

EXPLANATORY STATEMENT

AUSTRALIAN CAPITAL TERRITORY

TESTAMENTARY GUARDIANSHIP ORDINANCE 1984

No. 34 of 1984

The purpose of this Ordinance is to enable any parent (with some exceptions) and any guardian of a child to appoint a testamentary guardian (a person who becomes a guardian of a child after the death of the parent or guardian who appoints him) and to remove restrictions on who may be appointed a testamentary guardian in the Australian Capital Territory.

At present the appointment of testamentary guardians in the Australian Capital Territory is governed by the Tenures Abolition Act 1660 (Imperial) which applies by virtue of the Seat of Government Acceptance Act 1909. The Tenures Abolition Act 1660 (Imperial) enables a father to appoint a guardian of his (legitimate) child, and provides that 'popish recusants' may not be appointed as guardians.

The principle of the Ordinance is that any person who is a guardian of a child may appoint a testamentary guardian. Thus both parents of a legitimate child, and any person who is lawfully appointed as a guardian of a child, will be able to appoint a testamentary guardian. The only exception to this principle is where a Minister of State is a guardian by virtue of his office.

However, a parent or other guardian whose guardianship has been abrogated by order of a court will not be able to appoint a testamentary guardian.

In addition, the mother of an illegitimate child will be able to appoint a testamentary guardian for that child.

The father of an illegitimate child, if appointed as guardian of that child would, under the Ordinance, be able to appoint a testamentary guardian.

Details of the Ordinance are as follows:

Section 1 provides that the Ordinance may be cited as the Testamentary Guardianship Ordinance 1984.

Section 2 contains definitions for the purposes of the Ordinance.

'Child' is defined to include any person who is less than 18 years old, except a person who has been married. Guardianship is not appropriate to such a person.

The definition of 'ex-nuptial child' takes account of the legitimisation provisions of the Marriage Act 1961.

This section provides that references in the Ordinance to a parent of a child refer to both parents of a legitimate child, and the mother of an ex-nuptial child, but do not include any parent who was a guardian of the child but whose guardianship has been abrogated by order of a court in Australia, or of an overseas court where the order of that court would be recognised by a court in the Territory in accordance with the rules of private international law.

In its terminology, this Ordinance distinguishes between a parent of a child (as earlier defined) who is a guardian, and other guardians. Thus, references in this Ordinance to a guardian of a child are to any person (other than a parent of the child (as defined)) who is a guardian of the child, whether appointed in accordance with the law of an Australian State or Territory; by order of an Australian court; or in accordance with the law of another country, or by an order of a court of another country (where the appointment would be recognised by a court of the Territory in conformity with the rules of private international law). However, a Minister of State who is a guardian of a child in his capacity as a Minister of State is not included.

Section 3 provides that the application of the Ordinance to a child is not affected by the place or the date of his birth. It also makes it clear that the Ordinance is not intended to affect the law relating to adoption.

Section 4 confers on each parent (as defined in section 2) and each guardian (as defined in section 2) of a child the power to appoint one or more testamentary guardians. The appointment may be made by will or codicil.

Section 5 provides that an appointment by a person, who was not, immediately before his death, a parent or a guardian of the child, is of no effect. By virtue of this section, in conjunction with section 2, an appointment by a parent whose right of guardianship has been removed by a court order will not take effect.

Section 6 determines the time at which an appointment of a testamentary guardian takes effect.

Where there is a surviving parent, the time of appointment is determined, in the first instance, by the intentions of the appointor. The appointment is to take effect on the death of the appointor if the instrument of appointment shows that was his intention. If no such intention is shown, the appointment becomes effective on the death of the surviving parent. The operation of these rules can, however, be varied by order of the Court under section 8.

Where the appointor is not survived by a parent of the child the appointment takes effect on the death of the appointor.

Section 7 sets out the powers and responsibilities of a testamentary guardian. The section distinguishes guardianship and custody in the same manner as the Family Law Act 1974.

A testamentary guardian is to be responsible for the long-term welfare of the child and has all the powers, rights and duties vested by law or custom in the guardian of a child, except the custody of the child. However, where no parent of the child is alive, and no order of a court granting, or having the effect of granting, custody to another person is in force, the testamentary guardian is to be entitled to custody of the child. A testamentary guardian is to carry out his responsibilities jointly with any other guardian (including a parent who is a guardian).

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Section 8 enables the Supreme Court to vary the operation of the rules in section 6 for the taking effect of an appointment of a testamentary guardian where a parent of the child is alive.

A testamentary guardian whose appointment by virtue of section 6 does not come into effect on the death of the appointor may apply to the Court for an order that his appointment take effect immediately.

Also, where the appointment of a testamentary guardian has taken effect, and a parent of the child is alive, that parent may apply to the Court for an order suspending the guardianship of the testamentary guardian until the death of the parent or for some other period.

Section 9 provides that the Ordinance does not affect the powers of the Supreme Court relating to guardianship and custody - in particular, the powers to settle disputes between persons entitled to guardianship of the child, to appoint a guardian and to revoke an appointment of a guardian are preserved.

Section 10 amends the Second Schedule to the Seat of Government (Administration) Ordinance 1930, in order to vest responsibility for administration of the Ordinance in the Attorney-General.

Section 11 repeals sections 8 and 9 of the Tenures Abolition Act 1660 (Imperial) in their application to the Australian Capital Territory.

9/84

Authorised by the Attorney-General