is not the child of a man whose sperm is used in that procedure, unless that man is also the husband or domestic partner of the birth mother. Section 14(2) is consistent with, not inconsistent with, that section.

(2) Section 60H(1)(c) of the *Family Law Act* provides in relation to the above circumstances that the man who is married to, or in a de facto relationship with, the birth mother is expressly declared to be the father of the child born as the result of an artificial conception procedure in which a donor's sperm is used. Section 14(2) is consistent with, not inconsistent with, that section.

(3) Section 60H(3) allows for a man who donates sperm used to cause a woman to become pregnant to be treated as the legal parent of a child, **but only** if two conditions are met: (a) a State law so provides; and (b) the Commonwealth prescribes that State law. Neither of those preconditions is satisfied, thus s 60H(3) at present has no operation. Again, s 14(2) is not inconsistent with s 60H(3).

34.43. As to "indirect" inconsistency, while s 60H is the only section in the *Family Law Act* which makes provision for parental status in relation to children born as the result of artificial conception procedures, the Commonwealth has evinced no intention to "cover the field" in relation to that topic. That is, the federal law does not contain a negative implicit proposition that, for the purposes of the *Family Law Act,* no other law is to govern the parenthood of children born as the result of artificial conception procedures.

35.44. Relevantly for present purposes, there is nothing in the scheme of the Act to suggest that, **in circumstances where s 60H does not apply** to resolve the question of a person's parental status, a State law cannot apply to determine that question. There is no "real conflict" between s 14(2) and s 60H or any other provision of the *Family Law Act*.

D. FIRST ALTERNATIVE SUBMISSION: S 14(2) IS PICKED UP AND APPLIED BY S 79

36.45. In the alternative to the submission developed in Part C, Victoria submits that if the Court concludes that s 14(2) of the NSW *Status of Children Act* is a law regulating jurisdiction rather than part of the general corpus of State laws, then:

(1) the law is capable of being picked up and applied by s 79 of the *Judiciary Act*;

(2) for the reasons given above at 42 to 44, and the reasons given by the First and Second Respondents' Submissions at [27]-[50], the *Family Law Act* does not "otherwise provide" within the meaning of s 79 of the *Judiciary Act*; and

(3) therefore, the Full Court of the Family Court was correct to hold that s 14(2) of the NSW *Status of Children Act* was picked up by s 79 of the *Judiciary Act*.[29]

E. SECOND ALTERNATIVE SUBMISSION: THE TERM "PARENT" IN THE *FAMILY LAW ACT* DOES NOT INCLUDE A SPERM DONOR

37.46. In the further alternative, Victoria submits that if the question whether a person is a legal parent for the purposes of the *Family Law Act* is to be determined solely by reference to the provisions of that Act, and not by reference to State law operating either directly or pursuant to s 79, Mr Masson is not Child B's legal parent within the meaning of the Act:

(1) he is not Child B's legal parent by reason of s 60H (this is uncontroversial); and

(2) he is not Child B's legal parent within the meaning of the general (and undefined) term "parent" as used in the *Family Law Act*.

The term "parent" in the FLA is directed to a question of law

38.47. Victoria contends that the term "parent" as used in the *Family Law Act* does not encompass a sperm donor (whether or not he has acted as a social parent).[30] The term "parent" as used in that Act is not directed to a question of fact. Rather, the term "parent" is directed to a person's **legal status**. That is a question of law. It requires that one look outside the term "parent" to ascertain whether, under some other law, a person is a child's legal parent. The term "parent" in the *Family Law Act* is not a "*tabula rasa*, with all that used to be there removed".[31]

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29 M Davies, A Bell and P Brereton, *Nygh's Conflict of Laws in Australia* (8th ed, 2010), 629.

30 The approach of the Family Court on this issue has varied over time. See, in particular, the cases set out in the judgment of the Full Court at [51]-[82].

31 *Vallance v The Queen* (1961) 108 CLR 56, 76 (Windeyer J). And see M Leeming, "Theories and Principles Underlying the Development of the Common Law — The Statutory Elephant in the Room" (2013) 36 *UNSW Law Journal* 1002, 1015-7.

39.48. A person's status as legal parent (or not) may be the subject of specific provisions of the *Family Law Act,* including s 60H; but if that Act does not make provision in relation to the status of a person as a parent in a particular case, a person's status as a legal parent (or not) is to be resolved by reference to the general law — ie. the common law and/or applicable State law.

40.49. And, as French CJ, Gummow, Hayne, Crennan and Bell JJ observed in *Aid/Watch Incorporated v Commissioner of Taxation*:[32]

> A law of the Commonwealth may exclude or confirm the operation of the common law of Australia upon a subject or, as in the present case, **employ as an integer for its operation a term with a content given by the common law as established from time to time.**
>
> ...
>
> Where statute picks up as a criterion for its operation a body of the general law, such as the equitable principles respecting charitable trusts, then, in the absence of a contrary indication in the statute, the statute speaks continuously to the present, and picks up the case law as it stands from time to time.

41.50. That is, changes in common law that occur after a statute is enacted are also capable of affecting the meaning of a statutory text.[33]

The common law should be developed to recognise that a sperm donor is not a legal parent

42.51. Further, Victoria contends that the common law should be understood to recognise that a sperm donor is not a legal parent, regardless of the marital status of the birth mother.[34] That is so particularly in light of the legislative developments in the States and Territories that have, progressively since the mid-1980s, uniformly[35] excluded a sperm donor from

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32 (2010) 241 CLR 539 at 548-549 [20], [23] (emphasis added). See also *Williams v Wreck Bay Aboriginal Community Council* [2019] 93 ALJR 279 at [71] (the Court).

33 S Gageler, "Common Law Statutes and Judicial Legislation: Statutory Interpretation as a Common Law Process" (2011) 37 *Monash University Law Review* 1 at 11.

34 It may be that at common law, a sperm donor to an unmarried woman would not have been regarded as the legal parent of the child. Historically at common law, a child born to an unmarried woman was "*filius nullus*" — child of no-one — and there was no legal relationship between the child and her biological father: S Mason, "Abnormal Conception" (1982) 56 ALJ 347 at 349. The common law rule was abolished by legislation enacted by each of the States and Territories (see paragraph 14(1), above), so that a child now has the same rights in respect of her father regardless of whether her parents are married. It is likely that the common law would now be regarded as reflecting those changes.

35 It may be accepted that inconsistent or divergent statutory changes by the States could not properly influence the development of the common law of Australia: *Esso Australia Resources Limited v Commissioner of Taxation* (1999) 201 CLR 49 at 61-63 [22]-[28] (Gleeson CJ, Gaudron and Gummow JJ). However, in the present case the statutory developments have been uniform: to use the language of the joint judgment in *Esso* at [27], there has been "a consistent pattern of State legislation".

having the status of parent in all circumstances.[36] As in *R v L*, it would be "out of keeping" with statutory changes[37] to draw a distinction between single women and women in a married or de facto relationship for the purposes of defining who is a legal parent in circumstances where artificial conception procedures have been used.

Victoria's approach provides certainty

43.52. Victoria's approach to ascertaining legal parenthood provides much greater certainty than the approach of the Third Respondent and the Commonwealth, which treats the term "parent" as a question of fact to be resolved on a case by case basis by reference to evidence of intention and/or social parenting (noting that no party appears to contend that mere donation of genetic material for artificial conception, without more, is sufficient to render a person a legal parent).

44.53. In particular, the factual approach will lead to significant uncertainty. For example:

(1) There will be uncertainty as to whether a donor is a legal parent at the time of the child's birth, when no social parenting will yet have occurred. Victoria contends that the intention of the parties cannot be controlling; but that in so far as intention is said to be relevant, the donor and the birth mother may have had different intentions, or their intentions may be the subject of dispute.

(2) It is unclear what level of social parenting would render a sperm donor a legal parent.[38] Would limited or sporadic time with the social parent be sufficient? Or would it be necessary for the child to spend time with the social parent frequently and regularly? Would overnight visits be necessary? Would it be necessary that the child call the social parent "dad" (or similar)? Or that she spend time with the donor's extended family?

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36 As to the influence of statute law on the development of the common law, see: R Pound, "Common Law and Legislation" (1908) 21 *Harvard Law Review* 383 at 385; P Finn, "Statutes and the Common Law" (1992) 22 *University of Western Australia Law Review* 7; A Mason, "The interaction of statute law and common law" (2016) 90 ALJ 324 at 331-337; Finn P, "Statutes and the Common Law: the Continuing Story" in Corcoran S and Bottomley S (ed), *Interpreting Statutes* (5th Ed, 2005); *Adelaide Steamship Co Limited v Spalvins* (1998) 81 FCR 360 at 373 (Olney, Kiefel and Finn JJ).

37 (1991) 174 CLR 379 at 390 (Mason, Deane and Toohey JJ).

38 See J Millbank, "The Status of Known Sperm Donors Under the *Family Law Act*" (2006) 18 *Australian Family Lawyer* 30 at 37: "known donors engage in a range of roles from limited or casual acquaintance with the child to occasional or frequent avuncular or warm 'family-friend' contact, to regular 'Sunday-Dad' contact". See also J Millbank, "From Here to Maternity: A Review of the Research on Lesbian and Gay Families" (2003) 38 *Australian Journal of Social Issues* 541.

(3) The Commonwealth's approach would lead to the possibility of a person's status as a legal parent changing over time, depending on when the donor commenced a social parenting role and whether at some point he ceased such a role. It could also lead to a donor effectively "bootstrapping" himself into the status of legal parent by obtaining a parenting order at a time when he is not a legal parent and then relying on the resulting relationship with the child to say that he has become a legal parent, although he was not a legal parent at the time of the child's birth.

45.54. This uncertainty provides an additional reason why Victoria's submission as to the meaning of "parent" in the *Family Law Act* is to be preferred. This degree of uncertainty is undesirable[39] and is unlikely to have been intended by the Parliament. As the Victorian Law Reform Commission observed in 2007:[40]

> The Commission believes strongly that **it is in the best interests of children that the status of their parents and donors be as clear and certain as possible**. Certainty in the law minimises the likelihood of disputes and litigation. It also assists people to understand their rights and responsibilities and to make decisions and arrangements with the benefit of that knowledge.
>
> We recommend that sperm donors should be presumed at law not to be the father of any children conceived by women without male partners as a result of their donation. This is consistent with the status of donors whose gametes are used by heterosexual couples, and with the status of donors in NSW, Western Australia, South Australia, Tasmania and the ACT.
>
> In a system where heterosexual couples, same-sex couples and single women can access donor sperm, and where donors are precluded from directing their donations, **it does not make sense for donors to have a different legal status in relation to children depending on the relationship status of the women who receive the sperm**.

Victoria's approach promotes coherence in the law

46.55. Finally, the approach of the Appellant and the Commonwealth leads to a person being a legal parent for one law — the *Family Law Act* — but not for other laws, including other Commonwealth laws and other State laws.

47.56. In that regard, it is significant to note the meaning of "parent" in the *Child Support (Assessment) Act 1989* (Cth). Section 5 of that Act provides as follows (emphasis added):

> ***parent***:
>
> (a) when used in relation to a child who has been adopted—means an adoptive parent of the child; and
>
> (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*; and

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39 As Allsop CJ observed in *Paciocco v Australia and New Zealand Banking Group Limited* (2015) 236 FCR 199 at 267 [264]: "Certainty in the law is an element or essence of enduring importance".

40 Victorian Law Reform Commission, *Assisted Reproductive Technology and Adoption* (2007) 120, 136 (emphasis added).

(c) when used in relation to a child born because of a surrogacy arrangement—includes a person who is a parent of the child under section 60HB of the *Family Law Act 1975*.

48.57. Mr Masson is clearly **not** Child B's parent within the meaning of the *Child Support (Assessment) Act*, and is therefore not liable to support Child B (and see Commonwealth Submissions at [26]). This gives rise to the incongruous conclusion that, if Mr Masson's appeal is upheld, he would obtain the status of a parent under the *Family Law Act* (and thereby have parental responsibility for a child within the meaning of s 61C), but would not be subject to the obligations of a parent under the child support regime.[41] A construction of the *Family Law Act* that leads to that outcome is unlikely to have been intended by Parliament and should not be adopted.[42]

49.58. Further, State laws — which will be governed by the presumptions under their status of children legislation — deal with a broad range of issues where parental status is relevant, including adoption,[43] education, supervision, health, inheritance and property rights.[44] It would be incongruous and undesirable for the status of a person as a legal parent to a child (or not) to differ as between these State laws and Commonwealth law.

50.59. The reforms enacted at all levels of government from the mid-1980s were intended to achieve uniformity, not divergence, on the topic of parental status in the context of assisted conception. As Fogarty J observed in 1996, in *Re B and J*, this uniformity of approach was "far from coincidental". His Honour pointed out that in July 1980 the Standing Committee of Commonwealth and State Attorneys-General determined that uniform legislation on the status of children born as a result of artificial insemination by donor treatments should be enacted in all Australian jurisdictions; and that the Standing Committee re-affirmed these recommendations in 1981, 1982 and 1983.[45]

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41 So, for example, if the donor was a father, he would have the limited financial obligations imposed by s 67B of the *Family Law Act* in respect of birthing expenses but not the broader financial obligations of a parent under the *Child Support (Assessment) Act*.

42 In contrast, it may be noted that the term "parent" in the *Australian Citizenship Act 2007* (Cth) has been interpreted to include a person who was not a biological parent of a child, but was a social parent: see *H v Minister for Immigration and Citizenship* (2010) 188 FCR 393. See also the discussion in *Hudson v Minister for Immigration and Citizenship* (2012) 126 ALD 40. It may also be noted that s 8 of the *Australian Citizenship Act* refers to s 60H of the *Family Law Act* in relation to determining who is a parent of a child born as a result of artificial conception.

43 See, eg, *Application of D and E* (2000) 26 Fam LR 310 at 313 [9], 315-316 [21]–[22] (Bryson J).

44 Victorian Law Reform Commission, *Assisted Reproductive Technology & Adoption: Position Paper Two — Parentage* (2005), [2.9].

45 (1996) 135 FLR 472 at 478. The reference to the Standing Committee re-affirming its recommendations is found only in the online report of the decision: [1996] FamCA 124.

~~51.~~60. In 1985 the Senate Standing Committee on Legal and Constitutional Affairs published its report on *IVF and the Status of Children*, in which it recommended uniformity in dealing with the status of children born through IVF or other artificial reproduction procedures. It observed that "[a]ny departure from nationwide uniformity in status law — whether at the level of substance or at the level of wording and/or structure — frustrates the principle of simplicity and clarity and increases the prospect of children finding themselves entangled in complex litigation to determine familial status".[46]

~~52.~~61. In addition, the States undertook various inquiries to inform appropriate regulation,[47] thus the uniform laws enacted reflected a careful and considered response to the issues raised by assisted conception.[48]

~~53.~~62. It is important that statutes are interpreted, and the common law is developed, in a way that promotes coherence in the law.[49] Victoria's approach produces a coherent approach to parental status. Victoria's approach avoids a construction of the *Family Law Act* that leads to the consequence that a person might be a parent under one Commonwealth law but not another, or be a parent under a Commonwealth law but not under State laws. In contrast, the construction advanced by the Commonwealth and the Third Respondent leads to incoherence and incongruity.

~~54.~~63. Thus, returning to the present case, Mr Masson is not Child B's legal parent by reason of s 60H of the *Family Law Act*. He is not Child B's legal parent as a matter of New South Wales law. Nor should he be regarded as Child B's legal parent under the common law. Thus he is not a "parent" within the meaning of that term as used in the *Family Law Act*.[50]

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46 Parliamentary Paper No 493/1985 (presented on 6 December 1985) at 10 [2.6].

47 See, eg, NSW Law Reform Commission, *Artificial Conception: Human Artificial Insemination* (Discussion Paper 11, 1984 and Report 49, 1986); NSW Law Reform Commission, *Artificial Conception: In Vitro Fertilization* (Discussion Paper 15, 1987 and Report 58, 1988); NSW Law Reform Commission, *Relationships* (Report 113, 2006); South Australia, *Report of the Select Committee of the Legislative Council on Artificial Insemination by Donor, In Vitro Fertilization and Embryo Transfer Procedures and Related Matters in South Australia* (April 1987); Demack J, *Report of the Special Committee appointed by the Queensland Government to Enquire into the Laws Relating to Artificial Insemination, In Vitro Fertilization and Other Related Matters*, (Qld Parliament, Brisbane, 1984); Victoria, Committee to Consider the Social, Ethical and Legal Issues Arising from In Vitro Fertilization (the "Waller Committee"), *Report on Donor Gametes* (1983).

48 Cf *State Government Insurance Commission v Trigwell* (1979) 142 CLR 617 at 633 (Mason J).

49 *Miller v Miller* (2011) 242 CLR 446, 454 [15]-[16] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

50 Victoria notes that Mr Masson was recorded on Child B's birth certificate as her father. That, it might be said, means that by reason of s 69R of the *Family Law Act* Mr Masson is presumed to be Child B's parent. However, as a matter of New South Wales law Mr Masson should not have

However, social parenting is not irrelevant to the operation of the *Family Law Act*

55.64. As noted at the outset, that is not to suggest that questions of fact around social parenting are irrelevant to the operation of the *Family Law Act*. To the contrary, they can be very significant. As noted above, Division 6 of Part VII of the Act provides for the making of parenting orders in relation to children. Section 60CA provides that the best interests of the child are the paramount consideration in deciding whether to make a particular parenting order. Section 64C provides that parenting orders can be made in favour of a person who is not the child's legal parent, including orders in relation to who is to have parental responsibility for a child. Section 65C provides that, in addition to the child, a parent, a grandparent, or any person "concerned with the care, welfare or development of the child" may apply for a parenting order: s 65C.[51]

56.65. Section 64B provides that a parenting order may deal with the following matters:

(1) the persons with whom the child is to live;

(2) the time the child is to spend with a person;

(3) the allocation of parental responsibility for a child, and consultations between persons with parental responsibility;

(4) the communication a child is to have with a person;

(5) maintenance of a child; and

(6) any aspect of the care, welfare or development of the child, or any aspect of parental responsibility.

57.66. Section 61D provides that a parenting order confers parental responsibility on a person in relation to a child, but only to the extent set out in the order — that is, a parenting order does not render a person in whose favour the order is made the legal parent of the child.[52]

58.67. Social parenting can be the basis for parenting orders providing for a child to spend a great deal of time with her social parents, for the social parent to have parental responsibility and, potentially, for the residence of the child not to be altered by the legal

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been so registered and the NSW Registrar of Births Deaths and Marriages has the power to correct the register (see s 45 of the *Birth Deaths and Marriages Registration Act 1995* (NSW)) if requested or on his or her own motion, or could be required or authorised by a court to do so: *LU v Registrar of Births Deaths and Marriages No 2* [2013] NSWDC 123 at [34] (Taylor DCJ). Thus this proceeding cannot be satisfactorily resolved on the basis of the presumption in s 69R. Further, it is doubtful that Order 6 of the trial judge's order was a valid order.

51 The *Family Law Act* does not prescribe a "hierarchy of applicants" for such orders, and in all cases applications for parenting orders fall to be determined by reference to the child's best interests: *Ellison & Karnchanit* (2012) 48 Fam LR 33 at 60-61 [111].

52 See s 4(1) and s 61B in relation to the meaning of "parental responsibility".

parents. That is so even in relation to a child who is the child of a couple, but whose sperm donor has played a social parent role.[53]

~~59.~~68. Thus, in this case the Court had power to make a parenting order that provides for Child B to spend time and communicate with Mr Masson, even though he is not Child B's legal parent. The Court also had power to make an order to the effect that Child B's residence not be moved to New Zealand if such an order was in her best interests, even though Mr Masson is not Child B's legal parent.

~~60.~~69. But such orders should not have been made on the basis that Mr Masson was Child B's legal parent. As the Full Court found, that error infected the exercise of the Court's jurisdiction at first instance.[54]

PART V: ESTIMATE OF TIME

~~61.~~70. The Attorney-General for Victoria estimates that she will require approximately 1 hour for the presentation of her oral submissions.

Dated: ~~22~~28 March 2019

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53 See, eg, *Wilson & Roberts (No. 2)* [2010] FamCA 734. There, Dessau J decided that the mothers (who were the legal parents) should have sole parental responsibility for the child, and made parenting orders pursuant to s 64D that gradually increased contact with the sperm donor and his partner (who were not legal parents, but had played a social parent role in the child's life). The mothers were also permitted to relocate with the child overseas, with notice, but if that occurred then the donor and his partner were still to have contact with the child.

54 *Parsons & Masson* [2018] FamCAFC 115 at [91]-[97].