

# HIGH COURT OF AUSTRALIA

KIEFEL CJ,  
BELL, GAGELER, KEANE, NETTLE, GORDON AND EDELMAN JJ

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MASSON

APPELLANT

AND

PARSONS & ORS

RESPONDENTS

*Masson v Parsons*  
[2019] HCA 21  
19 June 2019  
S6/2019

## ORDER

1. *Appeal allowed.*
2. *Set aside orders 2, 3, 4 and 8 made by the Full Court of the Family Court of Australia dated 28 June 2018 and, in their place, order that appeal number EA 111 of 2017 be dismissed.*
3. *The first and second respondents pay the appellant's costs of the appeal to this Court.*

On appeal from the Family Court of Australia

### Representation

M P Kearney SC and C L Lenehan with E A Lawson and D P Hume for the appellant (instructed by Steiner Legal)

B W Walker SC with M McMahon and J S Stellios for the first and second respondents (instructed by McDonald Johnson Lawyers)



S B Lloyd SC with S M Christie SC and P D Herzfeld for the third respondent (instructed by Legal Aid NSW)

S P Donaghue QC, Solicitor-General of the Commonwealth, with B K Lim for the Attorney-General of the Commonwealth, intervening (instructed by Australian Government Solicitor)

R M Doyle SC with F I Gordon for the Attorney-General for the State of Victoria, intervening (instructed by Victorian Government Solicitor)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.



## CATCHWORDS

### Masson v Parsons

Constitutional law (Cth) – Courts – Federal courts – Federal jurisdiction – Matter arising under Commonwealth law – Where Commonwealth law provides rules in respect of parentage of children born of artificial conception procedures – Where State law provides irrebuttable presumption that biological father of child conceived by fertilisation procedure is not father in specified circumstances – Whether s 79(1) of *Judiciary Act 1903* (Cth) operates to pick up and apply text of State law as Commonwealth law – Whether State law regulates exercise of jurisdiction – Whether Commonwealth law has "otherwise provided" within meaning of s 79(1) of *Judiciary Act* – Whether tests for contrariety under s 79(1) of *Judiciary Act* and s 109 of *Constitution* identical – Whether State law applies of its own force in federal jurisdiction.

Family law – Parenting orders – Meaning of "parent" – Where *Family Law Act 1975* (Cth) presumes best interests of child served by shared parental responsibility – Where s 60H of *Family Law Act* provides rules in respect of parentage of children born of artificial conception procedures – Where appellant provided semen to first respondent to conceive child with belief that he was fathering child – Where appellant had ongoing role in child's financial support, health, education and general welfare and enjoyed extremely close and secure attachment relationship with child – Where first respondent later in de facto relationship with second respondent – Where appellant found to be "parent" within ordinary meaning of word but not under s 60H – Whether s 60H exhaustive of persons who may qualify as "parent" of child born of artificial conception procedure – Whether "parent" used in *Family Law Act* according to ordinary meaning except as otherwise provided – Whether appellant is "parent" within ordinary meaning – Whether ordinary meaning of "parent" excludes "sperm donor" – Whether appellant is "sperm donor".

Words and phrases – "artificial conception procedure", "complete upon its face", "federal courts", "federal jurisdiction", "implicit negative proposition", "inconsistency", "irrebuttable presumption", "jurisdiction", "matter", "ordinary meaning", "otherwise provided", "parent", "parentage", "parenting orders", "picked up and applied", "power", "presumptions", "regulates the exercise of jurisdiction", "sperm donor", "State jurisdiction", "State legislative power", "status".

*Constitution*, s 109.

*Family Law Act 1975* (Cth), ss 4, 60B, 60EA, 60G, 60H, 61D, 61DA.

*Judiciary Act 1903* (Cth), s 79(1).

*Status of Children Act 1996* (NSW), Pt 3 Div 1.



1 KIEFEL CJ, BELL, GAGELER, KEANE, NETTLE AND GORDON JJ. The principal issue for determination in this appeal is whether s 79(1) of the *Judiciary Act 1903* (Cth) picks up ss 14(2) and 14(4) of the *Status of Children Act 1996* (NSW) and applies them to applications for parenting orders made under Pt VII of the *Family Law Act 1975* (Cth), with the result that the appellant is irrefutably to be presumed *not* to be the father of his biological daughter. For the reasons which follow, that question should be answered: "no". Section 79(1) of the *Judiciary Act* applies where there is a gap in the law governing the exercise of federal jurisdiction by picking up State laws which regulate the exercise of State jurisdiction and applying them as Commonwealth laws governing the exercise of federal jurisdiction. As will be explained, ss 14(2) and 14(4) of the *Status of Children Act* are not provisions that regulate the exercise of jurisdiction. Nor is there any gap in the law governing the exercise of the Family Court's jurisdiction to make parenting orders under the *Family Law Act*. Part VII of the *Family Law Act* provides comprehensively for how the Family Court is to determine who is a parent.

2 There is also a question of whether ss 14(2) and 14(4) of the *Status of Children Act* are valid laws applying of their own force to applications for parenting orders made under Pt VII of the *Family Law Act* as part of the single though composite body of law in Australia. For the reasons which follow, that question should also be answered: "no".

### **The facts**

3 The appellant and the first respondent were close friends for many years. In 2006, the appellant provided his semen to the first respondent in order that she might artificially inseminate herself and as a result conceive a child, which she did. At the time of conception, the appellant believed that he was fathering the child and that he would, as the child's parent, support and care for her. His name was entered on the child's birth certificate as her father. Although the child thereafter lived with the first respondent and the second respondent, who is the first respondent's female partner, the appellant took his relationship with his child seriously. He had and continues to have an ongoing role in her financial support, health, education and general welfare, and he enjoys what the primary judge described as an extremely close and secure attachment relationship with the child.

4 By 2015, the first and second respondents resolved to relocate from this country to New Zealand and to take the child with them. The appellant responded by instituting proceedings in the Family Court of Australia for orders,

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inter alia, conferring shared parental responsibility between himself and the first and second respondents; restraining relocation of the child from the child's current area of residence in Australia; providing for the child to spend time with the appellant in a fortnightly cycle, five nights per fortnight, half school holidays and other special times; and addressing specific issues including overseas travel and communication.

### **Relevant statutory provisions**

#### *(i) Family Law Act*

5 Parenting orders are made under Pt VII of the *Family Law Act*<sup>1</sup>.  
Division 2 of Pt VII of the *Family Law Act* deals with "the concept of parental responsibility"<sup>2</sup>.

6 Section 61D(1) provides, in substance, that a parenting order confers  
parental responsibility for a child on a person to the extent that the order confers  
on that person duties, powers, responsibilities or authority in relation to the child.

7 Section 61DA provides, in substance, and so far as is relevant, that, when  
making a parenting order in relation to a child, the court must apply a rebuttable  
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.

8 Subdivision B of Div 1 of Pt VII, which is headed "[o]bject, principles and  
outline", provides, inter alia, in s 60B(1) that the objects of Pt VII include  
"ensuring that children have the benefit of *both* of their parents having a  
meaningful involvement in their lives, to the maximum extent consistent with the  
best interests of the child" (emphasis added).

9 Subdivision D of Div 1 of Pt VII is comprised of six sections – ss 60EA to  
60HB – which are described in s 60A(c) as "relevant to how this Act applies to  
certain children". Section 60F provides that a child of a marriage is a child of  
both parties to the marriage whether born in or out of wedlock or, where the child  
is adopted, the child is adopted after the marriage by the parties to the marriage

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1 *Family Law Act 1975* (Cth), s 64B(1) and (2).

2 *Family Law Act*, s 61A.



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or by one of them with the consent of the other. Section 60G provides for the granting of leave to bring adoption proceedings.

10 Section 60H provides rules in respect of the parentage of children born of artificial conception procedures. "[A]rtificial conception procedure" is defined by s 4(1) as including artificial insemination and the implantation of an embryo in the body of a woman. The terms of s 60H are as follows:

**"Children born as a result of artificial conception procedures"**

(1) If:

(a) a child is born to a woman as a result of the carrying out of an artificial conception procedure while the woman was married to, or a de facto partner of, another person (the *other intended parent*); and

(b) either:

(i) the woman and the other intended parent consented to the carrying out of the procedure, and any other person who provided genetic material used in the procedure consented to the use of the material in an artificial conception procedure; or

(ii) under a prescribed law of the Commonwealth or of a State or Territory, the child is a child of the woman and of the other intended parent;

then, whether or not the child is biologically a child of the woman and of the other intended parent, for the purposes of this Act:

(c) the child is the child of the woman and of the other intended parent; and

(d) if a person other than the woman and the other intended parent provided genetic material – the child is not the child of that person.

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- (2) If:
- (a) a child is born to a woman as a result of the carrying out of an artificial conception procedure; and
  - (b) under a prescribed law of the Commonwealth or of a State or Territory, the child is a child of the woman;

then, whether or not the child is biologically a child of the woman, the child is her child for the purposes of this Act.

- (3) If:
- (a) a child is born to a woman as a result of the carrying out of an artificial conception procedure; and
  - (b) under a prescribed law of the Commonwealth or of a State or Territory, the child is a child of a man;

then, whether or not the child is biologically a child of the man, the child is his child for the purposes of this Act.

- (5) For the purposes of subsection (1), a person is to be presumed to have consented to an artificial conception procedure being carried out unless it is proved, on the balance of probabilities, that the person did not consent.

- (6) In this section:

*this Act* includes:

- (a) the standard Rules of [the Family] Court; and
- (b) the related Federal Circuit Court Rules."

11 Section 60HA provides rules in respect of the parentage of children of de facto partners. Section 60EA in substance defines a "de facto partner" of a person as another person (whether of the same or a different sex) with whom the person is in a relationship, if the relationship is registered as such under a prescribed State or Territory law or if the relationship is as a couple living together on a genuine domestic basis. So far as is relevant, s 60HA is as follows:

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**"Children of de facto partners**

- (1) For the purposes of this Act, a child is the child of a person who has, or had, a de facto partner if:
- (a) the child is a child of the person and the person's de facto partner; or
  - (b) the child is adopted by the person and the person's de facto partner or by either of them with the consent of the other; or
  - (c) the child is, under subsection 60H(1) or section 60HB, a child of the person and the person's de facto partner.

This subsection has effect subject to subsection (2).

- (2) A child of current or former de facto partners ceases to be a child of those partners for the purposes of this Act if the child is adopted by a person who, before the adoption, is not a prescribed adopting parent.

..."

12 Section 60HB provides, in relation to children born under surrogacy arrangements, in substance, that if a court has made an order under a prescribed law of a State to the effect that a child is the child of one or more persons or each of one or more persons is a parent of a child, the child is the child of each of those persons for the purposes of the *Family Law Act*.

13 Division 12 of Pt VII of the *Family Law Act*, which is headed "[p]roceedings and jurisdiction", provides, in Subdiv D, for "[p]resumptions of parentage" and, in Subdiv E, for "[p]arentage evidence". The presumptions of parentage prescribed in Subdiv D are as follows:

- (1) In s 69P, a presumption in substance that a child born to a woman while she is married is a child of the woman and her husband.
- (2) In s 69Q, a presumption in substance that a child born to a woman who was cohabiting with a man between 44 and 20 weeks before the child's birth is a child of the man.

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- (3) In s 69R, a presumption that a person whose name is entered as a parent of a child in a register of births or parentage information kept under a law of the Commonwealth or of a State, Territory or prescribed overseas jurisdiction is a parent of the child.
- (4) In s 69S, a presumption in substance that a person expressly found to be a parent of a child by one of a number of specified courts is the parent of the child if the finding has not been altered, set aside or reversed.
- (5) In s 69T, a presumption of paternity arising from the execution by a man, under the law of the Commonwealth, a State or Territory or a prescribed overseas jurisdiction, of an instrument acknowledging that he is the father of a specified child.

14 Section 69U, which is the last section in Subdiv D of Div 12, provides for the rebuttal of presumptions and other matters as follows:

- "(1) A presumption arising under this Subdivision is rebuttable by proof on a balance of probabilities.
- (2) Where:
  - (a) 2 or more presumptions arising under this Subdivision are relevant in any proceedings; and
  - (b) those presumptions, or some of those presumptions, conflict with each other and are not rebutted in the proceedings;the presumption that appears to the court to be the more or most likely to be correct prevails.
- (3) This section does not apply to a presumption arising under subsection 69S(1)."

*(ii) Status of Children Act*

15 Section 21 of the *Status of Children Act* provides for applications to the Supreme Court of New South Wales for a declaration of parentage under that section. Division 1 of Pt 3 of the *Status of Children Act*, which is headed "[p]arentage presumptions", provides for presumptions, in some respects similar

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to the presumptions provided for in Div 12 of Pt VII of the *Family Law Act*, but in other respects different, as follows:

- (1) In s 9, a presumption, comparable to the presumption provided for in s 69P of the *Family Law Act*, of parentage arising from marriage.
- (2) In s 10, a presumption, comparable to the presumption provided for in s 69Q of the *Family Law Act*, of parentage arising from cohabitation.
- (3) In s 11, a presumption, comparable to the presumption provided for in s 69R of the *Family Law Act*, of parentage arising from registration of birth.
- (4) In s 12, a presumption, comparable to s 69S of the *Family Law Act*, of parentage arising from findings of courts.
- (5) In s 13, a presumption, comparable to s 69T of the *Family Law Act*, of parentage arising from acknowledgments.
- (6) In s 14, a presumption of parentage arising out of use of fertilisation procedures.

16

The last-mentioned presumption is as follows:

**"Presumptions of parentage arising out of use of fertilisation procedures**

- (1) When a woman who is married to a man has undergone a fertilisation procedure as a result of which she becomes pregnant:
  - (a) her husband is presumed to be the father of any child born as a result of the pregnancy even if he did not provide any or all of the sperm used in the procedure, but only if he consented to the procedure, and
  - (b) the woman is presumed to be the mother of any child born as a result of the pregnancy even if she did not provide the ovum used in the procedure.

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- (1A) When a woman who is married to or who is the de facto partner of another woman has undergone a fertilisation procedure as a result of which she becomes pregnant:
- (a) the other woman is presumed to be a parent of any child born as a result of the pregnancy, but only if the other woman consented to the procedure, and
  - (b) the woman who has become pregnant is presumed to be the mother of any child born as a result of the pregnancy even if she did not provide the ovum used in the procedure.

**Note.** 'De facto partner' is defined in section 21C of the *Interpretation Act 1987*.

- (2) If a woman (whether married or unmarried) becomes pregnant by means of a 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.
- (3) If a woman (whether married or unmarried) becomes pregnant by means of a fertilisation procedure using an ovum obtained from another woman, that other woman is presumed not to be the mother of any child born as a result of the pregnancy. This subsection does not affect the presumption arising under subsection (1A)(a).
- (4) Any presumption arising under subsections (1)-(3) is irrebuttable.
- (5) In any proceedings in which the operation of subsection (1) is relevant, a husband's consent to the carrying out of the fertilisation procedure is presumed.
- (5A) In any proceedings in which the operation of subsection (1A) is relevant, the consent of a woman to the carrying out of a fertilisation procedure that results in the pregnancy of her spouse or de facto partner is presumed.
- (6) In this section:
  - (a) a reference to a woman who is married to a man includes a reference to a woman who is the de facto partner of a man, and

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- (b) a reference (however expressed) to the husband or wife of a person:
- (i) is, in a case where the person is the de facto partner of a person of the opposite sex, a reference to that other person, and
  - (ii) does not, in that case, include a reference to the spouse (if any) to whom the person is actually married."

17 Section 15 provides, in substance, that every presumption arising under Div 1 of Pt 3, except for the presumptions arising under ss 12(1) and 14(1)-(3), is rebuttable by proof on the balance of probabilities.

18 Section 16 provides, in substance, that, if two or more rebuttable presumptions conflict with each other, and are not rebutted in any proceedings, "the presumption that appears to the court to be more or most likely to be correct prevails".

19 Section 17 provides, in substance, that, if two or more irrebuttable presumptions conflict with each other, "the presumption that appears to the court to be more or most likely to be correct prevails"; and that, if any irrebuttable presumption conflicts with a rebuttable presumption that is not rebutted in any proceedings, the irrebuttable presumption prevails.

20 Section 18 provides, in substance, that a prosecutor cannot rely on a presumption arising under the *Status of Children Act* to prove in criminal proceedings the parentage of a child.

(iii) *Judiciary Act*

21 Section 79(1) of the *Judiciary Act* provides as follows:

"The laws of each State or Territory, including the laws relating to procedure, evidence, and the competency of witnesses, shall, except as otherwise provided by the Constitution or the laws of the Commonwealth, be binding on all Courts exercising federal jurisdiction in that State or Territory in all cases to which they are applicable."

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### **The proceedings at first instance**

22 At first instance, there was no question that the first respondent, being the biological and birth mother of the child, was a parent of the child. The issue was whether the appellant or the second respondent was a legal parent of the child.

23 The primary judge, Cleary J, found that the first and second respondents were not partners in a de facto relationship when the child was conceived. It followed, as her Honour held, that the requirements of s 60H(1)(a) of the *Family Law Act* were not satisfied, with the result that s 60H was not engaged, and, therefore, that the second respondent "does not meet the legislative requirement to be the other intended parent". It does not appear to have been contended that the second respondent qualified as a parent of the child on any basis other than s 60H.

24 By contrast, although it was recognised that the appellant did not qualify as a parent under s 60H, it was contended that he qualifies as a parent otherwise than under that provision. The primary judge accepted that contention. Following the reasoning of Cronin J in *Groth v Banks*<sup>3</sup>, her Honour held that s 60H is properly to be understood "as expanding rather than restricting the categories of people who can be parents", and, in effect, that, in circumstances where s 60H is not engaged, a person may yet qualify as a parent of a child born as a result of an artificial conception procedure if the person is a parent of the child within "the ordinary meaning of the word". Her Honour further held that, because the appellant is the biological father of the child and, unaware of any de facto relationship between the first and second respondents, provided his genetic material for the express purpose of fathering a child whom he expected to help parent by financial support and physical care, which he had since done, the appellant is a parent of the child within the ordinary meaning of the word "parent" and, therefore, a parent of the child for the purposes of the *Family Law Act*.

### **The proceedings before the Full Court**

25 On appeal to the Full Court of the Family Court, Thackray J, with whom Murphy and Aldridge JJ agreed, held that the appellant is not a parent of the child. Like the primary judge, Thackray J accepted that s 60H is not exhaustive.

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3 (2013) 49 Fam LR 510.



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But, contrary to the primary judge's reasoning, Thackray J held that, because the matter was one within federal jurisdiction, s 79 of the *Judiciary Act* picked up s 14 of the *Status of Children Act* and applied it as a law of the Commonwealth, and that, perforce of s 14 of the *Status of Children Act* as so picked up and applied, the appellant was to be irrebuttably presumed *not* to be the parent of the child.

### **The meaning of "parent" and s 60H of the *Family Law Act***

26

The primary judge and the Full Court were correct in holding that s 60H is not exhaustive of the persons who may qualify as a parent of a child born as a result of an artificial conception procedure. Although the *Family Law Act* contains no definition of "parent" as such, a court will not construe a provision in a way that departs from its natural and ordinary meaning unless it is plain that Parliament intended it to have some different meaning<sup>4</sup>. Here, there is no basis in the text, structure or purpose of the legislation to suppose that Parliament intended the word "parent" to have a meaning other than its natural and ordinary meaning. To the contrary, s 4(1) provides that, when used in Pt VII, "parent", "in relation to a child who has been adopted, means an adoptive parent of the child". That implies that there is an accepted meaning of "parent" which, but for the express inclusion of an adoptive parent, would or might not extend to an adoptive parent<sup>5</sup>. Section 61B, which defines "parental responsibility" by reference to the legal duties, powers, responsibilities and authority of parents; s 69V, which provides for evidence of parentage; and s 69W, which provides for orders for

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4 See, eg, *Cody v J H Nelson Pty Ltd* (1947) 74 CLR 629 at 647 per Dixon J; [1947] HCA 17; *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 at 305 per Gibbs CJ, 310 per Stephen J, 321 per Mason and Wilson JJ, 335 per Aickin J; [1981] HCA 26; *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at 31 [4] per French CJ, 46-47 [47] per Hayne, Heydon, Crennan and Kiefel JJ; [2009] HCA 41; *Esso Australia Pty Ltd v Australian Workers' Union* (2017) 92 ALJR 106 at 123 [52] per Kiefel CJ, Keane, Nettle and Edelman JJ; 350 ALR 404 at 422-423; [2017] HCA 54; *Maunsell v Olins* [1975] AC 373 at 382 per Lord Reid.

5 See *Dilworth v Commissioner of Stamps* [1899] AC 99 at 105-106 per Lord Watson for the Privy Council; *Corporate Affairs Commission (SA) v Australian Central Credit Union* (1985) 157 CLR 201 at 206-207 per Mason A-CJ, Wilson, Deane and Dawson JJ; [1985] HCA 64.

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carrying out parentage testing procedures, are also consistent with a statutory conception of parentage which accords to ordinary acceptance. Section 60B(1) perhaps suggests that a child cannot have more than two parents within the meaning of the *Family Law Act*. But whether or not that is so, s 60B(1) is not inconsistent with a conception of parent which, in the absence of contrary statutory provision, accords to ordinary acceptance: hence, as it appears, the need for the express provision in s 60H(1)(d) that, where a child is born to a woman as a result of an artificial conception procedure while the woman is married to or a de facto partner of an "other intended parent", a person other than the woman and intended partner who provides genetic material for the purposes of the procedure is not the parent of the child.

27 So to conclude does not mean that the only persons who, by law, have parental responsibilities are persons who are parents according to ordinary acceptance or are otherwise defined in the *Family Law Act* as parents. And it does not mean that the only persons who may seek parenting orders under s 61D are parents according to ordinary acceptance or are otherwise defined as parents. The range of permissible applicants is broader than that. But it is implicit in each of the provisions that have been mentioned that the *Family Law Act* proceeds from the premise that the word "parent" refers to a parent within the ordinary meaning of that word except when and if an applicable provision of the *Family Law Act* otherwise provides.

28 It is true, as counsel for the first and second respondents submitted, that s 5(1) of the *Child Support (Assessment) Act 1989* (Cth) defines "parent", when used in relation to a child born because of the carrying out of an artificial conception procedure, as "a person who is a parent of the child under section 60H of the *Family Law Act*". In counsel's submission, that suggests that the drafter of the *Child Support (Assessment) Act* took s 60H of the *Family Law Act* to be exhaustive of the persons who are parents of a child born of an artificial conception procedure. That, however, is unlikely. It is more probable that the *Child Support (Assessment) Act* adopts an explicit definition of "parent" because it is an Act which imposes an enforceable pecuniary liability<sup>6</sup>. And even if it were otherwise, an Act of Parliament does not alter the law by merely betraying

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6 See *Luton v Lessels* (2002) 210 CLR 333 at 356-358 [65]-[67] per Gaudron and Hayne JJ; [2002] HCA 13.

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an erroneous opinion of it<sup>7</sup>. It may be that, where the interpretation of a statute is obscure or ambiguous or readily capable of more than one interpretation, the meaning ascribed to it in a subsequent statute may provide some insight<sup>8</sup>. But that is not this case. The meaning of s 60H is not obscure or ambiguous or readily capable of more than one interpretation. As both the primary judge and the Full Court held, its effect is plainly enough to expand rather than restrict the categories of people who may qualify as a parent of a child born as a result of an artificial conception procedure.

29

In *In re G (Children)*, Baroness Hale of Richmond observed<sup>9</sup> in relation to comparable English legislation that, according to English contemporary conceptions of parenthood, "[t]here are at least three ways in which a person may be or become a natural parent of a child" depending on the circumstances of the particular case: genetically, gestationally and psychologically. That may also be true of the ordinary, accepted English meaning of "parent" in this country, although it is unnecessary to reach a concluded view on that issue. The significance of her Ladyship's analysis for present purposes, however, is that, just as the question of parentage under the legislation with which she was concerned was one of fact and degree to be determined by applying contemporary conceptions of parenthood to the relevant circumstances, the question of whether a person qualifies under the *Family Law Act* as a parent according to the ordinary, accepted English meaning of "parent" is a question of fact and degree to be determined according to the ordinary, contemporary Australian understanding of "parent" and the relevant circumstances of the case at hand. The primary judge and the Full Court were correct so to hold.

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7 *Deputy Federal Commissioner of Taxes (SA) v Elder's Trustee and Executor Co Ltd* (1936) 57 CLR 610 at 625-626 per Dixon, Evatt and McTiernan JJ; [1936] HCA 64, quoting Maxwell, *On the Interpretation of Statutes*, 6th ed (1920) at 544. See also Pearce and Geddes, *Statutory Interpretation in Australia*, 8th ed (2014) at 127 [3.35].

8 *Ormond Investment Co v Betts* [1928] AC 143 at 164 per Lord Atkinson.

9 [2006] 1 WLR 2305 at 2316-2317 [33]-[37]; [2006] 4 All ER 241 at 252-253.

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### Section 79 of the *Judiciary Act*

30 As was explained in *Rizeq v Western Australia*<sup>10</sup>, the purpose of s 79(1) of the *Judiciary Act* is to fill a gap in the laws which regulate matters coming before courts exercising federal jurisdiction by providing those courts with powers necessary for the hearing and determination of those matters. In the case of a State court exercising federal jurisdiction (as in *Rizeq*), or a federal court exercising federal jurisdiction (as in this case), such a gap exists by reason of the absence of State legislative power to command a court as to the manner of its exercise of federal jurisdiction. In such cases, s 79(1) fills the gap by picking up the texts of State laws governing the manner of exercise of State jurisdiction and applying them as Commonwealth laws governing the manner of exercise of federal jurisdiction. But, as was stressed in *Rizeq*<sup>11</sup>, s 79(1) of the *Judiciary Act* has no broader operation than that. In particular, s 79(1) is not directed to, and it does not add to or subtract from, laws which are determinative of the rights and duties of persons as opposed to the manner of exercise of jurisdiction<sup>12</sup>.

31 In *Rizeq*, the accused was indicted before the District Court of Western Australia on two counts of offences against s 6(1)(a) of the *Misuse of Drugs Act 1981* (WA). Because he was a resident of New South Wales, his trial before the District Court of Western Australia was a trial in the exercise of federal diversity jurisdiction under s 75(iv) of the *Constitution*. Section 114(2) of the *Criminal Procedure Act 2004* (WA) was a law which regulated the exercise of State jurisdiction by providing that, in the case of offences of the kind with which the accused was charged, a majority verdict of guilty returned by not less than 11 jurors was sufficient to sustain a conviction. Because the Parliament of Western Australia lacks legislative power to command a State court exercising federal jurisdiction as to the manner of exercise of its jurisdiction, s 114(2) of the *Criminal Procedure Act* was incapable of applying of its own force. That left a gap in the laws regulating the trial, to which s 79(1) of the *Judiciary Act* responded by picking up the text of s 114(2) of the *Criminal Procedure Act* and

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10 (2017) 262 CLR 1 at 14 [15]-[16], 18 [32] per Kiefel CJ, 36 [90], 41 [103] per Bell, Gageler, Keane, Nettle and Gordon JJ; [2017] HCA 23.

11 (2017) 262 CLR 1 at 41 [103] per Bell, Gageler, Keane, Nettle and Gordon JJ.

12 *Rizeq* (2017) 262 CLR 1 at 41 [105] per Bell, Gageler, Keane, Nettle and Gordon JJ.

applying it as a law of the Commonwealth governing the conduct of the trial<sup>13</sup>. By contrast, s 6(1)(a) of the *Misuse of Drugs Act* was a law addressed to the conduct of individuals (rendering them liable for prosecution for criminal offences) and thus was determinative of the rights and duties of persons as opposed to the manner of exercise of jurisdiction. As such, as was held in *Rizeq*<sup>14</sup>, s 6(1)(a) was beyond the operation of s 79(1) of the *Judiciary Act* but it applied of its own force as a law of the State of Western Australia under which the accused was charged.

### Section 14(2) of the *Status of Children Act*

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As has been noticed<sup>15</sup>, Div 1 of Pt 3 of the *Status of Children Act* is expressed in terms of "presumptions". As Professor Thayer long ago demonstrated<sup>16</sup>, however, the word "presumption" is applied to a disparate range of distinctive legal techniques and doctrines. A presumption of fact, or evidentiary presumption, is a traditional inference, based on logic and common sense, which a tribunal of fact ordinarily draws from basic facts, particularly circumstantial evidence<sup>17</sup>. By contrast, a presumption of law is a legal rule that gives *additional* force to some basic facts in the proof of the presumed fact, by permitting or requiring an inference from the former to the latter<sup>18</sup>. If a presumption of the latter kind is rebuttable and so merely facilitates proof of the presumed fact, it is properly to be conceived of as a rule of law "relating to

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13 *Rizeq* (2017) 262 CLR 1 at 16 [23] per Kiefel CJ, 20 [42], 41 [104] per Bell, Gageler, Keane, Nettle and Gordon JJ.

14 (2017) 262 CLR 1 at 41 [105] per Bell, Gageler, Keane, Nettle and Gordon JJ.

15 See [15] above.

16 Thayer, "Presumptions and the Law of Evidence" (1889) 3 *Harvard Law Review* 141; Thayer, *A Preliminary Treatise on Evidence at the Common Law* (1898), ch 8. See also Tapper, *Cross and Tapper on Evidence*, 12th ed (2010) at 134.

17 *R v Falconer* (1990) 171 CLR 30 at 83 per Gaudron J; [1990] HCA 49. See Heydon, *Cross on Evidence*, 11th Aust ed (2017) at 368 [7255].

18 See Bohlen, "The Effect of Rebuttable Presumptions of Law upon the Burden of Proof" (1920) 68 *University of Pennsylvania Law Review* 307 at 312.

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evidence"<sup>19</sup>, and so, generally speaking, as a law capable of being picked up by s 79(1) of the *Judiciary Act*. If, however, a presumption of the latter kind is conclusive, and so requires an inference regardless of any competing evidence, logic or common sense, its effect will be to alter a rule that would otherwise attach legal consequences to the presumed fact, as opposed to the basic facts<sup>20</sup>. And if the rule that attaches legal consequences to the presumed fact is directed to the status, rights and duties of persons, so, too, must be the conclusive presumption of law which effects its alteration.

33 The presumptions identified in Div 1 of Pt 3 of the *Status of Children Act* are rules of law that apply upon proof of their stated factual premises. As has been seen<sup>21</sup>, except for the presumptions arising under ss 12(1) and 14(1)-(3), they are also stated to be "rebuttable presumptions", and they otherwise present as rules of law relating to evidence<sup>22</sup>. Generally speaking, therefore, it may be that they are capable of being picked up by s 79(1) of the *Judiciary Act* and applied in the exercise of federal jurisdiction as laws of the Commonwealth.

34 By contrast, the presumptions stated in ss 12(1) and 14(1)-(3) of the *Status of Children Act*<sup>23</sup> are "irrebuttable" rules determinative of a status to which rights and duties are attached<sup>24</sup>. In particular, ss 14(2) and 14(4) of the *Status of Children Act* operate as an irrebuttable rule of law that, in specified circumstances, the biological father of a child born as a result of a fertilisation procedure is *not* the father of the child. That is not a law relating to evidence or otherwise regulating the exercise of jurisdiction. It is a rule of law determinative of parental status which applies independently of anything done by a court or

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19 See Roberts and Zuckerman, *Criminal Evidence*, 2nd ed (2010) at 233.

20 See and compare *Williamson v Ah On* (1926) 39 CLR 95 at 108, 117 per Isaacs J; [1926] HCA 46.

21 See [17] above.

22 See and compare *Harris v Harris* [1979] 2 NSWLR 252 at 255 per McLelland J.

23 Like the provisions of the *Artificial Conception Act 1984* (NSW) which were their legislative predecessors.

24 See *Ford v Ford* (1947) 73 CLR 524 at 529 per Latham CJ; [1947] HCA 7.

other tribunal, and which, as such, stands in contrast to a provision that regulates the exercise of jurisdiction.

35 Counsel for the first and second respondents submitted to the contrary that s 18 of the *Status of Children Act*, by precluding reliance on presumptions in criminal prosecutions, indicates that the presumption laid down in ss 14(2) and 14(4) is "procedural" and, as such, capable of being picked up and applied by s 79(1) of the *Judiciary Act*. The argument is unpersuasive. Section 18 may be understood as creating a limited exception to the operation of the rule of law in ss 14(2) and 14(4). It mirrors the common law rule that, when the liberty of the subject is at stake, there is no room for presumptions in favour of the Crown<sup>25</sup>. But it says nothing, one way or the other, as to the nature of the presumptions to which it applies.

36 Counsel for the first and second respondents also referred to s 17(1) of the *Status of Children Act*, which provides for the resolution of conflicts between irrebuttable presumptions in favour of the presumption that appears more or most likely to be correct. Relying on that provision, counsel submitted that the presumption prescribed by ss 14(2) and 14(4) is, in truth, rebuttable, and, in any event, because of the need for judicial resolution, it is "procedural" and, therefore, capable of being picked up and applied by s 79(1) of the *Judiciary Act*.

37 Those submissions are also unpersuasive. The only other irrebuttable presumption in Div 1 of Pt 3 of the *Status of Children Act* is the presumption stated in s 12(1) that a person is a child's parent if, while the person is alive, a prescribed court has found expressly that the person is the child's parent or made a finding that it could not have made unless the person were the child's parent, and the finding has not been altered, set aside or reversed. The possibility of conflict between those two provisions does not suggest that the presumption in ss 14(2) and 14(4) is anything other than an irrebuttable rule of law. Possibly, a prescribed court could make a declaration of parentage of a child in favour of a person who is deemed by ss 14(2) and 14(4) not to be the father of the child, and if so, and if parentage were thereafter put in issue, it would fall to the Supreme Court of New South Wales to decide whether the prescribed court's declaration of parentage or ss 14(2) and 14(4)'s denial of fatherhood was "more or most

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25 *Dillon v The Queen* [1982] AC 484 at 487 per Lord Fraser of Tullybelton for the Privy Council. See Heydon, *Cross on Evidence*, 11th Aust ed (2017) at 373 [7285].

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likely to be correct". For that reason, although the presumption prescribed by ss 14(2) and 14(4) is rightly termed "irrebuttable", it is also properly described as conditional. But either way, it is not a rebuttable presumption of law – because it is not rebuttable by evidence or other proof of competing facts. It is a rule of law which is subject to a further rule of law that, where there is apparent conflict between two rules of law, the one which the court determines to be more or most correct shall prevail. Such rules are well known to the law<sup>26</sup>.

38 Finally on this aspect of the matter, it is to be observed that ss 14(2) and 14(4) stand in contrast to provisions such as, for example, s 4 of the *Civil Liability (Third Party Claims Against Insurers) Act 2017* (NSW), which, although determinative of rights and obligations, are directed to the manner of exercise of jurisdiction<sup>27</sup>. Section 4 of the *Civil Liability (Third Party Claims Against Insurers) Act* governs the exercise of State jurisdiction in relation to claims against defendants who are indemnified under policies of insurance against civil liabilities by providing for claimants to bring claims directly against defendants' insurers. If such a claim is brought in a court exercising federal jurisdiction, as it might be perhaps as part of the whole of the matters in controversy in a proceeding before the Federal Court of Australia, s 79(1) of the *Judiciary Act* would pick up and apply s 4 of the *Civil Liability (Third Party Claims Against Insurers) Act* – as a Commonwealth law governing the manner of exercise of federal jurisdiction – in order to fill the gap in the Federal Court's powers to deal with such a claim<sup>28</sup>.

39 In contrast, the "irrebuttable presumption" laid down in ss 14(2) and 14(4) is not in its nature a law relating to evidence or otherwise regulating the exercise of jurisdiction. It is a conditional rule of law determinative of the parental status of the persons to whom it applies which operates independently of anything done

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26 See *Bankstown City Council v Alamo Holdings Pty Ltd* (2005) 223 CLR 660 at 668-669 [27]; [2005] HCA 46; Leeming, *Resolving Conflicts of Laws* (2011) at 1-2.

27 See *Rizeq* (2017) 262 CLR 1 at 33-34 [83], 39-40 [100] per Bell, Gageler, Keane, Nettle and Gordon JJ, referring to *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Barrett* (1945) 70 CLR 141 at 165-166 per Dixon J; [1945] HCA 50 and *James Hardie & Coy Pty Ltd v Seltsam Pty Ltd* (1998) 196 CLR 53 at 64-65 [22]-[24] per Gaudron and Gummow JJ; [1998] HCA 78.

28 *Rizeq* (2017) 262 CLR 1 at 36 [90] per Bell, Gageler, Keane, Nettle and Gordon JJ.



by a court or other tribunal. As such, ss 14(2) and 14(4) are not provisions to which s 79(1) of the *Judiciary Act* is capable of applying.

**The *Family Law Act* has "otherwise provided"**

40 The appellant contended that, even if s 14(2) is properly to be conceived of as a provision which regulates the exercise of State jurisdiction in matters arising under the *Status of Children Act*, it is incapable of being picked up by s 79(1) of the *Judiciary Act* and applied as a law of the Commonwealth in proceedings under the *Family Law Act* because the *Family Law Act* has "otherwise provided".

41 What has been said thus far is sufficient to dispose of the appeal. But it is appropriate to acknowledge the correctness of that submission. If ss 14(2) and 14(4) were properly to be conceived of as provisions which regulate the exercise of State jurisdiction, they could not be picked up and applied under s 79(1) of the *Judiciary Act* because the *Family Law Act* has otherwise provided.

42 In coming to that conclusion, there is but little assistance to be derived from principles for resolving conflicts between statutes having the same source<sup>29</sup>. Those principles proceed from the assumption that a legislature generally does not "intend to contradict itself"<sup>30</sup>, and require conflicts to be "alleviated, so far as possible, by adjusting the meaning of the competing provisions"<sup>31</sup> through familiar methods. By contrast, as counsel for the appellant submitted, s 79(1) anticipates State laws regulating the exercise of State jurisdiction which, if picked up and applied in federal jurisdiction, would contradict laws enacted by the Commonwealth Parliament<sup>32</sup>. Where that is so, the State law is not picked up

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29 cf *Northern Territory v GPAO* (1999) 196 CLR 553 at 588 [80] per Gleeson CJ and Gummow J; [1999] HCA 8.

30 *Butler v Attorney-General (Vict)* (1961) 106 CLR 268 at 276 per Fullagar J; [1961] HCA 32.

31 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 382 [70] per McHugh, Gummow, Kirby and Hayne JJ; [1998] HCA 28, applied in *Re Maritime Union of Australia; Ex parte CSL Pacific Shipping Inc* (2003) 214 CLR 397 at 411-412 [28]-[29]; [2003] HCA 43.

32 See Hill and Beech, "Picking up' State and Territory Laws under s 79 of the Judiciary Act – Three Questions" (2005) 27 *Australian Bar Review* 25 at 38.

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and applied as a law having its source in Commonwealth legislative power because the law of the Commonwealth has "otherwise provided". And, as submitted on behalf of the Commonwealth Attorney-General (intervening), the meaning of such a State law cannot be adjusted in order to avoid the inconsistency<sup>33</sup>.

43 Further, as was explained<sup>34</sup> in *Rizeq*, s 79(1) of the *Judiciary Act* operates only in the area of exclusive Commonwealth legislative power which comprises the regulation of the exercise of federal jurisdiction, and thus in which s 109 of the *Constitution* necessarily has no application. Acknowledging this to be so, there is no reason to construe "otherwise provided" in s 79(1) of the *Judiciary Act* as importing a more stringent test than the terms of s 109 of the *Constitution*, within their respective spheres of application<sup>35</sup>. The coherence of the body of law applicable in federal jurisdiction is maximised by treating the test for contrariety between Commonwealth and State laws applied to regulate the exercise of federal jurisdiction as identical to that between Commonwealth and State laws operating outside federal jurisdiction. The meaning of the expression "otherwise provided" in s 79(1) of the *Judiciary Act* is thus to be equated with the concept of inconsistency in s 109 of the *Constitution*.

44 As was earlier observed, Div 1 of Pt VII of the *Family Law Act* proceeds from the premise that "parent" is an ordinary English word which is to be taken as having its ordinary, accepted English meaning. In some respects, most notably in s 60H, the *Family Law Act* may be seen as expanding the conception of "parent" beyond ordinary acceptance by adding a limited range of persons who stand in specified relationships to children born of artificial conception procedures. Additionally, under s 60G, a person may qualify as a parent of a child born of an artificial conception procedure by reason of the person's adoption of the child under the law of a State or Territory. But ss 60H and 60G

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33 *Rizeq* (2017) 262 CLR 1 at 33 [81] per Bell, Gageler, Keane, Nettle and Gordon JJ.

34 (2017) 262 CLR 1 at 25 [60], 37 [92] per Bell, Gageler, Keane, Nettle and Gordon JJ; cf *GPAO* (1999) 196 CLR 553 at 576 [38] per Gleeson CJ and Gummow J (Gaudron J agreeing at 606 [135]); *Atrack (NT) Pty Ltd v Hatfield* (2005) 223 CLR 251 at 271 [61]-[63] per Gleeson CJ, McHugh, Gummow, Hayne and Heydon JJ; [2005] HCA 38.

35 cf *Austral Pacific Group Ltd (In liq) v Airservices Australia* (2000) 203 CLR 136 at 144 [17] per Gleeson CJ, Gummow and Hayne JJ; [2000] HCA 39.

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are not exhaustive of the classes of persons who may qualify as parents of children born of artificial conception procedures. It remains that, apart from those specific provisions, the question of whether a person is a parent of a child born of an artificial conception procedure depends on whether the person is a parent of the child according to the ordinary, accepted English meaning of "parent". And as has been explained<sup>36</sup>, that is a question of fact and degree to be determined according to the ordinary, contemporary Australian understanding of "parent" and the relevant circumstances of the case at hand.

45 It is also necessary to appreciate, as is explained later in these reasons, that the evident purpose of s 60H and more generally of Div 1 of Pt VII of the *Family Law Act* is that the range of persons who may qualify as a parent of a child born of an artificial conception procedure should be no more restricted than is provided for in Div 1 of Pt VII. Consequently, although ss 60G and 60H are not exhaustive of the persons who may qualify as parents of children born of artificial conception procedures, if a person does qualify as a child's parent either under s 60G by reason of adoption, or according to s 60H, or according to ordinary acceptance of the word "parent", it is beside the point that a State or Territory provision like s 14(2) of the *Status of Children Act* otherwise provides. Section 79(1) of the *Judiciary Act* does not operate to insert provisions of State law into a Commonwealth legislative scheme which is "complete upon its face" or where, upon their proper construction, the provisions of the Commonwealth scheme can "be seen to have left no room" for the operation of State provisions<sup>37</sup>. And, as is apparent from its text, context and history, Div 1 of Pt VII of the *Family Law Act* leaves no room for the operation of contrary State or Territory provisions. In effect, it contains an implicit negative proposition that nothing

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36 See [29] above.

37 *R v Gee* (2003) 212 CLR 230 at 254 [62] per McHugh and Gummow JJ; [2003] HCA 12, adopting, by analogy, the reasoning in *Deputy Commissioner of Taxation v Moorebank Pty Ltd* (1988) 165 CLR 55 at 64 per Mason CJ, Brennan, Deane, Dawson and Gaudron JJ; [1988] HCA 29, *GPAO* (1999) 196 CLR 553 at 576 [38] per Gleeson CJ and Gummow J, and *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at 351 [30] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ; [1999] HCA 9. See also *Bui v Director of Public Prosecutions (Cth)* (2012) 244 CLR 638 at 652-653 [25] per French CJ, Gummow, Hayne, Kiefel and Bell JJ; [2012] HCA 1.

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other than what it provides with respect to parentage is to be the subject of legislation<sup>38</sup>.

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The Commonwealth's legislative power under s 51(xxi) of the *Constitution* to legislate with respect to marriage includes power to legislate with respect to the paternity and status of children of a marriage<sup>39</sup>. The first provision of the *Family Law Act* to deal with assisted conception was s 5A, which was introduced by the *Family Law Amendment Act 1983* (Cth)<sup>40</sup>. Like some State legislation, it provided that a husband who consented to the artificial insemination of his wife with semen obtained from another man would be deemed to be the father of the child. Unlike State legislation, however, s 5A did not provide expressly that the sperm donor was *not* a parent of the child. The Commonwealth lacked power under s 51(xxi) to legislate with respect to the status of children not born of a marriage<sup>41</sup>. But in 1986 and 1987, four of the States referred concurrent legislative power with respect to ex-nuptial children to the Commonwealth under s 51(xxxviii) of the *Constitution*<sup>42</sup>. Following referral, the Commonwealth Parliament introduced s 60B of the *Family Law Act*, by way of the *Family Law Amendment Act 1987* (Cth), which was the legislative predecessor of the current s 60H<sup>43</sup>. Section 60B(1) was directed to married couples who conceived through artificial conception to which both parties to the

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38 See and compare *Agrack* (2005) 223 CLR 251 at 271 [60] per Kirby J; *Momcilovic v The Queen* (2011) 245 CLR 1 at 111 [244] per Gummow J; [2011] HCA 34; *Work Health Authority v Outback Ballooning Pty Ltd* (2019) 93 ALJR 212 at 222 [35] per Kiefel CJ, Bell, Keane, Nettle and Gordon JJ; 363 ALR 188 at 196; [2019] HCA 2.

39 *Attorney-General (Vict) v The Commonwealth* (1962) 107 CLR 529 at 554 per Kitto J, 564 per Taylor J, 574 per Menzies J, 602 per Owen J; [1962] HCA 37.

40 *Family Law Amendment Act 1983* (Cth), s 4.

41 *Russell v Russell* (1976) 134 CLR 495 at 540-542 per Mason J; [1976] HCA 23.

42 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).

43 *Family Law Amendment Act 1987* (Cth), s 24.

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marriage consented, and provided that the child was the child of the couple regardless of biological parentage. Section 60B(4) made similar provision for parties to bona fide de facto relationships. Section 60B(2) and (3) provided by reference to prescribed laws of the States and Territories for children born to single women as a result of artificial conception procedures. Section 60B(2) stated that such a child was the child of the woman. Like s 5A, however, s 60B did not state that such a child was *not* the child of the biological father. The *Family Law Reform Act 1995* (Cth) changed the focus of the legislation from parental rights to parental responsibility and provision was made for joint parenting, parenting orders, residence and contact. Section 60B was reconstituted as s 60H and remained silent as to the parental status of a biological father of a child born as a result of an artificial conception procedure who was not the partner of the mother. Further amendment followed in 2008 with the *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008* (Cth). It amended s 60H(1) so as to apply to the partner of a birth mother of a child regardless of the partner's sex and, for the first time, it provided that, where s 60H(1) is engaged, the biological father of the child is *not* the child's parent<sup>44</sup>. By contrast, however, no such provision was included in s 60H(2) or (3), and s 60H has remained in the same form until the present time. Evidently, Div 1 of Pt VII comprises a Commonwealth legislative scheme which is "complete upon its face" and thus, for the purposes of s 79(1) of the *Judiciary Act*, "otherwise provide[s]".

47

It is true, as Victoria contended, that for a long period of Australia's history it was the States alone, and before them the colonies, which regulated the status of children, legitimacy, and the welfare of children. During the 1970s, a number of States enacted legislation governing legitimacy and maintenance of children, which included presumptions of legitimacy and paternity<sup>45</sup>. During the 1980s, that legislation was expanded to deal with the consequences of advances in the field of artificial conception, initially in terms confined to the status of children born to married women who conceived by assisted conception, but later so as to encompass children born to lesbian couples and single women.

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<sup>44</sup> *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008* (Cth), Sch 3A item 6.

<sup>45</sup> See, eg, *Children (Equality of Status) Act 1976* (NSW); *Status of Children Act 1974* (Vic); *Family Relationships Act 1975* (SA); *Status of Children Act 1978* (Qld).

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As Victoria submitted, there is no doubt that it was one of the purposes of those enactments to ensure that a husband who consented to the artificial insemination of his wife with semen obtained from another man would irrebuttably be presumed to be the father of the child and that the legal links between the donor of the sperm used in the artificial conception procedure and the child thus conceived be dissolved. It is, however, plain from the referral of powers by the relevant States to the Commonwealth that the object of the exercise was to facilitate the creation of a uniformly applicable Commonwealth scheme, and plain from the form of Div 1 of Pt VII, and particularly from the current forms of ss 60G and 60H, that Div 1 of Pt VII is designedly selective as to the State and Territory provisions relating to parentage that the Commonwealth permits to apply. Sections 60H(2) and 60H(3) in particular create an obviously intended capacity for the Commonwealth from time to time to add or to choose not to add, or to exclude, those of the State and Territory legislative provisions determinative of the parentage of a biological father of a child born as a result of an artificial conception procedure that apply under the *Family Law Act*.

48 The evident purpose of Div 1 of Pt VII of the *Family Law Act* is that the Commonwealth is to have sole control of the provisions that will be determinative of parentage under the Act<sup>46</sup>. Upon that basis it should be concluded that, even if ss 14(2) and 14(4) of the *Status of Children Act* were provisions which regulated the exercise of State jurisdiction in relation to a matter for which the laws of the Commonwealth failed to provide (which they are not), and were otherwise capable of being picked up and applied as a law of the Commonwealth regulating the exercise of federal jurisdiction, a law of the Commonwealth (namely, the *Family Law Act*) would otherwise provide.

### **Section 109 of the *Constitution***

49 Counsel for the first and second respondents and counsel for Victoria each advanced a further argument that, accepting that ss 14(2) and 14(4) of the *Status of Children Act* are not picked up and applied by s 79(1) of the *Judiciary Act* as a law of the Commonwealth regulating the exercise of federal jurisdiction, they nevertheless form part of the single composite body of law operating throughout the Commonwealth, and as such apply of their own force in federal jurisdiction as a valid law of the State of New South Wales unless and to the extent that they

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<sup>46</sup> See also Australia, House of Representatives, *Family Law Amendment Bill 1987*, Explanatory Memorandum at 37 [132].

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may be rendered inoperative by reason of s 109 of the *Constitution* as inconsistent with a valid law of the Commonwealth. It was contended that ss 14(2) and 14(4) of the *Status of Children Act* are neither directly inconsistent with any valid law of the Commonwealth – because ss 14(2) and 14(4) do not alter, impair or detract from the operation of Commonwealth law<sup>47</sup> – nor indirectly inconsistent with Commonwealth law – because there is no Commonwealth law which evinces an intention to be a complete statement of the law governing the subject matter to which ss 14(2) and 14(4) apply, or, to put it another way, there is no Commonwealth law which contains an implicit negative proposition that nothing other than what the Commonwealth law provides with respect to that subject matter is to be the subject of legislation<sup>48</sup>.

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The first part of the argument may be accepted. For the reasons earlier given, ss 14(2) and 14(4) of the *Status of Children Act* create a rule of law that, in certain circumstances, the biological father of a child born as a result of an artificial conception procedure is *not* the father of the child. As has been explained, it is a rule of law determinative of status which applies independently of anything done by a court – as opposed to a rule regulating the exercise of jurisdiction – and so is not picked up by s 79(1) of the *Judiciary Act* and applied as a law of the Commonwealth. It may also be accepted that, but for inconsistency with Commonwealth law, ss 14(2) and 14(4) of the *Status of Children Act* would comprise part of the single composite body of law operating throughout the Commonwealth which, as a valid law of the State of New South Wales, applies of its own force in federal jurisdiction.

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<sup>47</sup> *Victoria v The Commonwealth* (1937) 58 CLR 618 at 630 per Dixon J; [1937] HCA 82; *Dickson v The Queen* (2010) 241 CLR 491 at 502 [13]-[14]; [2010] HCA 30; *Jemena Asset Management (3) Pty Ltd v Coinvest Ltd* (2011) 244 CLR 508 at 524-525 [39]-[41] per French CJ, Gummow, Heydon, Crennan, Kiefel and Bell JJ; [2011] HCA 33; *Outback Ballooning* (2019) 93 ALJR 212 at 221 [32] per Kiefel CJ, Bell, Keane, Nettle and Gordon JJ; 363 ALR 188 at 195-196.

<sup>48</sup> *Ex parte McLean* (1930) 43 CLR 472 at 483-484 per Dixon J; [1930] HCA 12; *Victoria v The Commonwealth* (1937) 58 CLR 618 at 630 per Dixon J; *Dickson v The Queen* (2010) 241 CLR 491 at 502 [13]-[14]; *Outback Ballooning* (2019) 93 ALJR 212 at 221-222 [33]-[35] per Kiefel CJ, Bell, Keane, Nettle and Gordon JJ; 363 ALR 188 at 196.

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Bell J  
Gageler J  
Keane J  
Nettle J  
Gordon J

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51 The second part of the argument, however, must be rejected. For the reasons already stated, the Commonwealth has "otherwise provided" within the meaning of s 79(1) of the *Judiciary Act* and, therefore, it cannot be accepted that ss 14(2) and 14(4) of the *Status of Children Act* are not inconsistent with Div 1 of Pt VII of the *Family Law Act*. Such is the structure and evident purpose of the provisions of that Division that, although ss 60G and 60H are not exhaustive of the persons who may qualify under the *Family Law Act* as parents of children born of artificial conception procedures, if a person qualifies as the child's parent either under s 60G by reason of adoption or under s 60H, or according to ordinary acceptance of the word "parent", State provisions like ss 14(2) and 14(4) of the *Status of Children Act* are irrelevant. Division 1 of Pt VII of the *Family Law Act* evinces an intention to be a complete statement of the law governing the subject matter to which ss 14(2) and 14(4) apply and thereby evinces a negative implication that nothing other than what the Commonwealth law provides with respect to that subject matter is to be the subject of legislation.

52 Perforce of s 109 of the *Constitution*, Div 1 of Pt VII of the *Family Law Act* prevails over ss 14(2) and 14(4) of the *Status of Children Act* to the extent of that inconsistency. In practical result, that means that the whole of ss 14(2) and 14(4) are excluded.

### **Sperm donors**

53 Finally, counsel for the first and second respondents and counsel for Victoria contended that, if ss 14(2) and 14(4) of the *Status of Children Act* are not picked up and applied by s 79(1) of the *Judiciary Act*, and do not apply of their own force as part of the single composite body of law operating throughout the Commonwealth, this Court should hold that the ordinary, accepted English meaning of "parent" excludes a "sperm donor".

54 Those submissions must also be rejected. As has been explained, the ordinary, accepted English meaning of the word "parent" is a question of fact and degree to be determined according to the ordinary, contemporary understanding of the word "parent" and the relevant facts and circumstances of the case at hand. To characterise the biological father of a child as a "sperm donor" suggests that the man in question has relevantly done no more than provide his semen to facilitate an artificial conception procedure on the basis of an express or implied understanding that he is thereafter to have nothing to do with any child born as a result of the procedure. Those are not the facts of this case. Here, as has been found – and the finding is not disputed – the appellant provided his semen to facilitate the artificial conception of his daughter on the express or implied



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*Bell* J  
*Gageler* J  
*Keane* J  
*Nettle* J  
*Gordon* J

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understanding that he would be the child's parent; that he would be registered on her birth certificate as her parent, as he is; and that he would, as her parent, support and care for her, as since her birth he has done. Accordingly, to characterise the appellant as a "sperm donor" is in effect to ignore all but one of the facts and circumstances which, in this case, have been held to be determinative.

55 It is unnecessary to decide whether a man who relevantly does no more than provide his semen to facilitate an artificial conception procedure that results in the birth of a child falls within the ordinary accepted meaning of the word "parent". In the circumstances of this case, no reason has been shown to doubt the primary judge's conclusion that the appellant is a parent of his daughter.

### **Conclusion**

56 It follows from these reasons that the appeal should be allowed. Orders 2, 3, 4 and 8 of the Full Court of the Family Court of Australia dated 28 June 2018 should be set aside. In their place, it should be ordered that appeal number EA 111 of 2017 to the Full Court be dismissed. The first and second respondents should pay the appellant's costs of the appeal to this Court.

57 EDELMAN J. This appeal concerns federal jurisdiction. In the terminology used in the field of federal jurisdiction there are at least three distinct concepts relevant to this appeal. First, there is "jurisdiction", which means an authority to decide. Federal jurisdiction is therefore a federal authority to decide. It has a personal dimension concerning the persons over whom authority to decide is exercised. It has a territorial dimension concerning the geographical area within which authority to decide can be exercised. And it has a subject matter dimension concerning the issues in respect of which authority to decide can be exercised.

58 Secondly, there are the powers that can be exercised by a court to make substantive orders when there is federal authority to decide. These include powers to impose criminal penalties, to award damages, to grant specific performance, injunctions or declarations, and so on. These orders can give effect to the rights, powers, duties, and liabilities of persons at general law or under statute. They can sanction an infringement of rights. And, on some occasions, the court's substantive orders will themselves define new rights or duties<sup>49</sup>. The boundaries within which the court's powers to make these substantive orders can be exercised are determined by the scope of the court's authority over person, place, and subject matter.

59 Thirdly, there are laws that regulate or govern the federal authority to decide within which these substantive orders are made. Sometimes these laws are described as laws that "regulate the exercise of federal jurisdiction"<sup>50</sup> or laws that "command a court as to the manner of exercise of federal jurisdiction"<sup>51</sup>. They are laws that concern aspects of federal jurisdiction such as how persons are served or made subject to authority, when a matter can be adjudicated, or the manner or process by which a matter is to be adjudicated. They are not limited to procedural laws or procedural powers of the court, although the most obvious examples are the rules of evidence and the rules of procedure<sup>52</sup>.

60 The primary difference between my reasons for decision in *Rizeq v Western Australia* ("*Rizeq*")<sup>53</sup> and those of the other members of the

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49 See Zakrzewski, *Remedies Reclassified* (2005), ch 13.

50 *Alqudsi v The Queen* (2016) 258 CLR 203 at 266 [171]; [2016] HCA 24; *Rizeq v Western Australia* (2017) 262 CLR 1 at 25 [59], 26 [62]; see also at 53-54 [144]; [2017] HCA 23.

51 *Rizeq v Western Australia* (2017) 262 CLR 1 at 26 [61]-[62].

52 *Rizeq v Western Australia* (2017) 262 CLR 1 at 55 [151], 59 [163], 72-73 [200].

53 (2017) 262 CLR 1.

Court concerned whether laws that confer powers upon a court to make substantive orders in relation to the rights, powers, duties, and liabilities of persons are laws that regulate or govern the federal authority to decide. In my view they are not. That issue was not argued and did not need to be decided in *Rizeq*. Likewise, it was not argued and does not need to be decided on this appeal, although it informs the approach taken to the resolution of this appeal and the related examples discussed.

61 A premise of s 79(1) of the *Judiciary Act 1903* (Cth) is that the court is "exercising" federal jurisdiction<sup>54</sup>. This assumes that the court already has federal jurisdiction; s 79(1) does not need to confer jurisdiction. In my view, it also assumes that the court has existing powers to make substantive orders which can be exercised in relation to new and existing rights and duties; s 79(1) is not needed to confer new rights or to impose new duties upon persons, nor is it needed to confer powers upon the court to make orders to recognise or enforce those rights or duties or to sanction a breach of duty. For this reason, I consider that no difficulty arises as to whether or not there is constitutional power for s 79(1) to confer, in relation to potentially unlimited subject matters when a matter is within federal jurisdiction, new powers on State courts to make orders in relation to new duties on persons who are subject to those powers<sup>55</sup>. Further, this view gives rise to no anomalies that might otherwise arise if s 79(1) were needed to "pick up" a court's powers, which it could only do from local legislation, even if the applicable proper law was from a different State or Territory.

62 These difficulties do not arise because s 79(1) of the *Judiciary Act* is concerned only with laws that regulate or govern the court's authority to decide. Section 79(1) says nothing about laws that create rules that are generally binding on people. Nor does it say anything about the existing powers of State, Territory or federal courts to recognise or enforce those rules or to sanction their breach<sup>56</sup>. It is concerned only with the necessary concomitant of a court having federal authority to decide and therefore to exercise its existing powers including in relation to existing rights and duties. That concomitant of the federal authority to decide is that the rules that govern or regulate that authority to decide, such as where a matter can be adjudicated, when it can be adjudicated, and "the manner

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54 *Solomons v District Court (NSW)* (2002) 211 CLR 119 at 134 [23]; [2002] HCA 47; *Rizeq* (2017) 262 CLR 1 at 56 [152]; compare at 35 [87].

55 See *Rizeq* (2017) 262 CLR 1 at 68-69 [191].

56 *Rizeq* (2017) 262 CLR 1 at 54 [146], 56 [152], 72 [200]; compare at 33-34 [83].

in which [a matter] is to be adjudicated"<sup>57</sup>, must also be federal. Hence, s 79(1) picks up laws which are "binding on all Courts" concerning these issues.

63 The instances cited in s 79(1) are instructive<sup>58</sup>. Laws relating to court procedure "bind" a court as to the manner in which it proceeds. Laws relating to evidence or competency of witnesses also "bind" a court as to the manner in which it proceeds. But s 79(1) is not limited to procedural or evidentiary matters<sup>59</sup>. Although not specifically mentioned in s 79(1), another example is limitation laws that bar a remedy but do not extinguish the underlying right<sup>60</sup>. These are not procedural rules "governing or regulating the mode or conduct of court proceedings"<sup>61</sup>, but instead concern the "means which the law provides for prosecuting [a] claim"<sup>62</sup>. Those laws determine whether the proceeding cannot succeed because a right can no longer be adjudicated if the limitation period is pleaded in defence.

64 *Rizeq* was a case where there was no significant difficulty in distinguishing between, on the one hand, a State law that creates a general rule that is binding on people and empowers a court to enforce the rule or to sanction its breach (with which s 79(1) is not concerned) and, on the other hand, a State law that regulates or governs the court's authority to decide (with which s 79(1) is concerned). Mr Rizeq was convicted in the District Court of Western Australia of offences under s 6(1)(a) of the *Misuse of Drugs Act 1981* (WA), namely possession of a prohibited drug with intent to sell or supply. Mr Rizeq was sentenced by reference to s 34 of that Act. Since Mr Rizeq was an interstate

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57 *Rizeq* (2017) 262 CLR 1 at 16 [23]; see also at 26 [61], 72-73 [200].

58 *Rizeq* (2017) 262 CLR 1 at 54 [148].

59 *Rizeq* (2017) 262 CLR 1 at 15 [19], 33 [83], 46 [122].

60 See *The Commonwealth v Mewett* (1997) 191 CLR 471 at 534-535; [1997] HCA 29.

61 *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 at 543-544 [99]; [2000] HCA 36, quoting *McKain v R W Miller & Co (SA) Pty Ltd* (1991) 174 CLR 1 at 26-27; [1991] HCA 56. See also *Stevens v Head* (1993) 176 CLR 433 at 445; [1993] HCA 19.

62 *Rizeq* (2017) 262 CLR 1 at 73-74 [202], quoting *Bauserman v Blunt* (1893) 147 US 647 at 659, in turn quoting *Amy v Watertown [No 2]* (1889) 130 US 320 at 325.

resident, being a resident of New South Wales, the authority that the District Court exercised was federal jurisdiction<sup>63</sup>.

65 Although the authority that was exercised over Mr Rizeq was federal, both the substantive offence-creating provision, s 6(1)(a), and the penalty provision, s 34(1), were State laws that applied of their own force. The rules concerning the offence in s 6(1)(a) and the maximum penalty in s 34(1) of the *Misuse of Drugs Act* were rules that applied to Mr Rizeq independently of whether the authority of the court was State or federal. Section 79(1) of the *Judiciary Act* did not need to "pick up" the text of those provisions<sup>64</sup>.

66 However, in the trial of Mr Rizeq, other provisions which concerned the manner in which, or process by which, the matter was to be adjudicated, and which therefore regulated the federal authority of the District Court, were required to be, and were, picked up by s 79(1). One of those provisions was s 114(2) of the *Criminal Procedure Act 2004* (WA), which concerned the circumstances in which a verdict of ten or more jurors shall be taken as the verdict on the charge. Another was s 11(a) of the *Misuse of Drugs Act*, which created a presumption of an intention to sell or supply a prohibited drug. Although s 11(a) was not raised or considered on the appeal to this Court, it was a rule of evidence that regulated the manner in which the District Court was to proceed in determining facts. It could not make the offence one that was "against any law of the Commonwealth" within s 80 of the *Constitution*.

67 On the other hand, there will be cases where there is more difficulty in characterising a State law to determine whether it (i) creates a general rule that is binding on people or concerns application of existing powers to recognise or enforce the rule or sanction of its breach, or (ii) regulates or governs the court's authority to decide. For instance, general law rules that create duties of contribution<sup>65</sup> are rules that apply of their own force in federal jurisdiction and can be enforced by courts. They are not rules that regulate or govern the court's authority to decide. However, State laws that extend the circumstances of

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63 *Constitution*, s 75(iv); *Judiciary Act*, s 39(2). See *Rizeq* (2017) 262 CLR 1 at 11 [3], 19 [37], 42 [107].

64 *Rizeq* (2017) 262 CLR 1 at 74 [204]; compare at 16 [23].

65 *Burke v LFOT Pty Ltd* (2002) 209 CLR 282 at 292 [14], 300 [41]; [2002] HCA 17.

general contribution<sup>66</sup> have been assumed in the absence of argument to regulate or govern the court's authority to decide<sup>67</sup>.

68 Another example of a difficulty in characterising a State law is s 4 of the *Civil Liability (Third Party Claims Against Insurers) Act 2017* (NSW). If this provision were characterised as regulating or governing the authority of the court then s 79(1) of the *Judiciary Act* would be required to pick it up, although that might not be possible if the matter were brought in another State even if the law of New South Wales were the applicable proper law<sup>68</sup>. Alternatively, a more natural characterisation of the section might be to treat it as conferring a substantive power on the State court to enforce rights and duties directly against an insurer. In such a circumstance, in my view, it would apply of its own force and, if part of the proper law in a case, it would apply to any other State court whether exercising federal jurisdiction or not. If the power were relied upon in the context of a matter in the Federal Court of Australia then the issue would be whether the broad power in s 23 of the *Federal Court of Australia Act 1976* (Cth) extended to making, as an order of a kind that "the Court thinks appropriate", the same order as would have been made if the matter had been brought in a State court. That question would not depend upon the registry of the Federal Court in which the matter was heard.

69 The issue of characterisation that arises on this appeal concerns the so-called "presumptions" in s 14(1)-(3) of the *Status of Children Act 1996* (NSW), which are said in s 14(4) to be "irrebuttable" presumptions. An irrebuttable presumption is an oxymoron. It is not a presumption at all. It is a rule of substantive law<sup>69</sup>. A true presumption, such as that contained in s 11(a) of the *Misuse of Drugs Act*, arises from a standardised inference about the existence of a secondary fact based upon the probative force attributed to the presence of a

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66 See, eg, *Law Reform Act 1995* (Qld), ss 6, 7.

67 *Austral Pacific Group Ltd (In liq) v Airservices Australia* (2000) 203 CLR 136 at 142 [11]-[12], 143 [15], 155 [53]; [2000] HCA 39. Compare *Rizeq* (2017) 262 CLR 1 at 64 [178], 67 [186].

68 See Stellios, "Choice of law in federal jurisdiction after *Rizeq v Western Australia*" (2018) 46 *Australian Bar Review* 187 at 197-198, discussing *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503. See also *Rizeq* (2017) 262 CLR 1 at 70-71 [194].

69 Greenleaf, *A Treatise on the Law of Evidence*, 16th ed (1899), vol 1 at 108; Wigmore, *A Treatise on the System of Evidence in Trials at Common Law* (1905), vol 4 at 3535 §2492; Wills and Lawes, *The Theory and Practice of the Law of Evidence*, 2nd ed (1907) at 43-44; Holdsworth, *A History of English Law*, 3rd ed (1944), vol 9 at 139, 143-144; Wigmore, *Evidence in Trials at Common Law*, Chadbourn rev (1981), vol 9 at 307-308 §2492.

primary fact. In contrast, the "irrebuttable presumption" in s 14(2) leaves "no room for judicial inquiry"<sup>70</sup> as to the facts. Hence, I agree with the joint judgment on this appeal that s 14(1)-(3) of the *Status of Children Act*, although described as "irrebuttable" presumptions in s 14(4), are really substantive rules of law.

70 The rule in s 14(2) of the *Status of Children Act* is that a man is not the father of a child merely because the child is born as a result of pregnancy by means of a fertilisation procedure using his sperm. That rule appears to be concerned with the general statutory rights and duties of persons. For instance, s 14(2) purports to apply independently of the powers of a court, by creating a rule as to parentage that will affect the duties of the parent and others, such as in relation to compulsory schooling<sup>71</sup>.

71 However, s 14(2) can also be seen as inseparable from the court's substantive powers to determine and declare who is a parent, particularly where the court is required to resolve conflicting rules. Section 17(1) provides that "[i]f two or more irrebuttable presumptions arising under this Division conflict with each other, the presumption that appears to the court to be more or most likely to be correct prevails". One rule that could conflict with s 14(2) is the substantive rule of law, also described as an "irrebuttable" presumption<sup>72</sup>, in s 12(1):

"A person is presumed to be a child's parent if:

- (a) while the person is alive, a prescribed court has:
  - (i) found expressly that the person is the child's parent, or
  - (ii) made a finding that it could not have made unless the person was the child's parent, and
- (b) the finding has not been altered, set aside or reversed."

In this context, s 14(2) is inseparable from ss 12(1) and 17(1) and therefore is inextricably associated with the powers of the court to make findings and orders about parentage.

72 Ultimately, in my view, it does not matter whether s 14(2) is characterised as concerned with the general statutory rights and duties of persons, or as

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70 *Williamson v Ah On* (1926) 39 CLR 95 at 108; [1926] HCA 46.

71 See, for instance, *Education Act 1990* (NSW), ss 22, 22B, 23.

72 *Status of Children Act*, s 12(2).

inseparable from the powers of the court to make substantive orders, or both<sup>73</sup>. Under either of those characterisations s 14(2) is a law that applies of its own force. It is not a law that would need to be picked up by s 79(1) of the *Judiciary Act*. However, for the reasons given in the joint judgment<sup>74</sup>, s 14(2), read with s 14(4), is inconsistent with Div 1 of Pt VII of the *Family Law Act 1975* (Cth) and is therefore inoperative by operation of s 109 of the *Constitution*.

73 I agree with the orders proposed in the joint judgment.

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73 Compare *Rizeq* (2017) 262 CLR 1 at 39-40 [100].

74 At [51]-[52].



