

AUSTRALIAN CAPITAL TERRITORY

Birth (Equality of Status) Ordinance 1988

No. 93 of 1988

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Authorised by the ACT Parliamentary Counsel—also accessible at www.legislation.act.gov.au

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AUSTRALIAN CAPITAL TERRITORY

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No. 93 of 1988

I, THE GOVERNOR-GENERAL of the Commonwealth of Australia, acting with the advice of the Federal Executive Council, hereby make the following Ordinance under the *Seat of Government (Administration) Act 1910*.

Dated 15 December 1988

N. M. STEPHEN
Governor-General

By His Excellency's Command,

CLYDE HOLDING
Minister of State for the Arts
and Territories

An Ordinance to remove the legal disabilities of persons born out of wedlock, to provide for declarations of parentage, and for related purposes

PART I—PRELIMINARY

Short title

1. This Ordinance may be cited as the *Birth (Equality of Status) Ordinance 1988*.¹

Commencement

2. (1) This section and section 1 shall come into operation on the day on which this Ordinance is notified in the *Gazette*.

(2) The remaining provisions of this Ordinance shall come into operation on such date as is fixed by the Minister by notice in the *Gazette*.

(Ord. /88)—Cat. No.

Authorised by the ACT Parliamentary Counsel—also accessible at www.legislation.act.gov.au

Interpretation

3. In this Ordinance, unless the contrary intention appears—

“acknowledgement of paternity” means an acknowledgement made in accordance with subsection 10 (1);

“corresponding law”, in relation to a law of the Territory, means a law of a place other than the Territory that is similar to, or has a similar effect to, the law of the Territory;

“declaration of parentage” means a declaration made under subsection 12 (1);

“ex-nuptial child” means a child whose father and mother were not married to each other at the time the child was conceived and have not subsequently married each other, not being a child who is a legitimate child, or is to be deemed to be a legitimate child, by virtue of Part VI of the *Marriage Act 1961*;

“legal practitioner” means—

- (a) a barrister and solicitor within the meaning of the *Legal Practitioners Ordinance 1970*; or
- (b) a person who is entitled to practise as a barrister or solicitor under a corresponding law of a State or another Territory;

“medical test” means a medical test specified in a notice under subsection 17 (1);

“overseas jurisdiction” means a country, or part of a country, other than Australia;

“registered medical practitioner” means a person registered as a medical practitioner under the *Medical Practitioners Registration Ordinance 1930* or under a corresponding law of a State or another Territory;

“registered nurse” means a person registered as a nurse under the *Nurses Ordinance 1988* or under a corresponding law of a State or another Territory;

“register of births” means the Register of Births kept in accordance with section 8 of the *Registration of Births, Deaths and Marriages Ordinance 1963* or a register in which births are recorded under the law of a State, another Territory or a prescribed overseas jurisdiction;

“register of parentage information” means—

- (a) the Register of Parentage Information kept in accordance with section 8 of the *Registration of Births, Deaths and Marriages Ordinance 1963*; or
- (b) a register, other than a register of births, in which information as to parentage is recorded under the law of a State, another Territory or a prescribed overseas jurisdiction;

“Registrar” means the Registrar of Births, Deaths and Marriages.

Application

4. (1) This Ordinance applies—

- (a) whether or not any of the persons whose relationships are in issue was born in the Territory;
- (b) whether or not any of those persons is, or has ever been, domiciled in the Territory;
- (c) whether or not any of those persons was born, or died, before or after the commencement of this section; and
- (d) irrespective of the age of any of those persons.

(2) Nothing in this Ordinance shall be taken to affect the operation of sections 9, 33, 42 and 43 of the *Adoption of Children Ordinance 1965*.

(3) Nothing in this Ordinance shall be taken to affect the law in force in the Territory relating to the guardianship or custody of children.

PART II—STATUS OF CHILDREN

Children all of equal status

5. Subject to section 6, whenever the relationship of a person with his or her father and mother, or with either of them, is to be determined by or under the law of the Territory, whether in proceedings before a court or otherwise, the relationship shall be determined irrespective of whether the father and mother of the person are or have ever been married to each other, and all other relationships of or to that person, whether of consanguinity or affinity, shall be determined accordingly.

Construction of instruments

6. (1) Subsection (2) applies to—

- (a) an instrument executed after the commencement of this section; and
- (b) an instrument executed before that commencement, being an instrument that, by virtue of the law of the place where the instrument was executed, would be interpreted without regard to the illegitimacy of persons referred to in, or taking under, the instrument;

other than a will or codicil.

(2) In an instrument to which this subsection applies—

- (a) a reference, however expressed, to a child or children of any person shall, unless the contrary intention appears, be construed as, or as including, a reference to an ex-nuptial child of that person; and
- (b) a reference, however expressed, to a person or persons related to another person in a way other than that referred to in paragraph (a) shall, unless the contrary intention appears, be construed as, or as including, a reference to anyone who is so related in fact, notwithstanding that he or she or some other person through whom the relationship is traced is or was an ex-nuptial child.

(3) Without limiting the generality of any other provision of this Ordinance, any rule of law that a disposition in favour of an ex-nuptial child not conceived or born when an instrument takes effect is void as being contrary to public policy is, with respect to an instrument to which subsection (2) applies, abolished.

(4) Parts III and IV apply in relation to the construction of a will or codicil if the testator died on or after the date of commencement of this section, but a will or codicil shall otherwise be construed as if this Ordinance had not been made.

(5) An instrument (other than an instrument to which subsection (2) applies or a will or codicil) that was executed before the date of commencement of this section shall be construed as if this Ordinance had not been made.

(6) Where an instrument contains a special power of appointment in favour of a class of persons, nothing in this Ordinance extends the class of persons in whose favour the appointment may be made or causes the exercise of the power to be construed so as to include any person who is not a member of that class.

PART III—ESTABLISHING PARENTAGE

Presumptions arising from time of birth

7. (1) If a child is borne by a married woman—

- (a) who is cohabiting with her husband at the time of the child's birth; or
- (b) within 10 months after the woman ceased cohabiting with the husband;

the husband shall, for all purposes, be presumed to be the father of the child.

(2) If a woman bears a child within 10 months after a marriage to which the woman was a party has been terminated—

- (a) by the death of the woman's husband; or
- (b) otherwise than by a decree of dissolution of marriage;

the woman's husband shall, for all purposes, be presumed to be the father of the child.

(3) If—

- (a) after the parties to a marriage separated they resumed cohabitation;
- (b) within a period of 3 months after resuming cohabitation they again separated; and
- (c) the woman bears a child within 10 months after the period of cohabitation ends;

the woman's husband shall, for all purposes, be presumed to be the father of the child.

(4) If—

- (a) a child is borne by a woman who is, at the time of the child's birth, cohabiting with a man with whom she has cohabited throughout the period of 6 months before the child's birth; or
- (b) a child is borne by a woman who cohabited with a man throughout a period of at least 6 months, being a period that ended not more than 10 months before the child's birth;

the man shall, for all purposes, be presumed to be the father of the child.

(5) In this section, a reference to a marriage shall be read as including a reference to a void marriage.

(6) For the purposes of this section, a void marriage shall be deemed to have been terminated when it came to the knowledge of either of the parties to the marriage that there were reasonable grounds for believing that the marriage was void.

Presumptions arising from registered information

8. (1) Where, before or after the commencement of this section, the name of a person is entered in a register of births or a register of parentage information as the name of the father of a child, the person shall, for all purposes, be presumed to be the father of the child.

(2) Where, before or after the commencement of this section, the name of a person is entered in a register of births or a register of parentage information as the name of the mother of a child, the person shall, for all purposes, be presumed to be the mother of the child.

Presumptions arising from findings of courts

9. (1) Where, before or after the commencement of this section, a recognised court has, during the lifetime of a particular man—

- (a) made an order (however described) stating that the man is the father of a child specified in the order; or
- (b) made an order (however described) in such circumstances that it was not entitled to make the order unless it found as a fact that the man is the father of a particular child;

and the order has not been set aside, the man shall, for all purposes, be presumed to be the father of the child.

(2) Where, before or after the commencement of this section, a recognised court has, during the lifetime of a particular woman—

- (a) made an order (however described) stating that the woman is the mother of a child specified in the order; or
- (b) made an order (however described) in such circumstances that it was not entitled to make the order unless it found as a fact that the woman is the mother of a particular child;

and the order has not been set aside, the woman shall, for all purposes, be presumed to be the mother of the child.

(3) Where, after the commencement of this section, a court of the Territory makes an order of the kind referred to in subsection (1) or (2), the court may direct that a copy of the order shall be forwarded to such persons as the court thinks fit.

(4) In subsections (1) and (2), “recognised court” means a court of the Territory, the Commonwealth, a State, another Territory or a prescribed court of a prescribed overseas jurisdiction.

Acknowledgments of paternity

10. (1) A man may acknowledge that he is the father of an ex-nuptial child by executing an instrument, in a form approved by the Registrar, in the presence of the Registrar, a Commissioner for Declarations within the meaning of the *Statutory Declarations Act 1959*, a legal practitioner, a registrar or clerk of a court or a minister of religion of a recognised denomination within the meaning of the *Marriage Act 1961*.

(2) If—

- (a) a man has made an acknowledgement of paternity;
- (b) the instrument of acknowledgement has been signed by the mother of the child to whom the acknowledgement relates; and
- (c) the acknowledgement has not been annulled by an order under subsection (4);

the man shall, for all purposes, be presumed to be the father of the child.

(3) The man who made the acknowledgement shall forward the instrument of acknowledgement to the Registrar within 14 days after the day on which it was executed.

(4) An acknowledgement of paternity may be annulled by order of the Supreme Court.

(5) An application for an order may be made by or on behalf of any person who has a proper interest in the matter, including—

- (a) the man who executed the instrument of acknowledgement;
- (b) the mother of the child to whom the acknowledgement relates;
- (c) the child to whom the acknowledgement relates; or
- (d) the Registrar.

(6) If any person whose interests would, in the opinion of the court, be affected by making the order is not present or represented, and has not been given the opportunity to be present or represented, at the hearing of the application, the court may, if it thinks that the person ought to be present or represented at the hearing, adjourn the hearing in order to enable that person to be given such an opportunity.

Applications for declarations of parentage

11. (1) A person who—

- (a) being the mother of a child, alleges that a particular man is the father of the child;
- (b) being the father of a child, alleges that a particular woman is the mother of the child;
- (c) alleges that he or she is the father or mother of a particular child;
- (d) alleges that a particular man or particular woman is his or her father or mother; or
- (e) being the Registrar, or another person having a proper interest in the matter, wishes it to be determined whether a particular man or particular woman is the father or mother of a particular child;

may apply to the Supreme Court for a declaration of parentage.

(2) If—

- (a) an application for a declaration of parentage has been dismissed;
- (b) an appeal against an order dismissing an application for a declaration of parentage has been dismissed; or
- (c) a declaration of parentage has been set aside on appeal;

on the ground that the existence of the relationship alleged in the application or specified in the declaration had not been established, the applicant for the declaration may make a further application to the Supreme Court for the declaration sought in the original application if—

- (d) facts or circumstances that were in existence at the time the original application was heard were not disclosed to the court at that time; and
- (e) those facts and circumstances were not known to, and could not, by the exercise of reasonable diligence, have been discovered by, the applicant at that time.

(3) The Supreme Court may refuse to hear an application under subsection (1) or (2) if the Court is of the opinion that it would not be in the interests of the child to whom the application relates, or of the child's mother, to hear the application.

Declarations of parentage

12. (1) If, on hearing an application under subsection 11 (1) or (2), the Supreme Court is satisfied that a particular person is the father or mother of a particular child, the court may make a declaration to that effect.

(2) A declaration of parentage may be made whether or not the parent or child is, or both of them are, alive, or notwithstanding that the child is not born.

(3) If a person whose interests would, in the opinion of the court, be affected by making a declaration of parentage is not present or represented at the hearing of the application, and has not been given an opportunity to be present or represented, the court may, if it thinks that the person ought to be present or represented, adjourn the hearing to enable the person to be given such an opportunity.

(4) When hearing an application made under subsection 11 (2)—

- (a) the court shall receive the evidence given at the hearing of the original application as well as any evidence relating to facts or circumstances of a kind referred to in paragraph 11 (2) (d); and
- (b) if, at the conclusion of the evidence adduced by the applicant, the evidence relating to those facts and circumstances is not material to establishing the existence of the relationship that the applicant alleges to exist, or wishes to be determined, the application shall be dismissed.

Presumptions arising from declarations of parentage

13. (1) While a declaration of parentage is in force, the person named in the declaration as the father or mother of the child to whom the declaration relates shall, for all purposes, be conclusively presumed to be the father or mother of that child, as the case requires.

(2) While a declaration of parentage (however described) made, whether before or after the commencement of this section, under a corresponding law is in force, the person named in the declaration as the father or mother of the child to whom the declaration relates shall, for all purposes, be presumed to be the father or mother of that child, but the presumption is rebuttable by proof on a balance of probabilities.

Annulment of declaration of parentage

14. (1) An application for an order annulling a declaration of parentage may be made to the Supreme Court by—

- (a) the applicant for the declaration;
- (b) a person named in the declaration; or
- (c) a person who would, before the declaration was made, have been entitled to apply for a declaration of parentage in relation to a person named in the first-mentioned declaration.

(2) If—

- (a) it appears to the court that facts exist, or circumstances have arisen, that were not disclosed to the court before the declaration was made, being facts or circumstances material to the question of the existence of the relationship specified in the declaration between the persons named in the declaration; and
- (b) after considering those facts or circumstances the court is not satisfied that that relationship between those persons is established;

the court may, by order, annul the declaration.

(3) If the applicant for the order is not—

- (a) a person who was an infant at the time the declaration was made; or
- (b) the Registrar;

the court shall not make the order unless it is satisfied that the facts or circumstances referred to in subsection (2) could not, by the exercise of reasonable diligence, have been disclosed to the court by the applicant when the application for the declaration was heard.

(4) When the court makes an order annulling a declaration—

- (a) the declaration ceases to have effect; and
- (b) the annulment does not affect anything done in reliance on the declaration before the order was made.

(5) If a person whose interests would, in the opinion of the court, be affected by making the order is not present or represented, and has not been given an opportunity to be present or represented, at the hearing of the application for the order, the court may, if it thinks that the person ought to be

present or represented, adjourn the hearing in order to enable that person to be given such an opportunity.

(6) Where the court makes an order annulling a declaration, it may make such ancillary orders (including orders varying property rights) as it considers just and equitable in order to place, as far as practicable, any person affected by the annulment in the same position as that in which the person would have been if the declaration had not been made.

Rebuttal of certain presumptions

15. (1) Where a presumption of law arises by virtue of a law in force in the Territory that—

- (a) a particular child is, or is not, a child of a particular marriage or of a particular man and a particular woman; or
- (b) a particular person is, or is not, the father or mother, as the case may be, of a particular child;

the presumption is rebuttable in any proceedings by proof on a balance of probabilities unless that law provides that the presumption is irrebuttable or conclusive.

(2) Notwithstanding any other provision of this Ordinance, in criminal proceedings the prosecution is not entitled to rely on a presumption arising by virtue of this Ordinance to prove the parentage of a child.

Conflicting presumptions

16. (1) Where—

- (a) 2 or more presumptions in respect of the parentage of a child, being presumptions arising by virtue of laws in force in the Territory, are relevant in any proceedings; and
- (b) those presumptions conflict with each other;

the presumption which appears to the court to be the more or most likely to be correct, having regard to all the circumstances relating to the birth of the child to whom the presumption relates, shall prevail unless it is rebutted in those proceedings.

(2) Notwithstanding subsection (1), a presumption arising by virtue of the *Artificial Conception Ordinance 1985* prevails over a conflicting presumption arising by virtue of this Part.

PART IV—USE OF MEDICAL TESTS IN DETERMINING PARENTAGE

Notice to carry out medical tests

17. (1) In civil proceedings in which the parentage of a child is in issue, the court before which the proceedings are taken may, of its own motion or on the application of a party to the proceedings or, if the child is not a party, on the application of the child, give notice to the effect that if, without reasonable excuse, specified medical tests (being medical tests relevant to establishing the parentage of the child) are not carried out on a specified person within a specified time and in accordance with any specified terms or specified conditions, the court is entitled by force of this subsection to draw such inferences from the failure to have the tests carried out as appear warranted in the circumstances and may, in particular, treat the failure—

- (a) as evidence corroborating the evidence of a party to the proceedings; or
- (b) if the person is a party to the proceedings and is relying in the proceedings on a rebuttable presumption of parentage arising by virtue of a law in force in the Territory—as evidence rebutting the presumption.

(2) The notice shall be given—

- (a) if the specified person is under 18 years of age—to the person who has custody of the specified person;
- (b) if the specified person is of unsound mind or for any other reason incapable of consenting to having the medical tests carried out—to the person who has the care and control of the specified person; or
- (c) in any other case—to the specified person.

(3) If the child makes an application, the child shall be joined as a party to the proceedings.

(4) Where—

- (a) a court gives a notice, or proposes to give a notice; and
- (b) any party to the proceedings who is alleged to be a parent of the child to whom the proceedings relate alleges that another person (being a person to whom the notice relates or would relate) is, or may be, a parent of the child;

the other person may be joined as a party to the proceedings for the purpose only of determining the parentage of the child.

(5) The court may at any time revoke or vary a notice.

(6) When deciding whether to give a notice, the court shall take into account any objection made on medical, religious or other grounds by the person to whom the notice would be given.

(7) An objection that has been taken into account shall be deemed not to be a reasonable excuse for the purposes of subsection (1).

(8) If the person to whom the notice is given fails to do whatever is necessary to have the specified medical tests carried out in accordance with the notice, the court may, without prejudice to its powers under subsection (1)—

- (a) dismiss the proceedings; or
- (b) allow the proceedings to continue on such terms as it thinks fit.

(9) In this section, “specified” means specified by the court in a notice under subsection (1).

Reports of medical tests

18. (1) A report prepared by the person who performed a medical test, and stating the result of the test, is admissible, in the proceedings in which the notice to which the test relates was given, as evidence of the matters stated in the report.

(2) The court which gave the notice may, of its own motion or on the application of a party to the proceedings or, if the child whose parentage is in issue is not a party, on the application of the child, call as a witness—

- (a) the person who prepared the report; or
- (b) any person who assisted in performing the medical tests referred to in the report.

(3) If the child makes an application, the child shall be joined as a party to the proceedings.

(4) A person called as a witness under subsection (2) may be cross-examined by any party to the proceedings, including a party who called the person or, if the child is not a party, by the child.

(5) The cost of performing a medical test (including any expenses reasonably incurred in taking any steps required for the purpose) and preparing a report with respect to the test shall be regarded as costs of the proceedings.

Offences related to medical tests

19. (1) A person who personates another in undergoing a medical test is guilty of an offence punishable, on conviction, by a fine not exceeding \$1,000 or by imprisonment for a period not exceeding 6 months.

(2) A person who proffers a person who is a minor or of unsound mind to undergo a medical test knowing that the person is not the person specified in the notice is guilty of an offence punishable, on conviction, by a fine not exceeding \$1,000 or by imprisonment for a period not exceeding 6 months.

(3) A person other than a registered medical practitioner, a registered nurse or a person included in a prescribed class of persons who takes a sample of a person's blood or other body tissue for the purpose of carrying out a medical test is guilty of an offence punishable, on conviction, by a fine of \$500.

PART V—MISCELLANEOUS

Joinder of parties

20. If a party to proceedings under this Ordinance who is alleged to be a parent of the child to whom the proceedings relate alleges that another person is, or may be, a parent of the child, that other person shall be joined as a party to the proceedings.

Notification of certain orders to Registrar

21. Where the Supreme Court makes a declaration of parentage, or an order under subsection 10 (4) or 14 (2), the Registrar of the court shall, within 28 days after the date on which the declaration or order was made, forward a sealed copy of the declaration or order to the Registrar of Births, Deaths and Marriages.

Regulations

22. The Minister may make regulations, not inconsistent with this Ordinance, prescribing all matters which are required or permitted by this Ordinance to be prescribed, or are necessary or convenient to be prescribed, for carrying out or giving effect to this Ordinance.

NOTE

1. Notified in the *Commonwealth of Australia Gazette* on 21 December 1988.