

EXPLANATORY STATEMENT

AUSTRALIAN CAPITAL TERRITORY

BIRTH (EQUALITY OF STATUS) ORDINANCE 1988

No. 93, 1988

The purpose of the Birth (Equality of Status) Ordinance 1988 (the Ordinance) is to make illegitimacy irrelevant for legal purposes in the ACT. The Ordinance enacts a general statement that a child's relationship with his or her father or mother shall be determined irrespective of whether they are or have ever been married to each other. It expressly abolishes any rule of law which made dispositions in favour of an illegitimate child void for being contrary to public policy. It also creates certain presumptions of paternity arising from the fact of cohabitation between the parties concerned and provides for an easier administrative system for acknowledgements of paternity. If the parties are in dispute, the Ordinance empowers the court to make declarations of parentage. Finally, the Ordinance allows for the use of medical tests to assist in determining parentage.

Background

Historically, a child born out of wedlock was a "filius nullius", the child of nobody. This principle was first modified by British law in 1830, when, by enactment, legal responsibility for the child was given to the mother. However, the rights of the child vis-a-vis his or her parents were very limited. More particularly, the rights of the father in relation to his child were far inferior to those of the mother - he had virtually no right of input to the upbringing of his child. The case of Hill v Crook (1873) LR 6 HL 265 entrenched this view further, deciding that a gift of property under a will to "children" prima facie included only legitimate children.

In 1976 the Commonwealth Government decided that the status of illegitimacy should be abolished in all Federal and Territory legislation. All States have enacted legislation to reflect a similar policy and this legislation completes the making of this reform throughout Australia. The Ordinance draws particularly from the Children (Equality of Status) Act 1976 (NSW).

Part 1 - Preliminary

Details of the Ordinance are as follows.

Section 1 provides that the Ordinance may be cited as the Birth (Equality of Status) Ordinance 1988.

Section 2 provides that sections 1 and 2 come into operation on gazettal of the Ordinance. The remaining provisions will come into operation on a date to be fixed by the Minister.

Section 3 defines a number of words and phrases used in the Ordinance.

Section 4 provides that the Ordinance applies irrespective of whether any of the persons whose relationships are in issue was born or domiciled in the Territory, whether or not any of those persons was born or died before the commencement of the Ordinance and irrespective of the age of any of those persons.

Subsections 4(2) and (3) provide that the Ordinance shall not affect the law in the Territory relating to the guardianship or custody of children or the operation of sections 9, 33, 42 and 43 of the Adoption of Children Ordinance 1965. This is intended to preserve the current law in these areas, pending the outcome of current reviews.

Part II - Status of Children

Section 5 provides that whenever the relationship of a person with his or her parents is to be determined under a law of the Territory, the relationship shall be determined irrespective of whether the father and mother are or have ever been married to each other.

Section 6 provides for the construction of instruments. Wills and codicils are expressly excluded as they will be dealt with by an amendment to the Wills Ordinance 1968. However, Parts III and IV of the Ordinance do apply to wills and codicils if the testator dies after the commencement of the Ordinance (subsection 6(4)).

Subsection 6(1) provides that section 6 applies to instruments executed after the commencement of the section and to instruments executed in a jurisdiction where illegitimacy is already irrelevant to the interpretation of the instrument. All instruments executed before the commencement date shall be construed as if this Ordinance had not been made (subsection 6(5)).

For instruments to which the section applies, subsection 6(2) provides that unless a contrary intention appears, a reference in the instrument to "child" includes an ex-nuptial child. If the instrument refers to a person related to another person in some other way, unless a contrary intention appears, the reference includes all persons in fact related irrespective of whether that relationship is traced through someone who was an ex-nuptial child. Subsection 6(3) abolishes any rule of law that made dispositions in favour of an ex-nuptial child void.

Subsection 6(6) provides that, when an instrument contains a special power of appointment in favour of a class of persons, nothing in this Ordinance extends the class or causes the power to extend to persons who are not a member of that class.

Part III - Establishing Parentage

Section 7 creates certain presumptions arising from the time of birth.

Subsections 7(1) and (2) provide that if a child is borne by a married woman -

- . while she is cohabiting with her husband;
- . within 10 months after she ceased to cohabit with him; or
- . within 10 months after the marriage was terminated by his death or otherwise than by a decree of dissolution of marriage;

the husband shall be presumed to be the father of the child.

Subsection 7(3) is intended to distinguish the operation of section 50 of the Family Law Act, which disregards a short resumption of cohabitation for the purposes of satisfying the criterion for dissolution of marriage. Instead, for the purposes of establishing paternity, a short resumption of cohabitation (ie up to 3 months) is not disregarded. This is to ensure that the constructive separation provided for under the Family Law Act does not prevent a Court from finding a child's true parent.

Subsection 7(4) deals with the general situation where a man and a woman are cohabiting or have cohabited together. If a woman is cohabiting with a man at the time of the child's birth and the parties have cohabited together for at least 6 months before the child's birth the man is presumed to be the father of the child. If a woman cohabited with a man for at least 6 months and a child is born within 10 months after she ceased to cohabit with him the man is presumed to be the father of the child.

Subsections 7(5) and (6) provide that "marriage" includes a void marriage.

Section 8 deals with presumptions arising from registration. Whether before or after the commencement of the section, where a person is named in a register of births or register of parentage information as the father or mother of a child, that person is presumed to be the father or mother as the case may be.

Section 9 deals with presumptions arising from findings of courts.

Subsection 9(1) provides that where, during the lifetime of a particular man, a recognised court has made an order stating that the man is the father of a particular child or has made an order that could only have been made on the basis that the man is the father of a particular child, and the order has not been set aside, that man shall be presumed to be the father of that child.

Subsection 9(2) creates the same kind of presumption in respect of the mother of a particular child.

Subsection 9(3) provides that, after the commencement of this section, if an ACT court makes an order of the kind referred to in subsections 9(1) or (2), the Court may direct that a copy be forwarded to such persons as the court thinks fit.

Subsection 9(4) defines "recognised court" to be a court of the Territory; the Commonwealth; a State; another Territory or a prescribed court of a prescribed overseas jurisdiction.

Section 10 provides that a man may acknowledge that he is the father of an ex-nuptial child by executing an instrument approved by the Registrar. The form is to be witnessed by the Registrar, a Commissioner for Declarations, 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.

Subsection 10(2) provides that if the mother of the child signs the instrument of acknowledgement and the instrument has not been annulled, the man shall be presumed to be the father of the child.

Subsection 10(3) places an obligation on the man acknowledging paternity to forward the instrument to the Registrar within 14 days. However, as a matter of criminal law policy, it is considered inappropriate to provide a penal sanction for failure to comply.

Subsection 10(4) provides that an acknowledgement of paternity may be annulled by the Supreme Court. Subsections 10(5) and (6) provide that, generally, any person who has a proper interest in the matter may apply for annulment. If a person whose interests would be affected by the order is not present, the court may adjourn the hearing to give the person an opportunity to appear.

Section 11 provides that application may be made to the Supreme Court for a declaration of parentage. Generally, any person having a proper interest in the matter may apply.

Subsection 11(2) provides that if the application is dismissed or a declaration has been set aside on appeal, the applicant may again apply if -

- . facts or circumstances were not disclosed to the court originally and
- . those facts or circumstances were not known to, and could not with reasonable diligence have been discovered by, the applicant.

Subsection 11(3) gives the court a discretion to refuse to hear an application for a declaration of parentage. This will, for example, prevent the mother of a child who is the product of a rape or incest from being harassed by the offender.

Section 12 provides that if the court is satisfied that a particular person is the father or mother of a particular child, the court may make an order to that effect whether or not the parent or child is alive or notwithstanding that the child is not born.

If a person whose interests would be affected by the declaration is not present and has not been given the opportunity to be present or represented the court may adjourn the hearing to allow the person to be given the opportunity.