

AUSTRALIAN CAPITAL TERRITORY LEGISLATIVE ASSEMBLY

ARTIFICIAL CONCEPTION (AMENDMENT) BILL

2000

EXPLANATORY MEMORANDUM

**Circulated by authority of
Kate Carnell MLA
Chief Minister**

AUSTRALIAN CAPITAL TERRITORY

ARTIFICIAL CONCEPTION (AMENDMENT) BILL

2000

OUTLINE

This Bill provides for

- a) an application to the court by a couple for a declaration of parentage where a child has been born as the result of *in vitro fertilisation* and—
 - the couple are the genetic parents of a child (i.e. they have donated both the egg and sperm for the child); or
 - a person (a 'substitute parent') who, pursuant to a substitute parent agreement, has indicated his or her intention to become the legally recognised parent of the child (a 'prescribed' parent') where:
 - i) the other substitute parent is a genetic parent of the child;
 - ii) he or she has undergone counselling and assessment as required by the Bill, along with the genetic parent;
 - iii) the third party donor of the egg or sperm is not the woman giving birth or her spouse;
 - at least six weeks and no more than 6 months has elapsed since the birth and the child's home is with them; and
 - the birth parents (the woman giving birth and her spouse) are in agreement with the application.
- b) either substitute parent to apply for a sole parentage order where at least one of the substitute parents is a genetic parent, and the other substitute parent agrees;
- c) the making of orders where one or both of the birth parents are dead, have become incapacitated, or cannot be found at the time of application;
- d) preservation of the right of inheritance of a child through his or her birth or former adoptive parents where
 - the child is the subject of a substitute parent agreement from; and
 - one or both of these have died before a parentage order is made.
- e) includes in the regulation-making power a power to make regulations in relation to assessment and counselling.

It also provides for

- re-registration of the birth of the child as a result of the order;
- disposition and grants of property in relation to the child; and

- access to information by the child and associated relatives.

The *Artificial Conception Act* as it currently applies provides for presumptions relating to parentage of a child which is the result of artificial conception (described as artificial insemination or the procedure of transferring into the uterus of a woman an embryo derived from an ovum fertilised outside her body). The Act provides that the woman giving birth to the child is for all purposes at law the mother of the child, and her spouse (including a de facto spouse) is for all purposes at law the father of the child. The Act reinforces this by providing that the donor of gametes of the child is not to be considered the parent of the child. This principle is part of uniform legislation throughout Australia, and is also enshrined in the *Commonwealth Family Law Act 1975*.

The amendments thus provide for a court order to the contrary under the specified circumstances.

Financial Considerations: Any additional demand on the courts and the agencies involved will be absorbed within the current budget allocation at this stage. It is not anticipated that a significant addition to costs will eventuate, given the small number of expected applications.

PART 1 - PRELIMINARY

Clauses 1 and 2 are formal requirements. They refer to the short title of the Bill, and commencement of the Bill, which is to be on a day fixed by the Minister by notice in the Gazette.

Clause 3 establishes the *Artificial Conception Act 1985* as the Act that the Bill is amending. This is the Act referred to as the 'principle Act' throughout the amendments.

Clause 4 adds the words "...and for related matters" to the long title of the *Artificial Conception Act*.

The amendments break the current provisions of the *Artificial Conception Act* into two sections, and the main part of the amendments constitute Parts III and IV. "**Part 1 — Preliminary**" becomes the definitions section. The current remainder of the Act, outlining the principle in relation to parentage set out above becomes "**Part 2 — Presumptions about Parentage**". The additional sections relating to parentage orders become "**Part 3 — Parentage Orders**" and "**Part 4 — Miscellaneous**". The last section also contains consequential amendments of other legislation.

Clause 5 inserts the heading "**PART 1 — PRELIMINARY**" before section 1 of the Act. This Part comprises the interpretation, or definitions, section.

Clause 6 repeals section 2 (a redundant commencement provision) and section 3 of the Principal Act substitutes these with section 2, a list of definitions with an expanded list. The new words defined include the following terms—

'birth father, means the man presumed, under Part 2 of this Act or under the *Birth (Equality of Status) Act 1988*, to be the child's father;

'birth mother', means the woman who gave birth to the child;

"birth parent", means the child's birth mother or the child's birth father;

'birth relative', means a person who was a grandparent, brother, sister, uncle or aunt of the prescribed child before the parentage order was made;

'genetic father', in relation to a child, means the man whose sperm was used to create the embryo;

'genetic mother', in relation to a child, means the woman whose egg was used to create the embryo;

'guardian', includes—

-
- (a) a person having the custody of the child under an order of a court;
and
 - (b) a person who is the guardian of the child under a law of the Territory, the Commonwealth, a State or another Territory;

'parentage order' means an order under new section 11;

'prescribed child' means a child about whom a parentage order has been made.

"prescribed father" of a prescribed child, means the male prescribed parent of that child;

"prescribed mother" of a prescribed child, means the female prescribed parent of that child;

"prescribed parent" of a prescribed child, means a substitute parent of that child in whose favour the parentage order has been made;

"prescribed relative" of a prescribed child, means a person who is a grandparent, brother, sister, uncle or aunt of the child because of the parentage order;

"procedure": the definition of procedure is restated from the repealed section.

'Register of Births' means the Register of Births kept pursuant to section 8 of the *Births, Deaths and Marriages Registration Act 1997*.

"substitute parent" of a child in respect of whom a parentage order is applied for, means a person who, pursuant to a substitute parent agreement, has indicated his or her intention to become a prescribed parent of the child;

"substitute parent agreement" in relation to a child in respect of whom a parentage order is applied for, means a substitute parent agreement within the meaning of the *Substitute Parent Agreement Act 1994* where—
pursuant to that agreement, a man and a woman have indicated their intention to become the prescribed parents of the child;

- a) either the man is the child's genetic father, or the woman is the child's genetic mother; and
- b) the agreement is not a commercial substitute parent agreement within the meaning of that Act.

Proposed new section 3 provides that any reference to "married woman" or "husband" or "wife" is a reference to a de facto marriage, or husband or wife.

Clause 7 inserts the heading "**PART 2—PRESUMPTIONS ABOUT PARENTAGE**" before section 4 of the Principal Act.

Clause 8 is a technical amendment consequent on the insertion of Parts, to clarify references by substituting the word 'Part' for 'Act' where appropriate.

Clause 9 contains the substantive changes to the principal Act by adding Parts 3 and 4, with the proposed new sections 8 to 30. Consequential amendments are made at clause 10.

After section 7 of the Principal Act the heading becomes "**PART 3 — PARENTAGE ORDERS**" and a further heading "*Division 3.1—Preliminary*" is added.

Where only 1 prescribed parent

Proposed new section 8 To avoid confusion and obtuse language, it provides that where the Bill refers to 'prescribed parents' or 'both prescribed parents' and only 1 person is applying for a parentage order, the words are to be taken as referring to that one person.

Proposed new section 9: provides that the Division applies in relation to a child who is born in the Territory as the result of a procedure carried out in the ACT, in which the gametes of a woman who is not the child's birth mother and of a man who is not the child's birth father were used to create the embryo. It applies whether the procedure was carried out before or after the commencement of this Division.

Applying for an order

Proposed new section 10: Subsection (1) provides that the substitute parents of a child may apply to the Court, in accordance with this section, for a parentage order in relation to the child.

Subsections (2) provides that an application may be made by either or both of the substitute parents

Subsection (3) states that an application may not be made within 6 weeks of the child's birth, but must be made —

- if the child was born before the commencement of this Division — within 6 months after it commences;

- otherwise within 6 months after the child is born.

Subsection (4) is a provision to allow for an order to be made for a child born before this Part of the Act commences. As it will become redundant, this provision expires after 3 months.

Making an order

Proposed new Section 11: provides that the Court must make a parentage order if—

- the court is satisfied that the making of the order is in the best interests and welfare of the child;
- the child's home is, and was at the time of the application, with both substitute parents;
- both substitute parents have attained the age of 18 years and are domiciled in the Territory;
- the Court is satisfied that both birth parents freely, and with a full understanding of what is involved, agree to the making of the order; and
the Court is satisfied that no unauthorised payment or reward (other than for expenses reasonably incurred) is associated with —
 - the making of the order;
 - any agreement required for the order;
 - handing over of the child to the prescribed parents; or
 - the making of any arrangements with a view to the making of the order (While only one of the substitute parents may be an applicant, this amendment refers to payment or reward etc. given or received by either substitute parent as the commercial nature of the agreement would be made out, even if the substitute parent involved in the payment or reward is not applying for the parentage order.)
- the Court is satisfied that both the prescribed and birth parents have received counselling and assessment from a counselling service that is not connected with the medical practitioner who carried out the procedure that resulted in the birth of the child or the institution at which it was carried out. However the Court may waive this requirement where the making of the order would not be otherwise contrary to the welfare and interests of the child.

Where only 1 of the child's substitute parents applies for a parentage order and the other substitute parent is still alive at the time of the application, the court may make an order in favour of the single applicant if it is satisfied that the other substitute parent freely, and with a full understanding of what is involved, agrees to the making of the order in favour of the applicant substitute parent. However, the Court may also make an order in favour of the applicant where it is satisfied that,

- after reasonable inquiries have been made, the other substitute parent cannot be found, and

- it would not be contrary to the welfare and interests of the child to make the order in favour of the applicant without the absent substitute parent's agreement.

The Court may dispense with the requirement that both birth parents must agree to a parentage order being made where it is satisfied that the birth parent is (or both birth parents are) dead, incapacitated, or cannot, after reasonable enquiry, be found. Where there is evidence that the birth parent or parents whose agreement cannot be obtained had changed their mind and no longer intended the applicants to become the legal parents of the child, the Court must not only be satisfied that it would not be contrary to the welfare and interests of the child to make the order, it must in addition be satisfied that it would be contrary to the welfare and interests of the child if it did not make the order in favour of the applicants.

It is intended that this more strict test be applied where it is known that the birth parent who cannot consent at the time of the application did in fact change his or her mind and not want the order to be made. It is considered that the Court should still be able to make the order, but this should be made not simply because it is in the child's interests (as the child's interests may be served whether the order is or is not made), but where the welfare of the child would be compromised if the order were not made. This means that consideration is to be given to the wishes of the birth parent who is unable at this time to express them.

The Court shall make a parentage order in favour of both of both substitute parents where—

1. both substitute parents apply for it, or
2. only one substitute parent applies for it, and
 - a) the other substitute parent is dead or incapacitated at the time of application; and
 - b) the non-applying substitute parent did not change their mind that the order should be made.

Otherwise, the Court shall make a parentage order in favour only of the substitute parent who applies for it.

Paragraph (3) gives effect to the intention that the deceased or incapacitated substitute parent in these circumstances should be regarded as the parent of the child for these purposes, as a natural parent would be recognised. It is also intended to deal with the case where the substitute parents decide, at some time between the making of the substitute parent agreement and the making of the application, that one of them is not to be the parent of the child, and the latter substitute parent dies or becomes incapacitated *before* the other parent makes the application.

Names of prescribed child

Proposed new section 12: provides for the naming of the child. Subsections (1) and (2) state that the child will have

- the substitute parents' surnames or whichever combination thereof, and

- the forenames,

that the Court, on the application of the genetic parents, approves in the parentage order.

Subsection (3) provides that if before the making of a parentage order, the prescribed child had been generally known by a particular name, the Court may, in the parentage order, order that the child shall have that name.

Subsection (4) adds the proviso that nothing in this proposed section prevents the changing of any name of a prescribed child, after the making of the parentage order, in accordance with the law of the Territory.

A new Division is created after new section 11 called "**Division 2—Effect of orders**"

Division 3.3-Effect of Orders

General effect

Proposed new section 13: Subsection (1) provides that the effect of a parentage order is that, for all purposes—

- the prescribed child becomes in law a child of the prescribed parents, and the prescribed parents become in law the parents of the child as if the child had been born to the prescribed parents;
- the prescribed child ceases to be a child of the birth parents or any adoptive parent or guardian, and any such person ceases to be a parent of the child;
- the relationship to one another of all persons shall be determined on this basis.

Subsection (2), however, provides that despite subsection (1), for the purposes of any law of the Territory relating to a sexual offence, where the relationship between persons is relevant (e.g. incest), relationships existing at the child's birth will still be taken to exist, in addition to the new relationships created under the parentage order.

Disposition of property

Proposed new section 14: Subsection (1) provides that these new relationships have effect in relation to dispositions of property whether by will or otherwise, and whether made before or after the commencement of this Part.

However this does not affect a disposition of property where the disponor has died before the commencement of this Part or the disposition took effect in possession before the commencement of this Part.

Subsection (3) states that the rule also does not apply in relation to an agreement or instrument (not being a disposition of property) made or executed before the commencement of this Part.

Subsection (4) refers to a disposition of property made by an instrument other than a will which

- could not (apart from this subsection) be revoked or varied by a like instrument;
- had not been given effect before the commencement of this Part; and
- does not appear to include a prescribed child as an object of the disposition.

The person who made the instrument may vary it to exclude a prescribed child from participation in any right, benefit or privilege under the instrument.

Subsection (5) states that the above provisions do not affect the operation of any provision in a will or other instrument (no matter when it was made or comes into operation) distinguishing between prescribed children and other children.

However, nothing in proposed section 13 or this section excludes any right of inheritance that a prescribed child might have from, or through his or her birth parent or former adoptive parent where that birth or former adoptive parent dies before the making of the parentage order in respect of the child.

Distribution of property by trustee or personal representative

Proposed new section 15: Subsection (1) states that despite any other provision of this Part but subject to this section, a trustee or personal representative does not have to ascertain whether or not a parentage order has been made (which may either entitle or disentitle a person to the property) before conveying, transferring or distributing property to those who appear to be entitled to the property.

Subsection (2) states that a trustee or personal representative conveying, transferring or distributing property in the manner referred to above is not liable to anyone claiming an interest in the property as a result of the making of a parentage order, unless the trustee or personal representative had notice of the claim before the conveyance, transfer or distribution.

Subsection (3) states that nothing in this section limits the right of a person to follow property into the hands of another person, other than a *bona fide* purchaser for value without notice.

Bequest by will to unascertained prescribed child

Proposed new section 16: Subsection (1) states that where a testator's personal representative is unable to ascertain the name and address of a beneficiary, under a will which—

- has been made after the commencement of this Part; and
- leaves property to a beneficiary who is not named but who is
 - described as a child of the testator or of a spouse, parent, child, brother or sister of the testator; and

- a person in respect of whom a parentage order was or has been made;

the personal representative is to give to the public trustee a copy of the will and a statement that he or she is unable to ascertain the name and address of the beneficiary.

Subsection (2) provides that where the public trustee is given a copy of such a will, the public trustee shall, in writing, request the registrar-general for information to assist in ascertaining the name and whereabouts of the beneficiary.

Subsection (3) provides that where the registrar-general receives such a request, he or she shall examine the records in his or her possession in an endeavour to provide such information and inform the public trustee of the results of that examination.

Subsection (4), provides that if the public trustee ascertains that beneficiary has died, the personal representative is to be informed of this.

Subsection (5) states that where the public trustee is able to ascertain the name and whereabouts of the beneficiary and the beneficiary is over 18 years old, he or she shall determine whether the beneficiary wishes to accept the bequest.

If the beneficiary does not wish to do so, the public trustee shall inform the personal representative accordingly.

If the beneficiary does wish to do so, the public trustee is to inform the personal representative that the proceeds of the bequest should be transferred to the public trustee on behalf of the beneficiary, and on receiving them transmits them to the beneficiary accordingly.

Subsection (6) provides that if the beneficiary has not attained the age of 18 years, the public trustee shall hold the proceeds on trust for the beneficiary upon the trusts (if any) set out in or arising under the will until the beneficiary attains the age of 18 years and when he or she does, transfer those proceeds to the beneficiary, unless the beneficiary then disclaims the bequest.

Subsection (7) ensures that he or she shall take transfer of the proceeds of a bequest to the public trustee by a personal representative to be a transfer of the bequest to the beneficiary.

Subsection (8) states that a written statement to the effect that the beneficiary has disclaimed the bequest given by the public trustee to the personal representative is, in the course of the administration of the estate, conclusive evidence that the beneficiary has disclaimed the bequest.

Subsection (9) re-emphasises that the public trustee shall not include in information conveyed to a personal representative under this section particulars that identify or tend to identify the beneficiary.

Gifts between living people

Proposed new section 17 applies to a deed executed after the commencement of this Part by which a gift of money is expressed to be made by a donor to a beneficiary who is

- not named but who is described as the child of the donor or of a spouse, parent, child, brother or sister of the donor,
- a person in respect of whom a parentage order was or has been made

The section provides that the same rule set out in new section 16 applies to this situation as if

- it was referring to the deed of gift instead of a will;
- it was referring to the donor instead of the testator; and
- it was referring to the money instead of the property.

A new Division is created: "**Division 3.4—Access to Information**"

Proposed new section 18 has the following definitions:

'associated person', for a parentage order, means the prescribed child, a prescribed parent or prescribed relative of the prescribed child, a birth parent or birth relative of the prescribed child, or a child or other descendant of the prescribed child;

'birth parent', of a prescribed child, includes any person who was the guardian of the child before the parentage order was made; and

'identifying information', which in relation to a parentage order, means—

- a copy of, or an extract from, an entry in the Register of Births relating to the prescribed child; or
- information from which the prescribed child, or a birth parent or birth relative of the child may be identified (other than information that consists of a residential address).

Confidentiality of records

Proposed new section 19: Subsection (1) provides that except as provided in this Division—

- the records of the Court (other than an order or decision of the Court) relating to proceedings on an application for a parentage order; or
- an entry in the register of births relating to the birth of a prescribed child, or a copy of or extract from, such an entry;

shall not be made available to, or be open to inspection by, any person.

Subsection (2) provides that this does not operate to prevent a person whose duties require him or her to do so from obtaining access to information where it is necessary to do so for the administration of this Part.

Right of access to identifying information

Proposed new section 20: Subsection (1) provides that unless otherwise provided for in this Division, an associated person is entitled to access to identifying information contained in records kept by the Registrar-General.

Subsection (2) states that a prescribed child (whether the child has attained the age of 18 years or not) is entitled to apply for a copy of, or an extract from, an entry in the Register of Births relating to the child. Any other identifying information may only be applied for with the consent in writing of—

- each of the child's prescribed parents;
- each of the child's birth parents; and
- any birth relative who may be identified from the information,

Subsection (3) provides that a birth relative, prescribed relative or descendant of a prescribed child is entitled to apply for identifying information only with the consent in writing of the person who may be identified from the information.

Subsection (4) provides that the consent of a person is not required for the purposes of the above two subsections if the Registrar-General is satisfied that the person is dead or cannot reasonably be found.

Provision of information by registrar-general

Proposed new section 21: Subsection (1) states that where, on an application for identifying information the registrar-general is satisfied that the applicant is entitled to access to that information; and that they have paid the prescribed fee, the registrar-general shall search the register of births and issue the applicant with that information or a notification of the result of the search, whichever applies.

Subsection (2) provides that where the registrar-general is of the opinion that information is required for an improper reason, or the person does not have a proper reason for requiring it, the registrar-general may refuse to comply with the request.

Application to Court in absence of consent

Proposed new section 22: Subsections (1) and (2) applies where a person would, under this Division, be entitled to identifying information with the consent in writing of another person, and that other person has refused to give that consent. The first-mentioned person may apply to the Court and the Court may, if of the opinion that there are circumstances that justify it doing so, make an order declaring that the applicant is entitled to access to the identifying information which it specifies.

Subsection (3) states that an order under subsection entitles the applicant to access to identifying information that it specifies.

Application to the Court in other circumstances

Proposed new section 23 provides similarly to new section 21 for application to the Court for an order by a person who is not otherwise entitled to, or who has been refused access to, identifying information.

The Court may, if it is of the opinion that there are circumstances that justify it, make an order entitling the applicant to access to the information specified in the order.

Medical information

Proposed new section 24 applies to the giving of information concerning the medical or psychiatric condition of an associated person. Where particular information may be disclosed (according to the general law) to an associated person who applies for it, but the medical record holder considers that the disclosure might be prejudicial to the physical or mental health or well-being of that applicant, the medical record holder may refuse to give the information personally and instead disclose it (without identifying a person other than the applicant) to a medical practitioner nominated by the applicant.

Division 3.5—Other matters

False statements

Proposed new section 25 creates the offence of wilfully making a false statement (whether orally or in writing) for the purpose of, or in connection with, an application for a parentage order. The penalty is 200 penalty units or imprisonment for 2 years, or both.

Impersonation of birth parents

Proposed new section 26 creates the offence of impersonating, or falsely representing oneself to be, a birth parent for the purpose of or in connection with an application for a parentage order. The penalty is 200 penalty units or imprisonment for 2 years, or both.

Presenting forged agreement

Proposed new section 27 creates the offence of presenting to the Court an agreement to the making of a parentage order signed by a birth parent if the signature was known to be forged or obtained by fraud, duress or other improper means. The penalty is 200 penalty units or imprisonment for 2 years, or both.

Legal representation of child

Proposed new section 28 provides that the court may order legal representation of the child in proceedings on an application for a parentage order.

Proof of parentage orders

Proposed new section 29 provides that in any proceedings in a court in the Territory, a document purporting to be either

- the original or a certified copy or certified extract of a parentage order; or
- an official certificate, entry or record of the making of a parentage order;

is evidence of the facts stated in, and matters appearing from, the document.

"PART 4—MISCELLANEOUS

Determination of fees

Proposed new section 30 provides that the Minister may, by notice in the *Gazette*, determine fees for the purposes of this Act. Such a determination is a disallowable instrument.

Regulation-making power

Proposed new section 31 gives the Executive the power to make regulations to give effect to the Act and, in particular, such matters as the forms to be used giving of information and entries in the register of births, as well as forms and standards of counselling and assessment for the purposes of paragraph 11 (g) (i).

Part 3 of the Bill provides for amendments to other Acts.

Amendment of *Births, Deaths and Marriages Registration Act 1997*

Clause 10 provides for amendment of the *Registration of Births, Deaths and Marriages Act 1963* by adding a new Division at the end of Division 3, Part 2, namely "**Division 4— Substitute parent information**", and adding the following new sections to the Act:

Registration of parentage order

Proposed new section 16A: Subsection (1) provides that where the registrar-general receives a sealed copy of a parentage order he or she shall register the order in a register of parentage orders.

Subsection (2) requires the registrar-general to keep an index of registered parentage orders.

Subsection (3) requires the registrar-general to bring the information in this Division to the attention of any person providing information concerning the birth of a child in respect of whom a parentage order has been made.

Re-registration of birth where parentage order made

Proposed new section 16B provides that on receipt of a sealed copy of a parentage order in relation to a child whose birth is registered in the register of births, the registrar-general shall re-register the birth of the child by noting—

- the child's new name;
- the sex, date and place of birth of the child; and
- the prescribed parents of the child within the meaning of the *Artificial Conception Act 1985*;
- a notation to the entry to the effect that the birth of the child is registered under this subsection.

Subsection (2) provides that on re-registering the birth of a child, the registrar-general shall make a notation on the original entry of the birth to the effect that the birth of the child has been re-registered under this Act on a specified page of the register. This is to apply similarly where the child has been adopted (Subsection (3)).

Amendment of Substitute Parent Agreements Act 1994

Clause 11 provides for amendment of section 10 of the *Substitute Parent Agreements Act 1994*. As special provision has been made for the Court to refer to the welfare and interests of the child in making a parentage order, such orders are excluded from the reference in Section 10 of the *Substitute Parent Agreements Act 1994*, which also relates to the welfare and interests of the child in other proceedings relating to substitute parent agreements.