

# AUSTRALIAN CAPITAL TERRITORY

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## Testamentary Guardianship Ordinance 1984

No. 34 of 1984

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 16 July 1984.

N. M. STEPHEN  
Governor-General

By His Excellency's Command,

GARETH EVANS  
Attorney-General

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

### Short title

1. This Ordinance may be cited as the *Testamentary Guardianship Ordinance 1984*.<sup>1</sup>

### Interpretation

2. (1) In this Ordinance, unless the contrary intention appears—

“child” means a person who is not and has not been married, and has not attained the age of 18 years;

“ex-nuptial child” means a child whose mother and father 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*.

(2) In this Ordinance, a reference to a parent of a child shall not be read as including a reference to—

- (a) the father of an ex-nuptial child; or
- (b) a parent whose guardianship of the child has been abrogated by—
  - (i) a judgment, decree or order of a federal court or a court of a State or Territory, being a judgement, decree or order that is in force; or
  - (ii) a judgment, decree or order of a court in an overseas country, being a judgment, decree or order that is in force and that would be recognized by a court of the Territory in conformity with the common law rules of private international law.

(3) In this Ordinance, unless the contrary intention appears, a reference to a guardian of a child (other than a reference to a testamentary guardian) shall be read as a reference to any guardian of the child, whether appointed—

- (a) in accordance with this Ordinance or a law of a State or another Territory;
- (b) by a judgment, decree or order of a federal court or a court of a State or Territory; or
- (c) in accordance with a law of an overseas country or part of an overseas country or by a judgment, decree or order of a court in an overseas country, being an appointment that would be recognised by a court of the Territory in conformity with the common law rules of private international law,

but shall not be read as including a reference to a Minister of State of the Commonwealth or of a State or Territory who, under a law of the Commonwealth or of that State or Territory is, in his capacity as such a Minister, the guardian of the child.

(4) In this Ordinance, a reference to a testamentary guardian is a reference to a guardian appointed in accordance with section 4.

### **Application**

3. (1) This Ordinance applies in relation to a child—

- (a) whether he was born in the Territory or elsewhere; and
- (b) whether he was born before or after the commencement of this Ordinance.

(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*.

**Appointment of testamentary guardians**

4. 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.

**Appointment by persons not entitled to guardianship**

5. 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.

**Time when appointment effective**

6. 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 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.

**Effect of appointment**

7. (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) Where, at any time after an appointment of a testamentary guardian of a child takes effect—

- (a) no parent of the child is alive;
- (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;

- (c) no order relating to the child has been registered under section 68 of the *Family Law Act 1975*; and
- (d) no order that would, by virtue of section 60A of the *Family Law Act 1975*, have effect for the purposes of 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 sub-section (1)—

- (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.

(3) 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 responsibility and duties and exercise his powers and rights in relation to that child jointly with that other person or those other persons.

### **Applications to Supreme Court**

8. (1) A testamentary guardian whose appointment does not, by virtue of section 6, take effect on the death of the appointor may at any time apply to the Supreme Court for an order that his appointment take effect forthwith.

(2) Where an appointment of a testamentary guardian of a child has taken effect by virtue of sub-paragraph 6 (a) (i) or sub-section (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) Jurisdiction to hear and determine applications under this section is vested in the Supreme Court.

(4) 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.

### **Powers of Supreme Court**

9. (1) Nothing in this Ordinance shall be taken to affect the powers of the Supreme Court relating to the guardianship and custody of children.

(2) Without limiting the generality of sub-section (1), nothing in this Ordinance 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;
- (b) to appoint a guardian of a child;
- (c) to appoint one 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.

### **Amendment of *Seat of Government (Administration) Ordinance 1930***

10. The Second Schedule to the *Seat of Government (Administration) Ordinance 1930* is amended by inserting in Part I—

“*Testamentary Guardianship Ordinance 1984*”

after—

“*Supreme Court Ordinance 1952*”.

### **Repeal—Tenures Abolition Act 1660**

11. Sections 8 and 9 of the Imperial Act 12 Car. 2 c.24 (the Tenures Abolition Act 1660) cease to have any force or effect in the Territory.

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#### **NOTE**

1. Notified in the *Commonwealth of Australia Gazette* on 23 July 1984.