IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY **NO S6 OF 2019**

On Appeal From the Full Court of the Family Court of Australia

BETWEEN: **MASSON**

Appellant

AND: **PARSONS**

First Respondent

PARSONS

Second Respondent

INDEPENDENT CHILDREN'S LAWYER

Third Respondent

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

HIGH COURT OF AUSTRALIA
FILED
22 FEB 2019
THE REGISTRY MELBOURNE

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PART I FORM OF SUBMISSIONS

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

PART II BASIS OF INTERVENTION

2. Pursuant to s 78A of the *Judiciary Act 1903* (Cth) (**Judiciary Act**) and s 91(1)(b)(i) of the *Family Law Act 1975* (Cth) (**Act**), the Attorney-General of the Commonwealth intervenes in support of the ground in paragraph 2 in the Notice of Appeal insofar as it contends that the Full Court erred in holding that s 14 of the *Status of Children Act 1996* (NSW) (**State Act**) was binding on the primary judge by reason of s 79 of the Judiciary Act.

PART III ARGUMENT

Summary

3. In the context of an application for parenting orders under Pt VII of the Act, the question whether a person is a "parent" of a child within the meaning of the Act may be of significance to the exercise of the court's discretion to make a parenting order. Among other things, the statutory default position is that, subject to the exercise of discretion, each "parent" of a child has parental responsibility.[1] Relatedly, while the court must "regard the best interests of the child as the paramount consideration",[2] in doing so it must "apply 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",[3] and it must otherwise consider features of the relationship that the child has with its parents.[4]

4. The Attorney-General of the Commonwealth advances three propositions concerning the approach that a court should adopt in determining for the purposes of Pt VII of the

1 Section 61C of the Act.
2 Sections 60CA and 65AA of the Act.
3 Section 61DA of the Act.
4 Sections 60CC(1), 60CC(2)(a), 60CC(3) of the Act.

Act whether a person is a "parent" of a child born as the result of an artificial conception procedure:

4.1. **State Act does not apply**: A court exercising federal jurisdiction to determine whether a person is a parent of a child for the purposes of Pt VII of the Act is not bound by the irrebuttable presumption in s 14(2) of the State Act – either because that provision does not apply of its own force and is not picked up as federal law by s 79 of the Judiciary Act or, alternatively, if it does apply of its own force (see AS [53]–[54]), because s 109 of the Constitution renders it inoperative in that context;

10 4.2. **Section 60H is not exhaustive**: Section 60H of the Act does not exhaustively provide for the parentage of a child born as a result of the carrying out of an artificial conception procedure and therefore, in cases to which it does not apply in terms, a "parent" may be identified for the purposes of Pt VII in accordance with other provisions of the Act; and

4.3. **"Parent" bears its ordinary contemporary meaning**: Throughout the Act, the word "parent" bears its ordinary contemporary meaning affected only by specific provision to the contrary in the Act (such as s 60H). In its ordinary contemporary meaning, "parent" connotes a relationship with a child that accounts for social,
20 cultural and other factual aspects of the relationship and is not sufficiently defined in all cases by a biological or genetic relationship.

5. The acceptance of these propositions would lead to the conclusion that the Full Court of the Family Court erred at least in the respect identified in paragraph 2 above.

I. State Act did not apply pursuant to s 79 of the Judiciary Act or otherwise

6. A State law is picked up and applied as federal law by s 79 of the Judiciary Act if three requirements are satisfied. The first requirement is that the State law be of a character that regulates the exercise of jurisdiction in the sense that it is a law "conferring or

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governing powers that State courts have when exercising State jurisdiction".[5] The second requirement is that the State law be "applicable" in the case. And the third requirement is that the Constitution or the laws of the Commonwealth do not "otherwise provide".

7. The Attorney-General of the Commonwealth submits that s 14(2) of the State Act satisfies the first and second requirements (contrary to AS [49]–[58]), but not the third requirement (consistent with AS [35]–[48]).

First requirement: s 14(2) of the State Act is a law regulating the exercise of jurisdiction

10 8. Section 14(2) of the State Act is, in terms, a "presumption". Presumptions are, generally speaking, capable of bearing the requisite character of a law directed to the regulation of the exercise of jurisdiction. They will often answer the description of a law "relating to evidence" as expressly included within the operation of s 79 of the Judiciary Act. However, not all statutory "presumptions" so-called will bear this character. Notwithstanding the use of the language of "presumption", a provision might properly be characterised differently, so as to take it outside the operation of s 79 if, for example, the presumption is irrebuttable and is properly characterised as laying down a norm or a rule rather than regulating the exercise of jurisdiction.[6]

9. Although s 14(2) is styled as an irrebuttable presumption (s 14(4)), the context in which
20 it appears indicates that it is, nonetheless, directed to the regulation of the exercise of jurisdiction and not to laying down a norm or rule of law. Specifically, s 17(1) of the State Act contemplates a conflict of irrebuttable presumptions and provides that in such a case "the presumption that appears to the court to be more or most likely to be correct prevails". That conflict resolution rule indicates two things of importance: first, it presupposes an underlying "correct" position that must be determined, including by

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5 *Rizeq v Western Australia* (2017) 262 CLR 1 at 35 [87] (Bell, Gageler, Keane, Nettle and Gordon JJ); see also at 14 [15], 15 [20] (Kiefel CJ). This requirement aligns the State laws to which s 79 applies with the gap in the law governing the exercise of federal jurisdiction that would otherwise exist "by reason of the absence of State legislative power *to govern what a court does in the exercise of federal jurisdiction*": at 36 [90] (Bell, Gageler, Keane, Nettle and Gordon JJ) (emphasis added);
30 see also 26 [63].

6 See, by way of contrast, *Electoral Funding Act 2018* (NSW) s 56(4); *Liquor Act 2007* (NSW) s 141(4).

applying the irrebuttable presumptions as appropriate; and, secondly, it is "the court" which is so to determine in those cases where there is a conflict. That points against the conclusion that s 14 is a law "having application independently of anything done by a court", and that it is "outside the operation of s 79 of the *Judiciary Act*" on that basis.[7] It also points against the proposition in AS [57] that the presumptions are applicable in administrative contexts, for if they are, there is no prescribed way for an administrator to resolve a conflict of presumptions. It is not, however, necessary to decide this issue.

10. The primary, if not only, conflict of irrebuttable presumptions that s 17(1) contemplates for s 14(2) appears to be the possibility of conflict with s 12(1).[8] Section 12(1) concerns findings of parentage by a prescribed court. "Prescribed court" means "a court of any State or Territory, a federal court, or a court of a prescribed overseas jurisdiction".[9] Section 17(1) thus contemplates that a court called upon to apply s 14(2) may permissibly prefer the contrary finding of another court if satisfied it is more likely to be "correct". A construction of s 14(2) that rendered the presumption a form of conclusive status is inconsistent with s 17(1). The possibility of s 14(2) being displaced points to the true character of the provision as an evidentiary rather than normative rule.

11. This characterisation is consistent with principles of construction applicable to deeming provisions. Section 14(2), being an "irrebuttable" presumption (subject to s 17(1)), has a large operation that is akin to the operation of a deeming provision to give rise to a statutory fiction. Such provisions are generally construed not to have a legal operation beyond that required to achieve their object.[10] In light of s 17(1), in particular, the object sought to be achieved by s 14(2) is the regulation of the exercise of jurisdiction to determine a child's parentage, and not to provide a rule in all cases and independently of the exercise of jurisdiction.

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7 *Rizeq v Western Australia* (2017) 262 CLR 1 at 41 [105] (Bell, Gageler, Keane, Nettle and Gordon JJ).

8 See s 15(1) of the State Act, which identifies which presumptions are "irrebuttable".

9 Section 3(1) of the State Act.

10 *Muller v Dalgety & Co Ltd* (1909) 9 CLR 693 at 696 (Griffith CJ); *Wellington Capital Ltd v Australian Securities and Investments Commission* (2014) 254 CLR 288 at 314 [51] (Gageler J); *Re Culleton (No 2)* (2017) 91 ALJR 311 at 322 [60] (Nettle J).

12. The conclusion that s 14(2) is a law regulating the exercise of jurisdiction, in the nature of a law relating to evidence, is supported by authority in the Supreme Court of New South Wales describing the law as "procedural in character" and applying "when the question of proof of parentage comes before the court".[11]

13. Finally, the submission made at AS [58] cannot be accepted. The appellant appears to raise a constitutional issue associated with notions of "direction as to the manner and outcome of the federal jurisdiction to determine whether a person is a 'parent'". The issue is not the subject of adequate notice under s 78B of the Judiciary Act and for that reason alone should not be entertained. In any event, it would be unnecessary and therefore inappropriate to decide any such issue in circumstances where s 14(2) is in any event not picked up by s 79 because the Act otherwise provides.

Second requirement: s 14(2) is "applicable"

14. The reference in s 79 of the Judiciary Act to a State law being "applicable" to a case should be construed to mean the State law being applicable in accordance with the proper construction of the State law. The terms of the State Act do not expressly define the cases to which s 14(2) is applicable. Consistent with the characterisation of s 14(2) as an evidentiary rule, it appears to be intended to apply at least[12] whenever the question of a child's parentage arises in any proceeding in a court (subject to there being sufficient connection with New South Wales). That is sufficient to make it "applicable" in cases concerning parentage under the federal Act.

Third requirement: the federal Act otherwise provides

15. Although s 14(2) is a law of a kind upon which s 79 may operate, and is intended to be applicable to the case, s 79 does not operate to pick up s 14(2) because the federal Act "otherwise provides".

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11 *Re A and B* (2000) 26 Fam LR 317 at 327 [39] (Bryson J).

12 It is unnecessary to determine if s 14 also has some operations outside of Court proceedings, such as under the *Education Act 1990* (NSW) ss 22, 22B and 23: cf AS [57].

16. It would be a mistake to seek out a role for s 79 in picking up State laws to alter the *meaning* of a word in federal legislation. The meaning of a word in a federal Act is, of course, discerned as a matter of construction of that Act, having regard only to the usual matters that inform the construction of such an Act. The proper interpretation of such a word can be affected by a State or Territory law only to the extent that the federal Act allows that to occur (as, for example, in the definition of the word "adopted" in s 4 of the Act, which expressly permits the content of the word to be affected by State, Territory and international adoption laws). Section 79 has nothing to say where the question before a court concerns the interpretation of a federal Act.

17. Where a word is used in federal legislation with its ordinary meaning (see further below at [36]–[43]), then whether the facts as found fall within that ordinary meaning will generally be or at least involve a question of fact.[13] In the determination of that question of fact, rules of evidence and other laws directed to regulating the exercise of jurisdiction may apply. In that context, s 79 may have relevant operation.

18. The Act uses the word "parent" to identify a relationship that is accorded significance in various different ways under that Act, including in making provision for the determination of who is a "parent" of a child in the context of an application for parenting orders under Pt VII.

19. The Act makes specific provision for determining whether a person is a "parent" in identified circumstances (such as in relation to surrogacy (s 60HB) and certain cases of artificial conception (s 60H)). The Act also contains its own evidentiary rules, including in the form of parentage presumptions (ss 69P–69U). Those presumptions are apt to conflict with s 14(2) of the State Act: indeed, in this very case, s 69R of the Act yields a contrary result to s 14(2) of the State Act.[14] The Act makes no express provision for resolving a conflict of presumptions arising under the Act itself and a law of a State,

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13 *Hope v Bathurst City Council* (1980) 144 CLR 1 at 8–10 (Mason J). See also *Vetter v Lake Macquarie City Council* (2001) 202 CLR 439 at 451 [27] (Gleeson CJ, Gummow and Callinan JJ); *Macoun v Commissioner of Taxation* (2015) 257 CLR 519 at 538 [64] (French CJ, Bell, Gageler, Nettle and Gordon JJ).

14 Section 69R provides "If a person's name is entered as a parent of a child in a register of births or parentage information kept under the law of the Commonwealth or of a State, Territory or prescribed overseas jurisdiction, the person is presumed to be a parent of the child."

which indicates the legislative intention that such presumptions under State law not apply. The comprehensiveness of the provision made within the Act for determining whether a person is a "parent" provides a further reason to conclude that the Act excludes any operation that s 79 would otherwise have to pick up evidentiary presumptions enacted by the States.

20. Indeed, where the Act makes provision by reference to State law, it does so expressly and subject to careful limitation. In addition to the definition of "adoption" noted above, s 60H allows for regulations to prescribe a State law that will, upon being prescribed, have consequences specified in the Act. That limited provision for the application of State law is at odds with any intention that State laws may otherwise affect the interpretation or operation of the Act. The fact that s 60H applies only in *certain* circumstances, and only where State or Territory laws have been *prescribed*, is inconsistent with the proposition that State and Territory laws may also apply in *other* (closely related) circumstances *whether or not* those State or Territory laws have been prescribed. To hold otherwise would defeat the obvious policy intention that the uniform operation of the Act should differ as between State and Territories *only* to the extent that a decision has been made by the Commonwealth to allow specific State or Territory laws concerning artificial conception to affect the circumstances in which a person is a "parent" for the purposes of the Act.

21. These features of the Act indicate that it is "complete upon its face"[15] in relation to determining who is a child's parent. The Act "leaves no room"[16] for State or Territory laws to affect that question.

Alternative argument based on s 109 if s 14(2) applies of own force

22. If, contrary to the submissions made in [8]–[12] above, s 14(2) is not a law regulating the exercise of jurisdiction but is instead characterised as creating a norm or rule of law providing for a person's parentage, then it is, insofar as it would operate on a child the

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15 *Bui v Director of Public Prosecutions (Cth)* (2012) 244 CLR 638 at 652 [25] (French CJ, Gummow, Hayne, Kiefel and Bell JJ); *R v Gee* (2003) 212 CLR 230 at 254 [62] (McHugh and Gummow JJ).

16 *Grant Samuel Corporate Finance Pty Ltd v Fletcher* (2015) 254 CLR 477 at 483 [8] (French CJ, Hayne, Kiefel, Bell, Gageler and Keane JJ).

subject of a proceeding for parenting orders under the Act, inconsistent with the Act and therefore inoperative to that extent by force of s 109 of the Constitution. For the reasons given in [18] to [21] above, the application of s 14(2) would "alter, impair or detract from"[17] the provisions in the Act for determining parentage in the context of Family Court proceedings concerning parenting orders, including the specific parentage presumptions and other provisions governing the determination of parentage. In those circumstances, it is not necessary to consider the nature and extent of any differences between the kinds of inconsistency that engage the "otherwise provides" condition of s 79 of the Judiciary Act and s 109 of the Constitution.

II. Section 60H is not exhaustive

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23. Section 60H is of some relevance to the facts of this case because it concerns children born as the result of carrying out an artificial conception procedure. The express terms of s 60H do not resolve the question of whether the appellant is B's parent. Section 60H(1) is not engaged because, as the primary judge found, the first and second respondents were not married or in a de facto relationship at the time the artificial conception procedure resulting in the birth of B was carried out (**AB 24, 26** PJ [83], [84], [101(i)]). Section 60H(2) is directed only to the relationship between the birth mother and the child. Section 60H(3) has no substantive operation because there is no "prescribed law" that would engage it.

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24. Section 60H therefore does not in terms resolve the question of whether the appellant is B's parent. Unless s 60H is properly construed as dealing exhaustively with *all* cases of artificial conception so that, by a negative implication, the parentage of a sperm donor is denied, then the question of whether the appellant is B's "parent" is not addressed by s 60H, and therefore remains to be resolved by applying the meaning of "parent" ascertained in accordance with the Act as a whole (see below at [36]–[43]).

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17 *Work Health Authority v Outback Ballooning Pty Ltd* [2019] HCA 2 at 9–10 [32] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ), 21 [65] (Gageler J), 38–39 [105] (Edelman J).

25. There are differences of opinion within the Family Court as to whether s 60H has an exhaustive operation. Some of the case law was discussed by the Full Court at [50]–[84] (**AB 119-125**)

26. In 1996, in *Re B and J* (1996) 135 FLR 472, Fogarty J considered s 60H but only through the filter of the *Child Support (Assessment) Act 1989* (Cth) (**Assessment Act**) which provided (and continues to provide) that "parent", when used in relation to a child born because of the carrying out of an artificial conception procedure, "means" a person who is a parent under s 60H. That is, s 60H is made exhaustive for child support purposes under the Assessment Act.[18] That does not indicate that s 60H is exhaustive for purposes under the Act (indeed, the exhaustive form of the definition of "parent" in the Assessment Act is in contradistinction to the language of the Act). Justice Fogarty recognised this and observed, without reaching a concluded view, that "[p]rima facie, s 60H is not exclusive, and so there would need to be a specific provision to exclude people who would otherwise be parents".[19]

27. In 2002, in *Re Patrick* (2002) 168 FLR 6, Guest J disagreed with Fogarty J's view of s 60H. His Honour expressed concerns about the possible consquences of a non-exclusive construction of s 60H, namely the potential exposure of sperm donors to unintended parenting obligations, and held that a sperm donor, whether known or unknown, was outside the meaning of "parent" in the Act.[20] The process of construction by which that conclusion was reached was, with respect, not sufficiently explained and appears to have been erroneous: his Honour's reasoning appears to have been that "in the absence of express provisions in Federal law, the [Act] can and should be read in light of such State and Territory presumptions [governing sperm donors]".[21] As a matter of principle, however, it was erroneous to attempt to read the Act "in light of" State law.

28. The error in Guest J's approach to construction was identified and explained in 2003 by Brown J in *Re Mark* (2003) 179 FLR 248 at 257–259 [63]–[78]. Her Honour declined to follow *Re Patrick*, and held that s 60H was not an exhaustive definition of "parent" in

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18 (1996) 135 FLR 472 at 479, citing *W v G* (1996) 20 Fam LR 49 at 64 (Hodgson J).

19 (1996) 135 FLR 472 at 482.

20 (2002) 168 FLR 6 at 74–75 [298]–[301].

21 (2002) 168 FLR 6 at 75 [301].

artificial conception cases, agreeing with the observations to this effect made by Fogarty J in *Re B and J.*[22]

29. In 2009, the Full Court of the Family Court adverted to s 60H in *Aldridge v Keaton* (2009) 235 FLR 450 at 456–457 [16]–[22], but nothing said there was directed to the question of whether s 60H was exclusive in the sense of connoting a negative implication to exclude persons from being "parents".

30. In 2013, in *Groth v Banks* (2013) 49 Fam LR 510 at 515 [20], Cronin J held that s 60H was not exhaustive, following *Re Mark* to the effect that s 60H "should be interpreted as expanding rather than restricting the categories of people who could be considered a child's parent". His Honour held (at 515 [21]) that: "Where s 60H is not enlivened on the facts, and the issue of who is a parent is provided for under the Commonwealth legislation, there is no need and indeed no precedent for looking to state legislation as an interpretive aid for the Commonwealth law."

31. Finally, in the decision under appeal, the Full Court of the Family Court held (at [67] **AB 122**) that s 60H "is manifestly not exhaustive".

32. Against this background of divergent opinion, and informed by it to the extent it may assist, the High Court should construe s 60H from first principles.

33. The text of s 60H does not indicate any intention to deal exhaustively with cases of artificial conception. There is no language to suggest that an exclusive definition was sought to be enacted.[23] Such textual indicators as there are point to a non-exhaustive construction. Two points are of particular note. *First*, the definition of "child" in s 4(1) of the Act provides that the Subdivision in which s 60H appears "affects the situations in which a child is a child of a person". The language of "affects the situations" (as opposed to *defines* or *specifies* the situations) presupposes underlying "situations" provided for elsewhere in the Act that are "affected" to the extent specified. That is consistent with the heading to the Subdivision, "how this Act applies to *certain* children" (emphasis added). *Second*, the inclusion of paragraph (d) of s 60H(1), which

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22 (2003) 179 FLR 248 at 253 [40].

23 Cf s 5(1) of the *Child Support (Assessment) Act 1989* (Cth) ("parent").

expressly provides for one circumstance in which a child "is not" the child of a person, speaks against a negative implication that would exclude all persons not mentioned in s 60H(1) from being "parents" of a child born as a result of the carrying out of an artificial conception procedure.[24]

34. Contextual considerations also favour a non-exhaustive construction of s 60H. In particular, an exhaustive construction would be apt to lead to absurd consequences and considerable inconvenience, which indicate that "the legislature could not have intended [the] statute to operate in [that] particular way".[25] The absurd consequences of an exhaustive construction are that children born as a result of artificial conception procedures may be left without any "parents" for the purpose of the Act unless the birth mother was married to or a de facto partner of another person who consented to the procedure (so as to attract s 60H(1)). Outside of that circumstance, sub-ss (2) and (3) depend for any substantive operation on the regulations prescribing a law to engage those sub-sections. Even assuming such prescription, s 60H(2) contemplates only the birth mother being a parent and s 60H(3) contemplates only a man being a parent. Some of the laws in fact prescribed for the purpose of s 60H(2) highlight the difficulties: for example, s 14 of the State Act (prescribed by reg 12CA of the *Family Law Regulations 1984* (Cth)) does not affirmatively provide for a child to be the child of *any woman*, including the birth mother, if the birth mother was not married or in a de facto relationship (as in the present case).[26] That highlights that, on the exhaustive construction of s 60H, a child could readily be left with no parents (as would be the result in the present case), either because of an absence of prescription of any law under sub-ss (2) and (3), or because of the content of the prescribed law. There is no indication in the Act, or in extrinsic material, of any legislative purpose that would support these outcomes.

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24 Paragraph (d) was effectively inserted when the *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008* (Cth) repealed and substituted s 60H(1).

25 *Legal Services Board v Gillespie-Jones* (2013) 249 CLR 493 at 509 [48] (French CJ, Hayne, Crennan and Kiefel JJ); *Cooper Brookes (Wollongong) Pty Ltd) v Federal Commissioner of Taxation* (1981) 147 CLR 297 at 321 (Mason and Wilson JJ).

26 See also s 23 of the *Status of Children Act 1978* (Qld).

35. On the other hand, a non-exhaustive construction of s 60H would allow the ordinary meaning of "parent", informed by the parentage presumptions in ss 69P–69U, to govern in all cases except those specifically addressed in s 60H (or another specific provision). For the reasons that follow, that construction is to be preferred.

III. "Parent" has ordinary contemporary meaning

36. The meaning to be attributed to "parent" in the Act is, of course, a function of construing the Act itself – applying principles of construction to discern the legislative intention as expressed by the enacting legislature in the text and structure of the Act. It would be a distraction to seek out conceptions of parentage from other laws or other jurisdictions. That is not to say that a court exercising federal jurisdiction to resolve a factual controversy about whether a person is a parent may not be required to apply in that exercise any laws picked up by s 79 of the Judiciary Act. But any such question about the manner of the *exercise* of jurisdiction is independent of the anterior question of what "parent" *means* in the Act.

37. Starting with the text in context usually involves giving the statutory language its "natural and ordinary meaning", unless context and purpose indicates that a different meaning was plainly intended.[27] The Court should ordinarily "apply the ordinary and grammatical sense of the statutory word(s) to be interpreted".[28] Nothing in the context or purpose of the Act suggests that any different approach is required in construing "parent" in Pt VII of the Act. Rather, several features of the Act tend to confirm that the word "parent" is used in an ordinary sense. In particular, several provisions presuppose the existence of an underlying meaning, by displacing or overriding that underlying meaning, but without giving specified or defined content to the underlying meaning.

38. For example, the definition of "parent" in s 4 of the Act is confined to its meaning "when used in Part VII in relation to a child who has been adopted" and, in that specific

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27 *Esso Australia Pty Ltd v Australian Workers' Union* (2017) 92 ALJR 106 at 123 [52] (Kiefel CJ, Keane, Nettle and Edelman JJ). See also *Pike v Tighe* (2018) 92 ALJR 355 at 361 [35], 362 [39] (Kiefel CJ, Bell, Keane, Gordon and Edelman JJ).

28 *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT)* (2009) 239 CLR 27 at 31 [4] (French CJ); *Screen Australia v EME Productions No. 1 Pty Ltd* (2012) 200 FCR 282 at 292–293 [43] (Keane CJ, Finn and Gilmour JJ).

context, means "an adoptive parent". "Adopted" is defined in s 4 to mean "adopted *under the law* of any place (whether in or out of Australia) relating to the adoption of children" (emphasis added). That is, a particular legal meaning is attributed to the word only in the specific context as required. Quite plainly, the word "parent" is used regularly in the Act in contexts unrelated to adoption, demonstrating that the Act assumes that the word "parent" has a meaning that it is not necessary to define.

39. Similarly, ss 69P–69U of the Act, which appear in a division dealing with proceedings and jurisdiction, supply a range of parentage presumptions. With one exception,[29] the presumptions are rebuttable "by proof on a balance of probabilities".[30] The statutory contemplation of the presumptions being rebutted by evidence presupposes a conception of parentage that can be identified, and the elements of which can then be established by evidence, independently of any definition or presumption. Similarly, where two or more presumptions are relevant and in conflict, the presumption that "appears to the court to be the more or most likely to be correct prevails".[31] The contemplation that a presumption may be "correct" again presupposes an underlying conception of parentage against which it is possible to measure the "correctness" of the presumption.

40. The ordinary meaning of "parent" in the Act is its ordinary contemporary meaning. The settled approach to construction "allows that, if things not known or understood at the time an Act came into force fall, on a fair construction, within its words, those things should be held to be included".[32] There is no reason to depart from that approach where, as here, the Commonwealth Parliament may be seen to have intended to provide for an ambulatory operation capable of responding to future developments. That intention is discerned from the decision to use the ordinary meaning of "parent", without prescribing the necessary or sufficient incidents of the relationship, and to attach to that relationship certain consequences in relation to parenting orders (namely, a presumption that sharing parental responsibility between both "parents" is in the best interests of the

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29 Section 69S(1): see s 69U(3) of the Act.

30 Section 69U(1) of the Act.

31 Section 69U(2) of the Act.

32 *Aubrey v The Queen* (2017) 260 CLR 305 at 321–322 [29] (Kiefel CJ, Keane, Nettle and Edelman JJ).

child).[33] It is improbable that the legislature would have intended to fix the best interests of children in the future to any historical conception of the parent-child relationship if, in the future, the ordinary understanding of that relationship were to develop.

41. In its ordinary contemporary meaning, "parent" denotes a relationship in which biological or genetic connection is one factor that points towards parentage, rather than a factor that is itself sufficient in all cases. The significance of the biological connection as a factor may depend on the circumstances of the case. In cases not involving artificial conception or assisted reproductive technologies, a biological relationship would ordinarily establish parentage notwithstanding the social context or subjective intentions of the people involved in the conception: see *ND v BM* (2003) 31 Fam LR 22. On the other hand, the advent of assisted reproductive technologies using donor ova means that the situation may not be straightforward in all cases as 'biological connection' is no longer necessarily synonymous with 'genetic connection'. Some cases may therefore require a court to consider the significance of different types of biological connections to a child and the social context of the conception. The development of future technologies such as mitochondrial donation may complicate the situation further in particular cases.[34]

42. The widespread and ordinary usage of qualified terminology such as "biological parent" highlights the broader meaning that the word "parent" alone has acquired. In a different statutory context, a Full Court of the Federal Court has noted that: "Being a parent within the ordinary meaning of the word may depend on various factors, including social, legal and biological".[35] The Court went on to acknowledge that: "The ordinary meaning of the word 'parent' is ... clearly a question of fact, as is the question whether a particular person qualifies as a parent within that ordinary meaning".[36]

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33 Section 61DA of the Act.

34 See Senate Community Affairs References Committee, Final Report, *Science of Mitochondrial Donation and Related Matters* (June 2018).

35 *H v Minister for Immigration and Citizenship* (2010) 188 FCR 393 at 427 [129] (Moore, Kenny and Tracey JJ).

36 *H v Minister for Immigration and Citizenship* (2010) 188 FCR 393 at 427 [130] (Moore, Kenny and Tracey JJ).

43. There is a developing case law in the Family Court about the ordinary meaning of "parent" in the context of the Act.[37] In the absence of any contention to the effect that, s 14(2) of the State Act aside, the primary judge was wrong to construe "parent" according to an ordinary meaning that accounted not only for biological connection, but also other social and factual considerations (**AB 25**, PJ [89]–[95]), the Court should not venture further into the precise meaning of "parent" in the Act. That would better be worked out in a succession of cases the facts of which require the articulation of the relationship.

Conclusion

10 44. For the reasons given above, the Full Court of the Family Court erred in applying s 14(2) of the State Act. The appeal should be allowed on that basis.

PART IV ESTIMATE OF TIME

45. Up to 45 minutes will be required for the presentation of oral argument.

Date: 22 February 2019

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[37] See, eg, *Marriage of Tobin* (1999) 150 FLR 185 at 195 [42] (Finn, Kay and Chisholm JJ); *Mulvany v Lane* (2009) 41 Fam LR 418 at 421–422 [16] (Finn J), 432 [32], 429 [75] (May and Thackray JJ); *Donnell v Dovey* (2010) 237 FLR 53 at 70 [92] (Warnick, Thackray and O'Ryan JJ); *Groth v Banks* (2013) 49 Fam LR 510 at 514 [14]–[16] (Cronin J).

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