



Australian Capital Territory

# **Testamentary Guardianship Act 1984**

**A1984-34**

**Republication No 6**

**Effective: 27 October 2008 – 21 April 2010**

Republication date: 27 October 2008

Last amendment made by A2008-20

Authorised by the ACT Parliamentary Counsel

## About this republication

### The republished law

This is a republication of the *Testamentary Guardianship Act 1984* (including any amendment made under the *Legislation Act 2001*, part 11.3 (Editorial changes)) as in force on 27 October 2008. It also includes any amendment, repeal or expiry affecting the republished law to 27 October 2008.

The legislation history and amendment history of the republished law are set out in endnotes 3 and 4.

### Kinds of republications

The Parliamentary Counsel's Office prepares 2 kinds of republications of ACT laws (see the ACT legislation register at [www.legislation.act.gov.au](http://www.legislation.act.gov.au)):

- authorised republications to which the *Legislation Act 2001* applies
- unauthorised republications.

The status of this republication appears on the bottom of each page.

### Editorial changes

The *Legislation Act 2001*, part 11.3 authorises the Parliamentary Counsel to make editorial amendments and other changes of a formal nature when preparing a law for republication. Editorial changes do not change the effect of the law, but have effect as if they had been made by an Act commencing on the republication date (see *Legislation Act 2001*, s 115 and s 117). The changes are made if the Parliamentary Counsel considers they are desirable to bring the law into line, or more closely into line, with current legislative drafting practice.

This republication does not include amendments made under part 11.3 (see endnote 1).

### Uncommenced provisions and amendments

If a provision of the republished law has not commenced or is affected by an uncommenced amendment, the symbol **U** appears immediately before the provision heading. The text of the uncommenced provision or amendment appears only in the last endnote.

### Modifications

If a provision of the republished law is affected by a current modification, the symbol **M** appears immediately before the provision heading. The text of the modifying provision appears in the endnotes. For the legal status of modifications, see *Legislation Act 2001*, section 95.

### Penalties

The value of a penalty unit for an offence against this republished law at the republication date is—

- (a) if the person charged is an individual—\$100; or
- (b) if the person charged is a corporation—\$500.



Australian Capital Territory

# Testamentary Guardianship Act 1984

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Australian Capital Territory

# Testamentary Guardianship Act 1984

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An Act to provide for the appointment of testamentary guardians, and for related purposes

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**1 Name of Act**

This Act is the *Testamentary Guardianship Act 1984*.

**2 Dictionary**

The dictionary at the end of this Act is part of this Act.

*Note 1* The dictionary at the end of this Act defines certain terms used in this Act, and includes references (*signpost definitions*) to other terms defined elsewhere in this Act.

For example, the signpost definition '*guardian*, of a child—see section 5.' means that the term 'guardian' is defined in that section.

*Note 2* A definition in the dictionary (including a signpost definition) applies to the entire Act unless the definition, or another provision of the Act, provides otherwise or the contrary intention otherwise appears (see Legislation Act, s 155 and s 156 (1)).

**3 Notes**

A note included in this Act is explanatory and is not part of this Act.

*Note* See the Legislation Act, s 127 (1), (4) and (5) for the legal status of notes.

**4 Meaning of *parent***

In this Act:

*parent* of a child does not include a parent whose guardianship of the child has been abrogated by—

- (a) a judgment, decree or order of a federal court or a court of a State that is in force; or
- (b) a judgment, decree or order of a court in a foreign country that is in force and that would be recognised by a Territory court in conformity with the common law rules of private international law.

*Note* *State* includes the Northern Territory (see Legislation Act, dict, pt 1).

## **5 Meaning of *guardian***

- (1) For this Act, a ***guardian*** of a child (other than a reference to a testamentary guardian) means any guardian of the child, whether appointed—
- (a) in accordance with this Act or a law of a State; or
  - (b) by a judgment, decree or order of a federal court or a court of a State; or
  - (c) in accordance with a law of a foreign country or part of a foreign country or by a judgment, decree or order of a court in a foreign country and that would be recognised by a Territory court in conformity with the common law rules of private international law.
- (2) However, a ***guardian*** of a child does not include—
- (a) the chief executive responsible for the *Children and Young People Act 2008*; or
  - (b) a Minister of the Commonwealth or of a State who, under a law of the Commonwealth or of the State is, in his or her capacity as Minister, the guardian of the child.

*Note*      *State* includes the Northern Territory (see Legislation Act, dict, pt 1).

## **6 Meaning of *testamentary guardian***

In this Act:

***testamentary guardian*** means a guardian appointed under section 8.

## **7 Application of Act**

- (1) This Act applies in relation to a child—
- (a) whether the child was born in the ACT or elsewhere; and
  - (b) whether the child was born before or after the commencement of this Act.

(2) Nothing in this Act shall be taken to affect the operation of the following sections of the *Adoption Act 1993*:

- section 8 (Rules of private international law not to apply)
- section 43 (General effect)
- section 54 (Australian adoptions)
- section 55 (Overseas adoptions).

## **8 Appointment of testamentary guardians**

Each parent and each guardian of a child may, by will or codicil, appoint a person to be a guardian of the child or persons to be guardians of the child.

## **9 Appointment by persons not entitled to guardianship**

An appointment of a testamentary guardian of a child by a person who was not, immediately before the person's death, a parent or guardian of the child is of no effect.

## **10 Time when appointment effective**

An appointment of a testamentary guardian of a child takes effect—

- (a) where the appointor is survived by a parent of the child—
  - (i) if the instrument of appointment shows that the appointor intended the appointment to take effect on his or her death—on the death of the appointor; or
  - (ii) in any other case—on the death of that parent; or
- (b) where the appointor is not survived by a parent of the child—on the death of the appointor.

## **11 Effect of appointment**

- (1) A testamentary guardian of a child has responsibility for the long-term welfare of the child and has, in relation to that child, all



the powers, rights and duties that are vested by law or custom in the guardian of a child, other than—

- (a) the right to have the daily care and control of the child; and
  - (b) the right and responsibility to make decisions concerning the daily care and control of the child.
- (2) Without limiting the application of subsection (1), a testamentary guardian of a child:
- (a) may take into his or her custody, and may manage, the real and personal property of the child (not being property held by a trustee under a trust) until he or she ceases to be the guardian of the child; and
  - (b) holds any real and personal property of the child that comes into his or her custody as trustee for the child; and
  - (c) may bring such proceedings as may be necessary to give effect to all or any of his or her powers under this section, including his or her powers as trustee for the child; and
  - (d) is responsible for accounting to the child, when the child attains the age of 18 years, for his or her custody and management of that property.
- (3) Where, at any time after an appointment of a testamentary guardian of a child takes effect—
- (a) no parent of the child is alive; and
  - (b) no judgment or order of a federal court or a court of a State or Territory granting custody or the right to have the daily care and control of the child (however expressed) to another person is in force; and
  - (c) no order relating to the child has been registered under the *Family Law Act 1975* (Cwlth), section 68; and

- (d) no order that would, under the *Family Law Act 1975* (Cwlth), section 60A have effect for that Act as if it were an order granting custody of the child is in force;

then the testamentary guardian has, in addition to the rights and responsibility referred to in subsections (1) and (2)—

- (e) the right to have the daily care and control of the child; and
- (f) the right and responsibility to make decisions concerning the daily care and control of the child.

(4) Where—

- (a) an appointment of a testamentary guardian of a child has taken effect; and
- (b) another person or persons has or have the guardianship of that child;

the testamentary guardian shall discharge his or her responsibility and duties and exercise his or her powers and rights in relation to that child jointly with that other person or those other persons.

## **12 Applications to Supreme Court**

- (1) A testamentary guardian whose appointment does not, under section 10, take effect on the death of the appointor may at any time apply to the Supreme Court for an order that his or her appointment take effect immediately.
- (2) Where an appointment of a testamentary guardian of a child has taken effect under section 10 (a) (i) or subsection (1), a parent of that child may apply to the Supreme Court for an order that the guardianship of the testamentary guardian be suspended until the death of the parent or for such period as is specified in the application.

- (3) On an application under this section, the Supreme Court may make or refuse to make the order sought, and may make such other orders as it thinks just.

### **13 Powers of Supreme Court**

- (1) Nothing in this Act shall be taken to affect the powers of the Supreme Court relating to the guardianship and custody of children.
- (2) Without limiting subsection (1), nothing in this Act shall be taken to affect the power of the Supreme Court—
  - (a) to settle disputes in relation to a child between persons having the guardianship of the child; or
  - (b) to appoint a guardian of a child; or
  - (c) to appoint 1 of a number of persons having the guardianship of a child to be the sole guardian of that child; or
  - (d) to revoke the appointment of a guardian of a child.

## Dictionary

(see s 2)

*Note 1* The Legislation Act contains definitions and other provisions relevant to this Act.

*Note 2* For example, the Legislation Act, dict, pt 1, defines the following terms:

- ACT
- child
- foreign country
- State
- Supreme Court
- the Territory.

***child*** means a person who is not and has not been married, and has not attained the age of 18 years.

***guardian***, of a child—see section 5.

***parent***, of a child—see section 4.

***testamentary guardian***—see section 6.

## Endnotes

### 1 About the endnotes

Amending and modifying laws are annotated in the legislation history and the amendment history. Current modifications are not included in the republished law but are set out in the endnotes.

Not all editorial amendments made under the *Legislation Act 2001*, part 11.3 are annotated in the amendment history. Full details of any amendments can be obtained from the Parliamentary Counsel's Office.

Uncommenced amending laws and expiries are listed in the legislation history and the amendment history. These details are underlined. Uncommenced provisions and amendments are not included in the republished law but are set out in the last endnote.

If all the provisions of the law have been renumbered, a table of renumbered provisions gives details of previous and current numbering.

The endnotes also include a table of earlier republications.

### 2 Abbreviation key

am = amended	ord = ordinance
amdt = amendment	orig = original
ch = chapter	par = paragraph/subparagraph
def = definition	pres = present
dict = dictionary	prev = previous
disallowed = disallowed by the Legislative Assembly	(prev...) = previously
div = division	pt = part
exp = expires/expired	r = rule/subrule
Gaz = gazette	renum = renumbered
hdg = heading	reloc = relocated
IA = Interpretation Act 1967	R[X] = Republication No
ins = inserted/added	RI = reissue
LA = Legislation Act 2001	s = section/subsection
LR = legislation register	sch = schedule
LRA = Legislation (Republication) Act 1996	sdiv = subdivision
mod = modified/modification	sub = substituted
o = order	SL = Subordinate Law
om = omitted/repealed	<u>underlining</u> = whole or part not commenced or to be expired

## Endnotes

3 Legislation history

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### 3 Legislation history

The *Testamentary Guardianship Act 1984* was originally the *Testamentary Guardianship Ordinance 1984*. It became an ACT Act on self-government (11 May 1989).

Before 11 May 1989, ordinances commenced on their notification day unless otherwise stated (see *Seat of Government (Administration) Act 1910* (Cwlth), s 12).

After 11 May 1989 and before 10 November 1999, Acts commenced on their notification day unless otherwise stated (see *Australian Capital Territory (Self-Government) Act 1988* (Cwlth) s 25).

#### Legislation before becoming Territory enactment

##### **Testamentary Guardianship Act 1984 No 34**

notified 23 July 1984

commenced 23 July 1984

as amended by

##### **Children's Services (Miscellaneous Amendments) Ordinance 1986 No 14**

notified 4 June 1986

commenced 26 April 1988 (s 2 and Cwlth Gaz 1988 No S116)

##### **Testamentary Guardianship (Amendment) Ordinance 1987 No 15**

notified 1 May 1987

commenced 1 May 1987

##### **Self-Government (Consequential Amendments) Ordinance 1989 No 38 sch 1**

notified 10 May 1989 (Cwlth Gaz 1989 No S160)

s 1, s 2 commenced 10 May 1989 (s 2 (1))

sch 1 commenced 11 May 1989 (s 2 (2) and see Cwlth Gaz 1989 No S164)

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**Legislation after becoming Territory enactment****Adoption (Consequential Amendments) Act 1993 No 23 s 6**

notified 8 April 1993 (Gaz 1993 No S57)  
s 1, s 2 commenced 8 April 1993 (s 2 (1))  
s 6 commenced 31 July 1993 (s 2 (2) and see Gaz 1993 No 28)

**Statutory Offices (Miscellaneous Provisions) Act 1994 No 97 sch pt 1**

notified 15 December 1994 (Gaz 1994 No S280)  
s 1, s 2 commenced 15 December 1994 (s 2 (1))  
sch pt 1 commenced 15 December 1994 (s 2 (2) and Gaz 1994 No S293)

**Children and Young People (Consequential Amendments) Act 1999 No 64 sch 2**

notified 10 November 1999 (Gaz 1999 No 45)  
s 1, s 2 commenced 10 Nov 1999 (s 2 (1))  
sch 2 commenced 10 May 2000 (s 2 (2))

**Legislation (Consequential Amendments) Act 2001 No 44 pt 382**

notified 26 July 2001 (Gaz 2001 No 30)  
s 1, s 2 commenced 26 July 2001 (IA s 10B)  
pt 382 commenced 12 September 2001 (s 2 and see Gaz 2001 No S65)

**Civil Unions Act 2006 A2006-22 sch 1 pt 1.28**

notified LR 19 May 2006  
s 1, s 2 commenced 19 May 2006 (LA s 75 (1))  
sch 1 pt 1.28 never commenced

*Note* Act repealed by disallowance 14 June 2006 (see Cwltz Gaz 2006 No S93)

**Statute Law Amendment Act 2007 A2007-3 sch 3 pt 3.98**

notified LR 22 March 2007  
s 1, s 2 taken to have commenced 1 July 2006 (LA s 75 (2))  
sch 3 pt 3.98 commenced 12 April 2007 (s 2 (1))

**Civil Partnerships Act 2008 A2008-14 sch 1 pt 1.24**

notified LR 15 May 2008  
s 1, s 2 commenced 15 May 2008 (LA s 75 (1))  
sch 1 pt 1.24 commenced 19 May 2008 (s 2 and CN2008-8)

## Endnotes

4 Amendment history

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### **Children and Young People (Consequential Amendments) Act 2008 A2008-20 sch 3 pt 3.19**

notified LR 17 July 2008

s 1, s 2 commenced 17 July 2008 (LA s 75 (1))

s 3 commenced 18 July 2008 (s 2 (1))

sch 3 pt 3.19 commenced 27 October 2008 (s 2 (4) and see Children and Young People Act 2008 A2008-19, s 2 and CN2008-13)

## **4 Amendment history**

### **Name of Act**

s 1 sub A2007-3 amdt 3.488

### **Dictionary**

s 2 am 1986 No 14 s 11; 1994 No 97 sch pt 1; 1999 No 64 sch 2;  
A2006-22 amdt 1.119 (A2006-22 rep before commenced by  
disallowance (see Cwlth Gaz 2006 No S93))  
defs reloc to dict A2007-3 amdt 3.489  
sub A2007-3 amdt 3.490

### **Notes**

s 2A renum as s 3

### **Meaning of *parent***

s 2B renum as s 4

### **Meaning of *guardian***

s 2C renum as s 5

### **Meaning of *testamentary guardian***

s 2D renum as s 6

### **Notes**

s 3 **orig s 3**  
renum as s 7  
**pres s 3**  
(prev s 2A) ins A2007-3 amdt 3.490  
renum as s 3 A2007-3 amdt 3.494

### **Meaning of *parent***

s 4 **orig s 4**  
renum as s 8  
**pres s 4**  
(prev s 2B) ins A2007-3 amdt 3.490  
renum as s 4 A2007-3 amdt 3.494  
am A2008-14 amdt 1.83; pars renum R5 LA



**Meaning of *guardian***□

s 5                    **orig s 5**  
renum as s 9  
**pres s 5**  
(prev s 2C) ins A2007-3 amdt 3.490  
renum as s 5 A2007-3 amdt 3.494  
am A2008-20 amdt 3.43

**Meaning of *testamentary guardian***□

s 6                    **orig s 6**  
renum as s 10  
**pres s 6**  
(prev s 2D) ins A2007-3 amdt 3.490  
renum as s 6 A2007-3 amdt 3.494

**Application of Act**□

s 7                    **orig s 7**  
renum as s 11  
**pres s 7**  
(prev s 3) am 1993 No 23 s 6  
renum as s 7 A2007-3 amdt 3.494

**Appointment of testamentary guardians**

s 8                    **orig s 8**  
renum as s 12  
**pres s 8**  
(prev s 4) renum as s 8 A2007-3 amdt 3.494

**Appointment by persons not entitled to guardianship**

s 9                    **orig s 9**  
renum as s 13  
**pres s 9**  
(prev s 5) renum as s 9 A2007-3 amdt 3.494

**Time when appointment effective**

s 10                  **orig s 10**  
om 1989 No 38 sch 1  
**pres s 10**  
(prev s 6) renum as s 10 A2007-3 amdt 3.494

**Effect of appointment**

s 11                  **orig s 11**  
om 2001 No 44 amdt 1.4022  
**pres s 11**  
(prev s 7) am 1987 No 15; ss renum R3 LA  
renum as s 11 A2007-3 amdt 3.494

## Endnotes

### 5 Earlier republications

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#### Applications to Supreme Court

s 12 (prev s 8) am A2007-3 amdt 3.491, amdt 3.492  
renum as s 12 A2007-3 amdt 3.494  
ss renum R4 LA

#### Powers of Supreme Court

s 13 (prev s 9) renum as s 13 A2007-3 amdt 3.494

#### Dictionary

dict ins A2007-3 amdt 3.493  
def **child** am A2006-22 amdt 1.117 (A2006-22 rep before  
commenced by disallowance (see Cwlth Gaz 2006 No S93))  
reloc from s 2 A2007-3 amdt 3.489  
def **exnuptial child** om A2006-22 amdt 1.118 (A2006-22 rep  
before commenced by disallowance (see Cwlth Gaz 2006  
No S93))  
reloc from s 2 A2007-3 amdt 3.489  
om A2008-14 amdt 1.84  
def **guardian** ins A2007-3 amdt 3.493  
def **parent** ins A2007-3 amdt 3.493  
def **testamentary guardian** ins A2007-3 amdt 3.493

## 5 Earlier republications

Some earlier republications were not numbered. The number in column 1 refers to the publication order.

Since 12 September 2001 every authorised republication has been published in electronic pdf format on the ACT legislation register. A selection of authorised republications have also been published in printed format. These republications are marked with an asterisk (\*) in column 1. Electronic and printed versions of an authorised republication are identical.

Republication No	Amendments to	Republication date
1	Ord 1989 No 38	31 August 1991
2	Act 1993 No 23	31 August 1993
3	A2001-44	4 February 2002
4	A2007-3	12 April 2007
5	A2008-14	19 May 2008

## 6 Renumbered provisions

as made by A2007-3 amdt 3.494 and under the *Legislation Act 2001*.

previous number	provision heading	renumbered or inserted as
1	Name of Act	1
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