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Update on Recent Family Law Cases

***Jabour & Jabour* [2019] FamCAFC 78**

Facts

- The parties had commenced cohabitation in 1988 and separated on a final basis approximately 27 years later, in May 2015. There were three adult children of the relationship.

- At the commencement of the relationship, the husband had owned a property in which he held equity of $70,000. That property became the former matrimonial home.

- At the time the parties commenced cohabitation, the husband also held an interest in a property which, following some transactions involving a co-owner of the land during the relationship, were ultimately converted to become his interest in a property registered in his sole name which was referred to in the judgment as Property A.

- In 2010 (approximately 22 years after the commencement of the relationship), the Property A land was rezoned such as to allow it to be used for residential purposes. This rezoning caused a significant increase in the value of the land.

- At the time of trial, property A was worth over $10 million, and represented over 90% of the total value of the parties' asset pool.

- The parties had agreed to divide their superannuation and the balance of their non-superannuation assets (including the former matrimonial home) equally by agreement, such that the sole issue falling for determination at trial was the distribution of the sale proceeds of Property A.

Trial Judgment

- The trial judge assessed the parties' contributions as 66% to the husband and 34% to the wife.

- The major reason for the significant adjustment in the husband's favour was his initial contribution of property A.

- The Husband relied upon the Full Court's decision in *Williams & Williams*[1] and a decision of Brereton J in the New South Wales Supreme Court by the name of *Kardos & Sarbutt*,[2] which he asserted together stood as authority for the proposition that in assessing an

[1] [2007] FamCA 313.
[2] (2006) 34 Fam LR 550.

initial contribution, regard should be had to the value of that contribution as at the time of the hearing, rather than just to its initial value.

- That submission was based in part on the following passage from *Williams*:

> *We think that there is force in the proposition that a reference to the value of an item as at the date of the commencement of cohabitation without reference to its value to the parties at the time it was realised or its value to the parties at the time of trial, if still intact, may not give adequate recognition to the importance of its contribution to the pool of assets ultimately available for distribution towards the parties. Thus where the pool of assets available for distribution between the parties consists of say an investment portfolio or a block of land or a painting that has risen significantly in value as a result of market forces, it is appropriate to give recognition to its value at the time of hearing or the time it was realised rather than simply pay attention to its initial value at the time of commencement of cohabitation. But in so doing it is equally as important to give recognition to the myriad of other contributions that each of the parties has made during the course of their relationship.*[3]

- The trial judge in *Jabour* held that:

> *…the husband, in bringing property A into the relationship, has made a significant contribution which needs to be appropriately recognised in the division of property between the parties.*[4]

- The trial judge also found that post-separation contributions favoured the Husband, particularly repayment of a loan owed to his mother.

<u>Appeal [Alstergren, Ryan & Aldridge JJ]</u>

- The wife appealed against the trial judge's findings and assessment in relation to the contribution-based adjustment.

- The grounds of appeal relied upon by the Wife concerned the weight given to the contribution of Property A and the weight given to the Husband's post-separation contributions.

- The Full Court focused on three key questions in determining the aspects of the appeal relating to Property A:

  1. Did the trial judge fail to give adequate reasons for determining the contribution-based entitlements as 66% to the Husband and 34% to the Wife?

  2. Did the trial judge misdirect herself as to the jurisprudence on contributions?

[3] At [26].
[4] At [25].

3. Was the trial judge's conclusion manifestly unjust and not reasonably open on the evidence?

- As to the first of these questions, the Full Court held that the trial judge's path of reasoning was 'tolerably clear,'[5] being that her Honour considered that the introduction of Property A was a significant contribution by the husband, taking into account its value at the time of the hearing. As such, they found that adequate reasons had been given.

- As to the second question, being whether the trial judge had misdirected herself as to the jurisprudence on contributions, the Full Court accepted a submission made on behalf of the Wife that the trial judge had fallen into error in 'seeking a nexus between contributions and a particular item of property when assessing contributions holistically over a long marriage and when considering the assets of the parties on a global basis ... quarantining from the assessment of contributions, all of the other contributions made by the parties to the assets of the marriage.'[6]

- In relation to a submission made by Counsel for the Husband to the effect that *Williams* is authority for the proposition that it is the value of the asset at the time of trial and not at cohabitation that should be considered, the Full Court held:

  While it is true that in Williams the Full Court accepted 'there is force' in that proposition, it did not do so unreservedly.[7]

- The Full Court then outlined a number of authorities from both before and after *Williams*[8] and ultimately rejected the suggestion that any increase in value in assets that were initially contributed by one party should be regarded as entirely that party's contribution.

- Instead, the Full Court emphasised (as held by the Full Court in *Pierce & Pierce*[9]), that the weight to be attached to initial contributions must be assessed against the rubric of all financial and non-financial contributions made by the parties throughout the relationship as a whole.[10]

- The Full Court also outlined and affirmed a number of decisions in which the Full Court had rejected the proposition that there must be a link established between contributions and the property produced as a result of those contributions.[11]

- The Full Court held that:

  It is apparent from these passages that the approach of the primary judge was to search for a nexus between the contributions by the parties to Property A and its present value.

5 At [25].
6 At [31]-[32].
7 At [38].
8 Including *Bilous v Mudaliar* (2006) 65 NSWLR 615; *Baker v Towle* (2008) 39 Fam LR 323; *Wallis & Manning* (2017) FLC ¶93-759; Hurst & Hurst (2018) FLC ¶93-851.
9 (1999) FLC ¶92-844.
10 At [55].
11 See *Dickons v Dickons* [2012] FamCAFC 154 and *Singerson & Joans* [2014] FamCAFC 238.

The only contribution of that kind she could identify was on the part of the husband bringing the property to the relationship.[12]

- Their Honours further held that the trial judge had:

  …weighed the myriad of contributions made by the parties against the contribution made by the husband by bringing in Property A rather than treating Property A as one of the myriad of the contributions made.[13]

- In addition, the Full Court found that there were important contributions which had formed part of the myriad but had been overlooked by the trial judge, including the wife's role in the decision-making behind and financial sacrifice involved in the transactions which had enabled the husband to become the sole owner of Property A, and a joint decision made by the parties to delay sale of Property A for 5 years in the hope that the rezoning would occur as it ultimately did, resulting in both parties living a 'modest lifestyle' pending the sale.[14]

- The Full Court also confirmed previous authorities[15] to the effect that a windfall such as a sudden increase in value arising from rezoning and not attributable to the efforts of the parties should be considered a contribution made by both parties and not the Husband alone.[16]

- In this regard, their Honours held that:

  > *It is difficult to see adequate recognition of this principle in the reasons. Indeed, the husband appears to have been given credit for the serendipitous revaluation of Property A by her Honour's recognition of the husband's contribution by having regard to its value at the time of the hearing, rather than it being merely the springboard for its later value*.[17]

- As such, their Honours held that the trial judge had misdirected herself as to the principles to be applied, leading to a material error justifying the orders being set aside.

- As a result of this conclusion, the Full Court was not required to consider the third question, being whether the trial judge's conclusion was manifestly unjust and not reasonably open on the evidence.

- Notwithstanding this, their Honours observed:

12 At [71].
13 At [73].
14 At [75]-[80].
15 *Zappacosta & Zappacosta* (1976) FLC ¶90-089; Wells & Wells (1977) FLC ¶90-285; *Zyk & Zyk* (1995) FLC ¶92-644; *Hurst & Hurst* (2018) FLC ¶93-851.
16 At [84].
17 At [85].

> *…there is considerable force in the appellant's submission that the outcome is so plainly unreasonable that had an error of application of principle not been identified, one would have had to have been inferred…*[18]

- In relation to the aspect of the appeal dealing with the treatment of the husband's post-separation contributions, the Full Court noted that the husband had not conducted his case at trial on the basis that he should receive an adjustment for such contributions and had not made any submissions in that regard.[19]

- The Full Court noted that while this fact alone did not preclude the trial judge from undertaking such a consideration, it was necessary that before she did so, this issue be raised with Counsel for the wife, who needed to have been given the opportunity to make submissions.[20]

- The trial judge's failure to do so meant that the wife had been denied procedural fairness.[21]

- The Full Court held that in any case, the post-separation contributions by the husband were either insufficient or insufficiently quantified to found a contributions-based adjustment in his favour.[22]

- In light of all of the foregoing, the appeal succeeded and the trial judge's orders were set aside.

- Having been invited to do so by both parties, the Full Court re-exercised the discretion in light of the findings of fact made by the trial judge.

- Those findings included that the parties had made equal contributions during their 27-year relationship and that there should be no adjustment pursuant to section 75(2).

- The only issue for the Full Court to determine was determined to be the percentage adjustment to be made in favour of the husband to account for his ownership of the former matrimonial home and Property A at the commencement of the relationship.[23]

- There was no evidence as to the value of Property A as at the date of commencement of the relationship.

- The Full Court held:

  Whatever was the value of the property at the commencement of the relationship its significance has been largely lost given the myriad of the contributions by each of the parties to their various business ventures, through their employment and care of the

[18] At [88].
[19] At [90]-[94].
[20] At [95].
[21] At [95].
[22] At [97]-[128].
[23] At [139].

family over a long relationship, including the contributions made to the retention of the property ... There is no doubt that they both worked hard and over many years they both contributed to the full extent of their capacity within the roles each took within the marriage.[24]

- The Full Court held that there should be no adjustment for the increase in value in Property A, and therefore assessed contributions as being 53% to the husband and 47% to the wife.

Orwin v Rickards [2019] VSC 375

Facts

- This was a professional negligence claim brought in the Supreme Court of Victoria against a solicitor in relation to the preparation of a Financial Agreement.

- The plaintiff entered into a Financial Agreement in March 2010. The defendant was the solicitor who acted for her in entering into the Agreement.

- The Agreement was drafted under the *Relationships Act 2008* (Vic) and not the *Family Law Act 1975* (Cth), despite the fact that the de facto provisions of the *Family Law Act* had commenced prior to the Agreement having been entered into.

- The plaintiff's purpose in entering into the Financial Agreement was to protect her assets, including an inheritance she expected to receive.

- There was some doubt as to whether the parties were in fact in a de facto relationship at the time the Agreement was entered into.

- The parties ended up separating in 2011.

- In 2015, the other party to the Agreement brought an application in the Federal Circuit Court seeking to set it aside, claiming duress, non-disclosure, undue influence and unconscionable conduct. He also sought orders for property settlement under section 90SM.

- The Agreement was ultimately held not to be valid as it had been entered into under the incorrect legislation. There were also other problems with the Agreement's compliance with the relevant legislative requirements, including the fact that it did not provide for what was to occur upon the breakdown of the relationship but rather set out the existing rights of the parties with respect to property.

- Property proceedings ensued, and were ultimately resolved by consent on the basis that the plaintiff would pay her former partner the sum of $550,000 and forgive a debt owed

[24] At [136].

by him in the sum of $22,470.

- Against the solicitor, the plaintiff claimed damages for breach of duty of care in relation to the preparation of the Agreement.

- She alleged that she had retained the solicitor to prepare an Agreement which would be valid, binding and enforceable in the event that the relationship came to an end and which would protect her assets and the assets she expected to inherit under her mother's will from any claim brought by her former partner.

- She argued that if the Agreement had been prepared properly, it would have protected her from a family law claim and she would not have had to pay either the settlement to her former partner or the costs of her family law proceedings.

- The plaintiff also sought recovery of the fees she had paid to the defendant in relation to the preparation of the Agreement.

- In the alternative, the plaintiff argued that as a result of the defendant's breach of duty of care, she had been deprived of the opportunity to enter into a valid and binding Agreement.

- The defendant joined Counsel who he had briefed to advise on the draft Agreement and the solicitor who had acted on behalf of the other party to the Agreement as additional defendants, claiming they were concurrent wrongdoers.

- The solicitor argued that even if the Agreement had been made under the correct legislation, it would not have been an effective or complete bar to family law proceedings brought by the plaintiff's former partner for a number of reasons:

    - first, because the parties to the Agreement were not in a de facto relationship at the date it was entered into;

    - second, because it was probable that such an Agreement would have been set aside on one of the grounds advanced by the plaintiff's former partner to impugn it in the Federal Circuit Court (particularly non-disclosure by the plaintiff); and

    - third, because the Agreement could not have extended to the protection of a subsequent inheritance from the plaintiff's mother.

- He further contended that in any event the plaintiff would have incurred legal fees, having regard to the fact that family law is a jurisdiction where parties ordinarily bear their own costs.

- The defendant also argued contributory negligence on the part of the plaintiff, who was herself a barrister.

- In addition, the solicitor argued that the claim was statute barred, as more than the permissible 6 years had passed since the cause of action had accrued.

- The defendant argued that the time limit of 6 years provided for in section 5(1)(a) of the *Limitation of Actions Act 1958* (Vic) commenced running on the date upon which the Agreement was entered into. The plaintiff argued that the time limit did not commence running until the de facto relationship ended and the other party brought a claim under the *Family Law Act*.

Held

- The Court held that the plaintiff's claim was in fact statute barred.

- In relation to the question of whether the 6 year time limit commenced running as at the date of the Agreement or at a later date when the relationship broke down and a claim was brought, his Honour considered cases relating to circumstances in which a loss may be suffered subject to some contingency,[25] particularly cases relating to advice provided by solicitors.

- In undertaking this consideration, his Honour had regard to the fact that the plaintiff was not simply seeking to recover damages for the contingent loss suffered upon the commencement of proceedings by her former partner, but was also claiming for an immediate loss, being the fees she had paid to the solicitor.[26]

- His Honour concluded that present case was most akin to *Winnote Pty Ltd v Page*,[27] a case in which solicitors had provided advice in reliance upon which the plaintiff had obtained a lease, only to have the plaintiff's purpose in entering into the lease thwarted when a third party had obtained a mining licence in relation to the land in question. His Honour noted that the New South Wales Court of Appeal in *Winnote* had found that the plaintiff had first suffered damage as a result of the solicitor's advice at the time it obtained the lease, because the bundle of rights it obtained was inferior to that which it would have obtained if properly advised, and that the fact that the quantum of damage had increased materially thereafter was irrelevant.[28]

- His Honour held that in the present case, the plaintiff had:

> *…sought to acquire property rights by entering into the financial agreement. It was the failure to acquire these rights which gave rise to the possibility of contingent loss. But the fact that the financial agreement was legally worthless also gave rise to an immediate loss.*[29]

- His Honour further held that:

[25] The leading case being *Wardley Australia Ltd v The State of Western Australia* [1992] HCA 55.
[26] At [45].
[27] [2006] NSWCA 287.
[28] At [50].
[29] At [53].

> *The economic interest of the plaintiff was that of obtaining the asset of effective ongoing protection with respect to her property rights upon any future breakdown of the de facto relationship. The financial agreement did not give her any effective protection of this kind. The plaintiff's damages were quantifiable in the first instance on the straightforward basis that the costs incurred with respect to the financial agreement were entirely thrown away. The plaintiff claims for this damage and it is plain the loss in issue was suffered in 2010. It follows that the plaintiff's claim as a whole is statute barred.*[30]

- In addition, the Court held that the plaintiff's evidence had failed to establish the 'threshold premise'[31] that the parties to the Agreement had in fact been in a de facto relationship at the time it was entered into (despite the fact that the Agreement itself had recorded that they were). His Honour noted that neither party called the plaintiff's former partner to give evidence in this regard, and that the plaintiff did not call any other friends or relatives to support her evidence as to the existence of the de facto relationship at the relevant time.[32]

- In addition to the factors outlined in section 4AA of the *Family Law Act 1975* (Cth), his Honour gave careful consideration to the plaintiff's evidence given both in the Supreme Court proceedings and in the Federal Circuit Court proceedings (which was inconsistent in some crucial respects), noting that her evidence in the Supreme Court proceedings was that her evidence given in the earlier proceedings had been false in certain aspects. His Honour also had regard to the evidence of the defendant as to the instructions he had taken from the plaintiff at the relevant time, which was more consistent with the evidence given by the plaintiff in the FCC than in her evidence in the Supreme Court proceedings. In light of all the evidence, his Honour found that the parties were not in a de facto relationship at the time the Agreement was entered into.

- The consequence of this finding was that section 90UC of the *Family Law Act 1975* (Cth) did not apply to the circumstances of the relationship and as such, there could be no breach of duty of care arising from a failure to draft and facilitate the entering into of an Agreement under that section. That is, the Court found that any failure by the solicitor to draft an agreement which took effect pursuant to section 90UC did not cause the plaintiff any loss because section 90UC did not in fact govern her situation.[33]

- Despite this finding, his Honour went on to consider the remaining issues raised by the parties, and concluded that any negligence that could have been found would have been partially offset by the significant risk that the Agreement would have been set aside for reasons not the solicitor's fault (for example as a result of non-disclosure or undue influence), that the plaintiff likely would have incurred costs in the FCC proceedings regardless, and that there would have been contributory negligence on her part. As a result, his Honour would only have awarded the plaintiff 30.7% of the quantum of the settlement of the FCC proceedings by way of damages had she succeeded with her

[30] At [60].
[31] At [61].
[32] At [66].
[33] At [13].

claim.

- His Honour further held that there was no negligence on behalf of the other joined defendants.

***Masson & Parsons* [2019] HCA 21**

Facts

- This case concerned the parentage of a child who had been conceived using Assisted Reproductive Technology (ART).

- The child's mother and the donor of the sperm used in the conception had been good friends.

- The mother was single at the time of the procedure, but at the time of the hearing the child had been living with the mother and the mother's female partner.

- The donor gave evidence that he had believed, and it had been intended, that he would play a significant role in the child's life as a parent. He was listed as the father on the child's birth certificate and was found to have had an ongoing relationship with the child, including playing a role in her financial support and matters pertaining to her health, education and general welfare.

- The mother and her partner wished to relocate to New Zealand with the child, which was opposed by the donor/father, and this was what led to the proceedings.

- One of the questions to be determined by the Court was whether the donor, who was indisputably a biological parent of the child, was legally her father pursuant to the provisions of the *Family Law Act 1975* (Cth).

- The relevant provision is section 60H, which provides as follows:

> *(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.

(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 Court; and

(b) the related Federal Circuit Court Rules.

- Because the mother and her partner had not been in a de facto relationship at the time of the procedure, the partner was not a parent of the child.

- This then left open the question of whether the donor could be a parent.

<u>Held</u>

- The trial judge, Cleary J, held that the donor also did not qualify as a parent pursuant to section 60H, but accepted the argument that the appellant qualified as a parent otherwise than under that provision.

- Her Honour followed the judgment of Cronin J in *Groth v Banks,*[34] a case with similar facts, in which his Honour had interpreted section 60H 'as expanding rather than restricting the categories of people who can be parents.'

- Her Honour went on to hold that because the donor was the biological father of the child and had provided his genetic material for the express purpose of fathering a child whom he expected to help parent by way of provision of financial support and physical care, which he had since done, he was 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.*

- On appeal, the Full Court (Thackray, Murphy and Aldridge JJ) held that the donor was not a parent of the child. Their Honours accepted that section 60H did not provide an exhaustive list of who could be a parent of a child conceived by way of ART.

- However, their Honours held that section 79 of the Commonwealth *Judiciary Act* had the effect that section 14 of the state (in that case New South Wales) *Status of Children Act* applied.

- Section 14(2) of the *Status of Children Act* provided that 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. Although that was New South Wales legislation, the same type of presumption appears in section 15 of the *Status of Children Act 1974* (Vic).

- Section 79(1) of the *Judiciary Act 1903* (Cth) provides that:

  > *The laws of each State and 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.*

- In reliance on the combination of those provisions, the Full Court held that the presumption contained within the state legislation applied, with the result that the donor was irrebuttably presumed not to be the father of the child.

- The donor/father appealed to the High Court.

[34] [2013] FamCA 430.

- The majority in the High Court (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ) agreed that section 60H did not provide an exhaustive list of the persons who could be parents of a child conceived through ART.

- Their Honours held that:

> *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*.[35]

And that:

> *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.*[36]

- Their Honours further held that:

> *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 acceptation: 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.*[37]

- Their Honours concluded 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.[38]

- Their Honours discussed the operation of section 79 of the *Judiciary Act*, together with the High Court's decision of *Rizeq v Western Australia*[39] and held that the purpose of the section 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 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*

[35] At [26].
[36] At [26].
[37] At [26].
[38] At [27].
[39] [2017] HCA 23.

Commonwealth laws governing the manner of exercise of federal jurisdiction. But, as was stressed in Rizeq, 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.[40]

- Their Honours concluded that the irrebuttable presumption contained within the state *Status of Children Act* was not a law relating to evidence or otherwise regulating the exercise of jurisdiction, and was rather a rule determinative of the rights and duties of persons (in this case, parental status) and therefore could not be picked up by section 79 of the *Judiciary Act*.[41]

- Their Honours further held that even if the relevant presumption was capable of being construed as a provision relating to the regulation of the exercise of jurisdiction, it would still not be picked up by section 79 of the *Judiciary Act* in the manner adopted by the Full Court of the Family Court.

- This was based on a finding that the meaning of the words 'otherwise provided' in section 79 of the *Judiciary Act* is comparable to the concept of inconsistency as provided by section 109 of the Constitution, so that 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.[42]

- Their Honours found that although the provisions of the *Family Law Act* did not contain an exhaustive list of persons who may qualify as a parent of a child, they had in fact 'left no room' for the operation of State provisions and as a result, the Commonwealth legislative scheme was found to be 'complete upon its face.'[43]

- Their Honours held that 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 individual case.[44]

- Turning to the facts of the case itself, their Honours held that:

  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

40 At [30].
41 At [34].
42 At [45].
43 At [46].
44 At [54].

> *conception of his daughter on the express or implied 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.*[45]

- Their Honours held that it was unnecessary to determine whether a man who 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,' because in the circumstances of the case at hand, no reason had been shown to doubt the primary judge's conclusion that the appellant is a parent of his daughter.[46]

[45] At [54].
[46] At [55].