

BETWEEN:

MASSON
Appellant

and



PARSONS
First Respondent

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PARSONS
Second Respondent

INDEPENDENT CHILDREN'S LAWYER
Third Respondent

APPELLANT'S OUTLINE OF ORAL ARGUMENT

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Part I: Certification

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

Part II: Outline of oral submissions

Introductory remarks

2. The status of parentage is significant for the parent and child: *G v H* (1994) 181 CLR 387 at 391, 400; *G v H* (1993) 113 FLR 440 at 441.
3. In ordinary language, a person may be or become a parent of a child in a number of ways: (i) through provision of gametes (a "biological parent"); (ii) through carrying and giving birth to a child (a "gestational parent"); or (iii) through an ongoing

relationship of nurture, comfort, love, education and protection (a “social or psychological parent”): *Re G* [2006] 1 WLR 2305 at [32]-[37]; AS¹ [39]-[40].

4. In its ordinary meaning, whether a person is a parent is a question of fact depending on all the circumstances: AR² [8]. There is no pre-determined or rigid rule. However, biology is typically the weightiest factor: AS [39].

Family Law Act 1975 (Cth) (Family Law Act)

5. “Parent” is defined in section 4. The term bears its ordinary meaning absent express or necessarily implied variation. Section 4 extends the meaning of “parent” to an extent: AS [37].
- 10 6. “Child” is also defined in section 4. “Parent” and “child” are binary correlatives: *Tobin* (1999) 150 FLR 185 at [59]; *H v Minister for Immigration and Citizenship* (2010) 188 FCR 393 at [66]. Subdivision D of Div 1 of Part VII “affects” the situations in which a child is a child of a person. The “note” to the definition of “child” is relevant.
7. Other relevant definitions: “parentage testing procedure” and “relative”.
8. The best interests of the child are an overriding consideration in Part VII: s 60B.
9. Section 69V assumes that parentage is an issue of fact to which evidence may be directed. Section 69W assumes that biology may be important.
10. The parentage presumptions in Subdiv-D of Div 12 of Part VII are rebuttable, save for the presumption in section 69S(1) which has unique characteristics: AS [46].
- 20 11. Section 60H is not exhaustive: AR [9].

Status of Children Act 1996 (NSW) (SOC Act)

12. The legislative history sheds light on the intended meaning of section 14 of the SOC Act: AS [56].
13. Section 14 of the SOC Act is directed to status: AS [53]-[54]. The Commonwealth’s submissions to the contrary should not be accepted.
14. Section 14 of the SOC Act is directed to a person’s status for the purposes of laws of New South Wales: *Interpretation Act 1987* (NSW) s 12(1); *Solomons v District Court*

¹ Appellant’s Submissions dated 8 February 2019.

² Appellant’s Reply Submissions dated 29 March 2019 at [8].

of *New South Wales* (2002) 211 CLR 119 at [9]. It should not be given a broad meaning: AR [9].

Sections 14(2) and (4) of the SOC Act are not State laws to which section 79 of the Judiciary Act 1903 (Cth) applies

15. State Parliaments may not govern or regulate the exercise of federal jurisdiction: *Rizeq v Western Australia* (2017) 262 CLR 1 at [61]-[63] (*Rizeq*). A law does not relevantly govern or regulate the exercise of federal jurisdiction if it has application independently of anything done by a court: *Rizeq* at [105]. Section 79 does no more than fill the gap created by the negative implication from Chapter III that a State law may not govern or regulate the exercise of federal jurisdiction: *Rizeq* at [63].

16. Sections 14(2) and (4) of the SOC Act have application independently of anything done by a court: AS [54]-[57].

In any event, the Family Law Act otherwise provides

17. Section 79 does not pick up a law if a Commonwealth law is complete on its face or leaves no room for the operation of State law: eg *Bui v DPP* (2012) 244 CLR 638 at [25]; AS [26]-[34].

18. The task of construction cannot involve the application of the presumption from *Butler v Attorney-General (Vic)* (1961) 106 CLR 268.

19. The *Family Law Act* otherwise provides. Section 14 of the SOC Act stipulates a pre-determined and rigid rule. The *Family Law Act* makes specific and detailed provision for those State and Territory laws which affect the meaning of “parent”: AS [45]. The *Family Law Act* contains its own presumptions of parentage and the First Respondent’s construction gives rise to difficulties in respect of those presumptions: AS [46].

Victoria’s common law argument

20. The issue of sperm donor parentage is best left to the legislature: AR [11].

21. It cannot be assumed that “parent” in the *Family Law Act* was intended to bear its common law meaning: AR [10].

Dated: 16 April 2019.