

BETWEEN:



MASSON

Appellant

and

PARSONS

First Respondent

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PARSONS

Second Respondent

INDEPENDENT CHILDREN'S LAWYER

Third Respondent

**OUTLINE OF ORAL ARGUMENT OF THE ATTORNEY-GENERAL
FOR THE STATE OF VICTORIA (INTERVENING)**

Part I: Internet Publication

This outline is in a form suitable for publication on the internet.

20 **Part II: Outline of Propositions**

First argument: composite body of law

1. Section 14(2) of the *Status of Children Act 1996* (NSW):
 - a. is a law which establishes a person's status as a legal parent independently of proceedings in a court: **VS [37]**; and
 - b. is not picked up and applied by s 79 of the *Judiciary Act 1903* (Cth): **VS [34]–[38]**.¹
2. In the absence of a specific or contrary provision in the *Family Law Act 1975* (Cth), the status of “parent” may be regulated by other laws (which apply of their own force): **VS [5], [33]**.

¹ Adopting Appellant's Submissions at [51]–[57] and Third Respondent's Submissions at [8]–[17].

3. There is no s 109 inconsistency between the *Family Law Act* and s 14(2) of the *Status of Children Act*, for the following reasons:

a. There is no provision of the *Family Law Act* which requires that a man whose sperm is used in an artificial conception procedure which results in the birth of child is to be treated as the legal parent of that child: **VS [42]**.

10 b. Section 60H is the only section of the *Family Law Act* which makes provision for parental status in relation to children born as a result of artificial conception procedures and the Commonwealth has evinced no intention to “cover the field” in relation to that topic. The *Family Law Act* law does not contain a negative implicit proposition that, for the purposes of that Act, no other law is to govern the parenthood of children born as a result of artificial conception procedures: **VS [43]-[44]**; *Work Health Authority v Outback Ballooning* (2019) 93 ALJR 212 [**JB Vol 5, tab 52**].

c. Section 60H provides all the circumstances in which a sperm donor is a legal parent under the *Family Law Act*. In that sense, and as a matter of construction, the provision is exclusive. Section 60H does not confer the status of legal parent upon sperm donors: **VS [31]**.

20 d. There is no basis upon which one can divine an intention to confer the status of legal parent upon a sperm donor in the position of Mr Masson from the other general provisions of the *Family Law Act*: **VS [8], [31]**.

e. The approach of the Appellant to ascertaining the meaning of “parent” in the *Family Law Act*, relying on a concept of its “ordinary meaning,” treats the status of parenthood as a question of fact, to be resolved by reference to a multifactorial analysis (including in relation to biology, intention and social parenting, evidence of which may alter over time): **VS [52]–[53]**. See further *H v Minister for Immigration and Citizenship* (2010) 188 FCR 393 at [55], [84], [90]-[91], [97], [127]-[129] [**JB Vol 3, tab 32 from p 1299**]. Such an approach is also antithetical to certainty and to coherence in the law: **VS [55]–[58], [62]**.

30 f. The Appellant and the Commonwealth raise the spectre that a construction of s 60H as an exclusive provision may leave a child with no parents: **AS [45], CS [34]**. This is not the case, at least in Victoria, see s 15(1) of the *Status of Children Act 1974* (Vic) (**JB Vol 2, tab 17 p 833**), which is a prescribed law

for the purposes of s 60H(2). Further, if there be an “ordinary meaning” of parent in the *Family Law Act*, it would of course include the birth mother who also has a biological connection to the child.

- g. The policy of the statutory changes effected by the States and Territories since the 1980s has been the achievement of certainty and uniformity with respect to artificial conception, in the interests of children: **VS [14]–[24], [54], [59]–[61]**:
- i. *Re B & J* (1996) 21 Fam LR 186 (Fogarty J) at 192–193 [**JB Vol 4, tab 45, pp 1709-1710**].
 - ii. *Parsons & Masson* (2018) 334 FLR 381 at [83]–[84] [**JB Vol 6, tab 56, pp 2436-2437**].
 - iii. *Assisted Reproduction Technology and Adoption*, Victorian Law Reform Commission (2007) at 136 [**JB Vol 6, tab 53, p 2196**].
- h. A finding that Mr Masson is not the legal parent does not deny his capacity to obtain parenting orders: **VS [10]–[11]**. He is a social parent of Child B and the Family Court will resolve issues, including where she ought live, according to the child’s best interests: **VS [64]–[68]**; eg *Wilson & Roberts (No 2)* [2010] Fam CA 734 at [43]–[35], [336]–[339] [**JB Vol 5, tab 51, pp 1966, 2017-2018**].

Second argument: s 14(2) is picked up and Commonwealth has not “otherwise provided”

4. Alternatively, if s 14(2) is to be understood as a law directed to the exercise of jurisdiction (and thus as falling within the second category in *Rizeq v Western Australia* (2017) 262 CLR 1 [**JB Vol 5, tab 48**]) then:
- a. it is picked up and applied by s 79 of the *Judiciary Act*; and
 - b. the Commonwealth has not “otherwise provided”: **VS [7], [45]**.²

Dated: 16 April 2019

Rachel Doyle SC

Frances Gordon

² Adopting First and Second Respondents’ Submissions at [27]–[50].