IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S6 of 2019

BETWEEN:

MASSON
Appellant

and

10

PARSONS
First Respondent

PARSONS
Second Respondent

INDEPENDENT CHILDREN'S LAWYER
Third Respondent

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APPELLANT'S SUBMISSIONS

PART I: CERTIFICATION

1. It is certified that this submission is in a form suitable for publication on the internet.

PART II: ISSUES

2. The issue raised by this appeal is whether section 79 of the *Judiciary Act 1903* (Cth) (***Judiciary Act***) picked up and applied ss 14(2) and (4) of the *Status of Children Act 1996* (Cth) (**SOC Act**) in parenting order proceedings in the Family Court of Australia
30 with the result that the appellant was irrebutably presumed not to be the father of his biological daughter.

PART III: SECTION 78B NOTICE

3. The appellant served a section 78B notice on 8 January 2019: CAB 146-149.

PART IV: JUDGMENTS BELOW

4. *Masson v Parsons* [2017] FamCA 789 (first instance)

5. *Parsons v Masson* [2018] FamFCAFC 115 (appeal)

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PART V: FACTS

6. The underlying applications in the proceedings were for parenting orders in respect of two children, both girls.

7. At the time of the first instance judgment, the two girls were aged 9 (**B**) and 8 (**C**): CAB 14 [3].[1] B is the appellant's (**Robert**) biological child: CAB 15 [8].

8. B and C live in Australia with the first (**Susan**) and second (**Margaret**) respondent. The proceedings below were, in part, precipitated by the desire of Susan and Margaret to move to New Zealand with the girls: CAB 16 [21]. Although the girls live with Susan and Margaret, they also spend time with Robert and know him (and have always known
10 him) as "daddy": CAB 14 [4], 15 [9], [11].

9. Susan and Robert had been close friends for at least 25 years: CAB 15 [17]. In late 2006, Susan and Robert conducted a private and informal artificial insemination procedure through which B was conceived: CAB 15 [8], 16 [18], 20 [56]. At the time of the conception, Robert believed that he was fathering a child whom he would help parent, by financial support and physical care: CAB 25 [95]. Robert provided his sperm for that purpose: CAB 26 [101(ii)]. Thereafter, Robert was identified as B's father on her birth certificate: CAB 15 [8].

10. Robert and C are not biologically related (CAB 15 [10]), but C only recently became aware of that fact (CAB 15 [11]). Nevertheless, Robert has taken his relationship with
20 both children seriously and has felt committed to both girls: CAB 41 [236]. It was conceded that Robert was concerned about the education, health and general welfare of the girls: CAB 55 [346]. For example, Robert had an ongoing involvement in B's schooling (see CAB 46 [277]) and C said that one of her favourite things was that Robert volunteered at the school canteen every second week (CAB 55-56 [348]). The primary judge accepted the independent expert's evidence that both girls enjoy extremely positive, close and secure attachment relationships with Robert (CAB 66-68 [445]-[446]).

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[1] These submissions use the pseudonyms for all persons used below.

11. The children have a close and connected relationship with Robert's partner: CAB 66-68 [445]-[446]. The children have a special bond with Robert's mother (CAB 45-46 [272]-[275]; 65 [435]) and have an exceptionally close and secure attachment relationship with her (CAB 66-68 [445]-[446]). Robert's mother cannot travel to New Zealand and the children would experience a real sense of loss if they were no longer able regularly to see her: CAB 45-46 [272]-[275]. The girls also have a warm, engaged and affectionate relationship with Robert's extended family, all of whom regard them as members of the family: CAB 45-46 [272]-[275] 65 [435].

12. One issue before the primary judge was whether Robert was the "parent" of B for the purposes of Part VII of the *Family* Law *Act 1975 (Cth)* (***Family Law Act***). A person who is not a parent of a child may apply for (and be the beneficiary of) a parenting order under the Act. However, the identification of a child's "parents" may affect a court's inquiry into the best interests of a child which, in turn, affects the parenting orders which the court may choose to make. For example, s 61DA(1) of the *Family Law Act* erects a 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: note CAB 64 [421].

13. As regards that issue, the primary judge held that Robert was a "parent" of B: CAB 64 [424]. Her Honour held that "biology" was part of the answer, but not determinative: CAB 24 [85], 25 [93]-[94]. Her Honour also held that the intention and belief of Robert that he would parent B was relevant, but not determinative: CAB 25 [92], [95].

14. The primary judge concluded that children would benefit from each of Susan, Margaret and Robert having a meaningful involvement in their lives to the maximum extent consistent with their best interests: CAB 65 [432]. Her Honour concluded that the children live with Susan and Margaret, but that they should also be able to spend regular week day, weekend and holiday time with Robert: CAB 71 [477]. Accordingly, her Honour concluded that the children should live in Australia, not New Zealand: CAB 71 [477].

15. Susan and Margaret appealed: see CAB 85-102. Ground 2(a) asserted that the primary judge had "failed to apply the relevant law in determining whether [Robert] was a legal parent of the child, B": CAB 88. Ground 2(b) asserted that the primary judge "failed to apply the relevant legal principles and/or the relevant legislative pathway in determining

[Susan and Margaret's] application to relocate to New Zealand with both of the children". The Full Court of the Family Court of Australia referred to these grounds as Grounds 1 and 2 respectively. The Full Court upheld those grounds, essentially for the same reason: that her Honour had erred in concluding that Robert was a legal parent of B.

16. The Full Court reached that conclusion because, in its view, ss 14(2) and (4) of the SOC Act were "picked up" and applied to the proceedings in the Family Court by force of section 79 of the *Judiciary Act*. Section 14(2) of the SOC Act states:

> If a woman (whether married or unmarried) becomes pregnant by means of a
> 10 fertilisation procedure using any sperm obtained from a man who is not her husband, that man is presumed not to be the father of any child born as a result of the pregnancy.

17. Section 14(4) states:

> Any presumption arising under subsections (1)-(3) is irrebuttable.

18. The Full Court was of the view that sections 14(2) and (4) were applicable unless a federal law otherwise provided: CAB 116 [29]. The Full Court did not discern anything in the *Family Law Act* which otherwise provided: note CAB 116-119 [29]-[49]. The result, the Full Court held, was that the primary judge had erred in the process of finding that Robert was a "parent" of B: note CAB 119 [48], 126 [92].

20 **PART VI: ARGUMENT**

19. The Full Court erred in holding that ss 14(2) and (4) were picked up by s 79 of the *Judiciary Act*. That being so, there was no error in the primary judge's construction and application of the term "parent" in the *Family Law Act*.

20. There were two, individually sufficient reasons why sections 14(2) and (4) were not picked up by section 79. First, the *Family Law Act* "otherwise provides". Secondly, sections 14(2) and (4) do not fall within the "narrow ... operation of s 79" articulated by this Court in *Rizeq v Western Australia* (2017) 262 CLR 1 (***Rizeq***): see *Rizeq* at 26 [64] (Bell, Gageler, Keane, Nettle and Gordon JJ).

Section 79: some general principles

21. Before turning to the two reasons why s 79 did not pick up ss 14(2) and (4), it is convenient to articulate some general principles relating to s 79.

22. The function of s 79 is to "fill" the gap in the law that exists because of the absence of State legislative power to govern the manner of the exercise of federal jurisdiction: *Rizeq* 26 [63] (Bell, Gageler, Keane, Nettle and Gordon JJ) and see also at 18 [32] (Kiefel CJ). It serves that function by picking up the text of a State law governing the exercise of State jurisdiction and applying that text as a Commonwealth law to govern the manner of exercise of federal jurisdiction: *Rizeq* at 18 [32] (Kiefel CJ) and at 26 [63] (Bell, Gageler, Keane, Nettle and Gordon JJ). "The section has no broader operation": *Rizeq* at 26 [63] (Bell, Gageler, Keane, Nettle and Gordon JJ). The operation of section 79 is, therefore, confined to the "area in which there is an absence of State legislative power": *Rizeq* at 37 [92] (Bell, Gageler, Keane, Nettle and Gordon JJ) and see similarly at 15 [21], [22] (Kiefel CJ).[2]

23. The area in which there is an absence of State legislative power was relevantly identified in *Rizeq* in the joint reasons at 41 [103]:

> What State laws relevantly cannot do within the limits of State legislative capacity is govern the exercise by a court of federal jurisdiction. A State law can determine neither the powers that a court has in the exercise of federal jurisdiction nor how or in what circumstances those powers are to be exercised. A State law cannot in that sense "bind" a court in the exercise of federal jurisdiction, and that is the sense in which that word is used in s 79 of the *Judiciary Act*.

See also in the joint reasons at 25 [59] ("The Parliament of the Commonwealth alone has power to regulate the exercise of federal jurisdiction ...") and in the reasons of Kiefel CJ at 14 [15] read with 13-14 [13].

24. The plurality in *Rizeq* applied these propositions at 41 [104]-[105]. Section 79 applied to pick up s 14(2) of the *Criminal Procedure Act 2004* (WA) (***Criminal Procedure Act***), which purported to govern what is taken to be the verdict of a jury: at [104]. In contrast, s 6(1)(a) of the *Misuse of Drugs Act 1981* (WA) (***Misuse of Drugs Act***) was not picked up by s 79. The plurality explained why at 41 [105]:

[2] See also Edelman J at 68 [188].

Section 6(1)(a) of the *Misuse of Drugs Act*, in contrast, is a law having application independently of anything done by a court. It is squarely within State legislative competence and outside the operation of s 79 of the *Judiciary Act*.

25. Kiefel CJ drew a similar contrast (and reached that same conclusion) at 18 [32].[3]

"Otherwise provides"

26. Section 79, in terms, does not pick up a State law if the laws of the Commonwealth "otherwise provid[e]".

27. That qualification on the operation of s 79 has a number of important consequences. Section 79 will not pick up a State law if there is an applicable Commonwealth law which is "complete upon its face": *R v Gee* (2003) 212 CLR 230 (***Gee***) at 254 [62] (McHugh and Gummow JJ); *Bui v Commonwealth Director of Public Prosecutions* (2012) 244 CLR 638 (***Bui***) at 652-653 [25] (French CJ, Gummow, Hayne, Kiefel and Bell JJ). Nor will s 79 pick up a State law if Commonwealth law "leaves no room" for the operation of the State law: *Grant Samuel Corporate Finance Pty Ltd v Fletcher* (2015) 254 CLR 477 (***Grant Samuel***) at 483 [8] (French CJ, Hayne, Kiefel, Bell, Gageler and Keane JJ). Of course, that formulation is consonant with the understanding of so called "indirect inconsistency" under s 109 of the Constitution: see *Work Health Authority v Outback Ballooning Pty Limited and Another* [2019] HCA 2 (***Outback Ballooning***) at [33] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).[4]

28. Professor Lindell has observed that those (established) propositions may be in tension with other statements of this Court, which indicate that "unlike the test for s109 [of the Constitution] this kind of inconsistency [involved in the phrase "otherwise provided" in s 79] requires the element of contradiction" between the Commonwealth law and the surrogate federal law: G Lindell *Federal Jurisdiction in Australia* (2016, 4th ed) at 370, 371. That seemingly has in mind the observations made by Gleeson CJ, Gummow and Hayne JJ in *Austral Pacific v Airservices Australia* (2000) 203 CLR 136 at 144 [17].

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[3] See also, arriving at the same conclusion by the application of somewhat different reasoning, Edelman J at 73 [200] and 74 [204].

[4] See also G Hill and A Beech 'Picking up State and Territory laws under s 79 of the Judiciary Act – three questions" (2005) 27 *Australian Bar Review* 25 at 39, referring to the approach adopted in *MacLeod v Australian Securities and Investments Commission* (2002) 211 CLR 287.

Their Honours first observed that the criteria to be applied in approaching that question were those identified in *Northern Territory v GPAO* (1999) 196 CLR 553 (***GPAO***) at 587-589, [78]-[83], where Gleeson CJ and Gummow J held that the relevant question is whether the operation of the Commonwealth law so reduces the ambit of State law that the provisions of the Commonwealth are "irreconcilable" with those of the State law. After referring to that passage in *Austral*, Gleeson CJ, Gummow and Hayne JJ went on to say that "*GPAO* shows that the question [that arises under the phrase "otherwise provided" in s 79] is not answered by the application of the doctrine identified, in the decisions construing s 109 of the Constitution, with the phrase 'covering the field'" (the
10 somewhat difficult metaphor, sometimes used to describe "indirect inconsistency" in the context of s 109[5]).

29. Professor Lindell has suggested that those observations may posit a comparatively "narrower conception of inconsistency" in the context of s 79, being one that requires what he describes as "actual contradiction": op cit at 372.[6] Yet, as Professor Lindell also observes, such an understanding would not sit well with the statements of principle in *Bui*, *Gee* and *Grant Samuel* referred to at para 27 above.

30. The apparent tension is resolved by recognising that here, as with the notion of "indirect inconsistency" for the purposes of analysis under s 109, the "essential notion" underpinning the "leave no room" formulation is that the Commonwealth law contains
20 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": *Outback Ballooning* [2019] HCA 2 at [35] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).[7]

31. And so, as Allsop P (with respect correctly) observed in *Kelly v Saadat-Talab* (2008) 72 NSWLR 305 at 309 [11], the various expressions in the authorities of the contrariety which will be sufficient to engage the qualification to s 79 can, in fact, be seen to be

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[5] *Momcilovic v R* (2011) 245 CLR 1 at 111 [242] and 117-118 [263]-[264] (Gummow J). As was observed in the joint reasons in *Work Health Authority v Outback Ballooning Pty Limited and Another* [2019] HCA 2 (***Outback Ballooning***) at [33], that concept might more accurately be expressed as being that the Commonwealth law expresses an intention to "cover the subject matter" with which it deals. See also Edeleman J at [106].

[6] See also *Putland v R* (2004) 218 CLR 174 (***Putland***) at 189 [40], [41] (Gummow and Heydon JJ), drawing an analogy with the doctrine of implied repeal and a requirement for a demonstration of "actual contrariety".

[7] Referring to *Momcilovic v R* (2011) 245 CLR 1 (***Momcilovic***) at 111 [242] (Gummow J).

"intimately related".[8] The notion of "leaving no room" simply refers to a particular circumstance in which the "Commonwealth law expressly or by implication made contrary provision"[9] to the State law to be picked up. As his Honour went on to explain in *Kelly*, if the Commonwealth law is complete upon its face leaving no room for the operation of a surrogate federal law, then that is so because part of the content of the existing Commonwealth law is a negation of additional statutory content on the relevant subject. Section 79 does not pick up a putative surrogate federal law that would "derogate" from such an "implicit negative proposition", where it is discerned: see, eg *Agtrack (NT) Pty Limited v Hatfield* (2005) 223 CLR 251 at 271 [60]. In such a case, the two laws are "irreconcilable" in the sense identified in *GPAO*: see *GPAO* at 588, 589 [81], [84]; *Putland* at 179-180 [7] (Gleeson CJ) and *Gee* at 254 [62] (McHugh and Gummow JJ).

32. This understanding of the qualification on the operation of s 79 is consistent with its objects. One object of s 79 is to "facilitate the particular exercise of federal jurisdiction by the application of a coherent body of law": *GPAO* at 588 [80] (Gleeson CJ and Gummow J). If federal law *already* provides for a scheme that is complete on its face, the addition of further statutory content via s 79 stands to detract from the existing internal coherence of that scheme.

33. It is, of course, true that one is dealing with the "problem" akin to that which "arises by conflict between conflicting statutes having the same source" (given that, if picked up, the law of the State or Territory would operate as a surrogate law of the Commonwealth): *GPAO* at 588 [80]. But that does not dictate any narrow approach to the question of inconsistency driven by a presumption of the nature identified by Fullagar J in *Butler v Attorney-General (Vic)* (1961) 106 CLR 268 at 276,[10] where his Honour observed that "where the comparison is to be made between two State Acts, there is a very strong

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[8] There are, of course, parallels between those observations and the discussion of the relationship between the "tests" (or different aspects) of inconsistency in the context of s 109: see eg *Jemena Asset Management (3) Pty Ltd v Coinvest Ltd* (2011) 244 CLR 508 at 525 [42] (the Court); *Momcilovic* (2011) 245 CLR 1 at 111 [242] (Gummow J) and at 140-141 [339]-[340] (Hayne J – in dissent in the result) and *Outback Ballooning* [2019] HCA 2 at [65]-[72] (Gageler J) and [105] (Edelman J).

[9] *Putland* (2004) 218 CLR 174 at 179-180 [7] (Gleeson CJ), emphasis added.

[10] In dissent in the result. See also *Ferdiands v Commissioner for Public Employment* (2006) 225 CLR 130 at 146 [49] (Gummow and Hayne JJ).

presumption that the State legislature did not intend to contradict itself, but intended both Acts to operate". More pointedly, it has been said that a conclusion by a Court that such a circumstance gives rise to implied repeal carries with it "a tacit reflection upon the legislators, that they should ignorantly, and without knowing it, make one act repugnant to and inconsistent with another…".[11]

34. In contrast, where s 79 is potentially engaged, there is no reason to attribute such a presumed intention to the Commonwealth Parliament in respect of the legislation of *other* polities. That is particularly so when the occasion for measuring those laws against the laws of the Commonwealth arises in the context of an ambulatory Commonwealth law (s 79) by which the Commonwealth Parliament has specifically adverted to (and provided for) the possibility of "contradiction" (by the inclusion of the qualification). Indeed, as Graeme Hill and Justice Beech have observed, "given the ambulatory operation of s 79, the State or Territory Act may have been drafted *after* the Commonwealth Act"[12] (as was the case here). The essential premise for the operation of the presumption in *Butler* is entirely absent in those circumstances.[13]

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The *Family Law Act* otherwise provides

35. Here, the *Family Law Act* relevantly "otherwise provides" such that ss 14(2) and (4) are not picked up by s 79.

36. Various provisions of the *Family Law Act* – and, in particular, those aspects of Part VII relating to parenting orders – use the term "parent". For example, s 60CC(2)(a) provides that "primary consideration" in determining what is in a child's best interests is "the benefit to the child of having a meaningful relationship with both of the child's parents". A number of "additional considerations" in s 60CC(3) also use the term "parent": eg sub-ss (b)(i), (c), (ca), (d)(i), (e), (f)(i), (g), (i). The term is also used in s 61DA. As was noted at para 12 above, the presence of those provisions means that the question of who

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[11] *Thornley v Fleetwood* (1713) 10 Mod 114 at 118 (see also M Leeming *Resolving Conflicts of Laws* (2011) Federation Press at 93-94).

[12] 'Picking up State and Territory laws under s 79 of the Judiciary Act – three questions" (2005) 27 *Australian Bar Review* 25 at 38 (original emphasis).

[13] It is true that in *Putland* (2004) 218 CLR 174 at 189 [40] Gummow and Heydon JJ made reference to an earlier passage in Fullagar J's reasons in *Butler* (1961) 106 CLR 268 at 275 (see footnote 6 above). However, their Honours did not suggest that the presumption Fullagar J went on to discuss in *Butler* at 276 was applicable in the context of s 79.

is a "parent" stands to affect the parenting orders which the court may choose to make under Part VII.

37. The term "parent" is defined is defined inclusively in s 4(1), which states "'***parent***', when used in Part VII in relation to a child who has been adopted, means an adoptive parent of the child". The effect of this definition is to give "parent" an extended meaning in relation to children who have been adopted, but otherwise to give "parent" its ordinary meaning: see, by analogy, *Fortress Credit Corporation (Australia) II Pty Ltd v Fletcher* (2015) 254 CLR 489 at 503 [18] (French CJ, Hayne, Kiefel, Gageler and Keane JJ).

38. Importantly, that aspect of the statute also points to the extent to which State and Territory laws (and the laws of other jurisdictions) will affect the meaning of the term "parent". In that regard, the term "adopted" is also defined in s 4(1) as meaning "adopted under the law of any place (whether in or out of Australia) relating to the adoption of children". That evinces a (limited and carefully confined) expansion of the notion of parentage by reference to the laws of other polities, and in a manner that is readily understandable - noting that adoption, being unknown at common law, has been regulated by statute at State and Territory level[14] and that the "matters" relating to children referred to the Commonwealth by the States for the purposes of s 51(xxxvii) did not extend to the matter of adoption.[15] Those aspects of the statutory design do not otherwise suggest that the term "parent" has a meaning other than its ordinary meaning. Nor do they suggest that the meaning of that term is in some way more generally dependent upon the expansions of (or limitations to) the notion of parenthood effected by State and Territory laws from time to time.

39. Turning to its ordinary meaning, the term "parent" signifies "a social relationship to another person": *H v Minister for Immigration and Citizenship* (2010) 188 FCR 393 at [48] (Moore, Kenny and Tracey JJ) (***H's Case***). Whether a person is a "parent" in that ordinary sense is a question of fact. It depends on various factors, including biological factors[16] and the degree of commitment shown by the "parent" to the child: *Hudson v*

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[14] M Davies, A Bell and P Brereton "*Nygh's Conflict of Laws in Australia*" (2014) 9th ed Lexis Nexis Butterworths p 705.

[15] See eg s 3(2) of the *Commonwealth Powers (Family Law—Children) Act 1986* (NSW).

[16] Noting that s 60H(1)-(3) assume that biology is a relevant factor.

Minister for Immigration and Citizenship (2012) 126 ALD 40 at [23] (Flick, Jagot and Barker JJ) (***Hudson***); *H's Case* at [129]. Evidence as to the putative parent's conduct "before and at the time of birth" as well as "conduct after the birth" are all capable of being relevant: *Hudson* at [23]. In accordance with ordinary conceptions of parentage, which are in turn reflected in the text of the *Family Law Act*,[17] biology will normally be the weightiest factor in determining whether a person is a parent. However, biology remains just a factor, and no single factor is always determinative.

40. So understood, the defect in the Full Court's approach becomes apparent. The term "parent" in the *Family Law Act* calls for an analysis in which many circumstances may be relevant, including biological and social connection. Save as provided for in the *Family Law Act* itself (as to which see paras [43]-[46] below), there is no room for the application of absolute rules or "irrebuttable" presumptions which deem a person *not* to be a parent irrespective of countervailing factors. There is an implicit negative proposition denying such absolute rules. As such, if s 79 operated to pick up s 14 of the SOC Act, it would undermine the coherence of the scheme established by the *Family Law Act* for the determination of who is a "parent".

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41. Further, the *Family Law Act* is complete on its face as regards both when there are to be presumptions as to be parentage and as to which State or Territory laws may apply to determine or deem parentage.

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42. Sections 60H, 60HA and 60HB are examples. Sections 60HA and 60HB operate deem an *additional* person to be a parent in special cases, not to *exclude* a person from the class of parents if that person otherwise falls within the ordinary meaning of the term. Section 60HA relates to children of parents in a de facto relationship. Section 60HB is entitled "Children born under surrogacy arrangements" and deems a person to be a parent's child where there is a relevant court order under a prescribed State or Territory law.

43. Section 60H specifically relates both to artificial insemination and State and Territory laws. It operates both to include and exclude a person from being a parent. A person who provides genetic material in respect of an artificial conception procedure is, in

[17] See *Groth v Banks* (2013) 289 FLR 1 at [12]-[16].

certain circumstances, deemed not to be a parent of the child: s 60H(1). However, that is so only in limited circumstances, which did not apply in this case.

44. Further, s 60H as a whole intersects with State and Territory laws through various provisions which permit "prescribed" State and Territory laws to affect whether a person is or is not a "parent" of a child. None of those provisions were applicable in the present case. (In particular, s 60H(1) did not apply because Susan and Margaret were not in a de facto relationship). This aspect of s 60H shows that Parliament turned its mind to when State or Territory laws would be apt to affect status under the Act in the context of artificial insemination.

10 45. The fact that only "prescribed laws" are picked up is important. It evidences a parliamentary intention – for policy reasons that are obvious – that the operation of the *Family Law Act* should not differ as between the States and Territories unless a conscious decision has been made by the Commonwealth for specific State or Territory laws to be picked up. A striking consequence of the approach taken below is that a child's "parent" for the purposes of the *Family Law Act* might differ depending on the State or Territory in which parenting order proceedings are commenced or heard. It is most unlikely that the Commonwealth Parliament would have intended the best interests of the child to be affected by a single party's choice of geographical forum. It is equally unlikely that the Commonwealth Parliament would have intended to encourage forum shopping by 20 aggrieved parties to family law proceedings. Rather, reflecting the "national purpose" of the heads of Commonwealth legislative power which (in part) support it (ss 51(xxi) and (xxii)), the *Family Law Act* provides for uniformity in the regulation of the subject matter with which it deals.[18] Although Part VII is also supported by s 51(xxxvii) pursuant to referrals by the States insofar as it concerns ex-nuptial children,[19] it is apparent that the Commonwealth Parliament has applied an equally uniform approach there (subject to the limited exceptions just identified). This further demonstrates the existence of a negative implication contrary to the approach taken below. The approach taken below

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18 *Commonwealth v Australian Capital Territory* (2013) 250 CLR 441 at 453 [7].

19 See *Commonwealth Powers (Family Law—Children) Act 1986* (NSW); *Commonwealth Powers (Family Law—Children) Act 1986* (Vic); *Commonwealth Powers (Family Law—Children) Act 1990* (Qld); *Commonwealth Powers (Family Law) Act 1986* (SA); *Commonwealth Powers (Family Law) Act 1987* (Tas).

achieves an end-run around this careful scheme: it has the effect that a person who provided genetic material is, by reason of a State law, deemed not to be a parent even though that consequence would not flow from the very provision which Parliament addressed to that issue, namely s 60H(1).

46. Further, Div 12 of Pt VII of the *Family Law Act* provides for a range of "presumptions" in respect of parentage. Save in one special respect, those presumptions are rebuttable by evidence on the balance of probabilities: s 69U(1). The special respect is the presumption in s 69S(1), which creates a conclusive presumption that a person *is* a parent where there is an unimpeached finding to that effect by a Court. A number of observations may be made about Div 12. **First**, there will often be a direct clash between the Div 12 presumptions and s 14 of the SOC Act. If s 14 of the SOC Act were to apply, the presumption could not. **Secondly**, if s 14 of the SOC Act were to apply, the presumption would not be rebuttable by proof on the balance of probabilities (cf s 69U(1)), it would simply have no work to do. **Thirdly**, if s 69S(1) and ss 14(2) and (4) of the SOC Act were purportedly to apply in the one case, there would be logical inconsistency between the two – the former creating an irrebuttable presumption of parentage and the latter creating an irrebuttable presumption of non-parentage. **Fourthly**, Div 12 is a further aspect of the statutory design which indicates that the Commonwealth Parliament turned its mind to the kinds of presumptions which ought to operate as regards parentage and, having done so, did not choose to adopt the kind of irrebuttable presumption created in ss 14(2) and (4).

47. Indeed, in this case, there was a direct clash between one of the Div 12 presumptions and ss 14(2) and (4) of the SOC Act. Robert was identified as B's father on her birth certificate (CAB 15 [8])) and, it can be inferred, is entered as her parent on the New South Wales register of births. There is, therefore, a presumption under the *Family Law Act* that Robert is B's parent: s 69R. The *Family Law Act* provides for that presumption to be refuted, but only provides for it to be refuted by evidence on the balance of probabilities. If ss 14(2) and (4) were to apply, the presumption would not be *refuted* by *evidence*; rather, the presumption would simply have no work to do at all.

48. The Full Court erred in holding that the *Family Law Act* did not otherwise provide. The Full Court did not ask whether the *Family Law Act* was relevantly "complete on its face" or left no room for the operation of the State law. The Full Court instead appeared to be

looking for some kind of logical inconsistency or an instance where obedience to both laws was impossible, such as a federal provision deeming a person in Robert's position to be a "parent": see CAB 117 [33]. The "otherwise provides" qualification in s 79 is not limited to that narrow notion of inconsistency. It applies wherever a federal law is "to be regarded *in any way* as 'inconsistent' with the application of the State Act which [is] said to be picked up by s 79": *GPAO* at [79] (Gleeson CJ and Gummow J). That, of course, includes the broader notions of contrariety identified above.

Section 79 was, in any event, inapplicable

49. As has been noted above, in *Rizeq*, the Court emphasised that s 79 had a narrow operation, limited by its function of filling the gap in State legislative power.

50. In *Rizeq*, the gap was Western Australia's incapacity to regulate the exercise of federal jurisdiction and, in particular, its incapacity to govern what is taken to be the verdict of a jury: see at [104]. Section 6(1)(a) of the *Misuse of Drugs Act*, in contrast, was outside the operation of s 79: it had "application independently of anything done by a court": *Rizeq* at 18, [32] (Kiefel J) and at 41, [105] (Bell, Gageler, Keane, Nettle and Gordon JJ).

51. Sections 14(2) and (4) of the SOC Act are more akin to s 6(1)(a) of the *Misuse of Drugs Act* than s 114(2) of the *Criminal Procedure Act*.

52. Section 14(2), read with s 14(4), creates an "irrebuttable presumption". The first and second respondents may attach importance to the term "presumption". But, like the (discarded) distinction between "procedural" and "substantive" laws, a narrow focus upon that statutory label is apt to mislead: *Rizeq* at 15 [19] (Kiefel CJ); 33 [83] (Bell, Gageler, Keane, Nettle and Gordon JJ) and 46 [122] (Edelman J).

53. It is important to observe, in that regard, that the use of "presumption" in that context is a misnomer: section 14(4) is, in substance, a declaration directed to a person's "status in law". A person may be said to have such a status when she or he belongs to a class of persons who, by reason only of their membership of that class, have certain rights or duties, capacities or incapacities, specified by law and which do not exist in the case of persons not included in the class: *Ford v Ford* (1947) 73 CLR 524 at 529 per Latham CJ.

Examples of such a status include marriage, alienage and bankruptcy. Parentage is a further recognized example: see *H's Case* at [128].[20]

54. The effect of ss 14(2) and (4) is to regulate the membership of the class of persons holding *that status*. It does so by excluding certain men from holding the status of being the "parents" of certain children for the purposes of State law in the particular specified circumstances. Where s 14(2) applies, there is not a mere presumption: there is a rule that gives rise to legal consequences and which has application "independently" of Court proceedings.

55. Sections 14(2) and (4) can conveniently be contrasted with the provisions applied by Webb J in *R v Oregan; Ex parte Oregan* (1957) 97 CLR 323 (***Oregan***), as explained by this Court in *Rizeq* at 17 [28] (Kiefel CJ) and at 37 [95] (Bell, Gageler, Keane, Nettle and Gordon JJ).[21] In *Oregan*, Webb J held that s 79 picked up certain provisions of Victorian statute law relating to the custody of infants. As was emphasised in the joint reasons in *Rizeq* at [95], *all* of the provisions picked up by s 79 were provisions directed to the *powers of a State court* to make orders concerning the welfare and custody of children.

56. This understanding of s 14 is consistent with its history. Sections 14(2) and (4) are the successors to s 6 of the *Artificial Conception Act 1984* (NSW) (***Artificial Conception Act***): note page 1 of the Explanatory Memorandum to the Status of Children Bill 1996 (NSW). Section 6 of the *Artificial Conception Act* created an irrebuttable presumption as to fatherhood of certain children conceived through artificial insemination "for all purposes".

57. So understood, it is clear that s 14(2) has "application independently of anything done by a court". It is not a mere rule or "presumption" of evidence. When it applies, a person is declared not to be a person's parent for any and all valid purposes. Those purposes include, for example, provisions of the *Education Act 1990* (NSW) which impose duties or confer rights on parents of a child: eg ss 22, 22B, 23. Further, when it applies, s 14(2)

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[20] See also M Davies, A Bell and P Brereton "*Nygh's Conflict of Laws in Australia*" (2014) 9th ed Lexis Nexis Butterworths p 697.

[21] Cf Edelman J at 60-61 [165]-[168].

is binding on administrative decision-makers as much as State courts exercising State jurisdiction. It has that application before any court is called upon to exercise jurisdiction.

58. Indeed, if s 14(2) *were* a direction as to how or in what circumstances a court could exercise jurisdiction, it would not be picked up by s 79 because the Constitution itself would otherwise provide. If s 14(2) were such a direction, it would be a direction as to the manner and outcome of the federal jurisdiction to determine whether a person is a "parent": cf *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1. Section 14(2) would direct a Court to find that a person was not a "parent" even though, under the *Family Law Act*, that person bore the status of "parent". The vice can be perceived if one compares how a Court subject to s 14(2) would approach the issue with how a Court not subject to s 14(2) would approach the issue. The former would be conclusively directed to find that the person was not a parent. The latter would address the issue for itself and, on the present hypothesis, would find that the person was not a "parent".

The resolution of the appeal

59. For those reasons, the Full Court erred in holding that ss 14(2) and (4) of the SOC Act were picked up by s 79 of the *Judiciary Act*. No other error in the primary judge's approach to the term "parent" was identified. The primary judge correctly approached the issue as one to which many circumstances were capable of being relevant, including Robert's biological connection, his expectations and commitments at the time of conception and the role he had played after birth.

PART VII: ORDERS SOUGHT

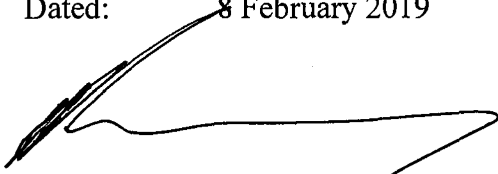
1. Appeal allowed with costs.

2. Set aside orders 2, 3 and 4 of the orders made by the Full Court of the Family Court of Australia made on 28 June 2018 and, in their place, order that appeal number EA 111 of 2017 be dismissed.

PART VIII: ORAL ARGUMENT

1. The appellant estimates he will require 1 1/2 hours for the presentation of oral argument.

Dated: 8 February 2019



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