

SUCCESSION AND OTHER ACTS AMENDMENT BILL 2000

EXPLANATORY NOTES

GENERAL OUTLINE

Objective of the Bill

The Bill will allow a parent or guardian of a child to appoint a person as a guardian of the child by will to take effect either on the death of the parent or guardian, or on the death of the child's last remaining parent.

Reasons for the Bill

The *Children's Services Act 1965* (the repealed Act) was replaced by the *Child Protection Act 1999* on 23 March 2000.

Section 90 of the repealed Act allowed a parent of a child to appoint a person as a guardian of the child under the person's will. Under the repealed Act, a person appointed as a guardian under a parent's will would then have all of the necessary powers in relation to that child including the ability to take the child into his or her care.

It is likely that many parents have provided for the guardianship of their children under existing wills. The effect of the repeal of section 90 is that these directions will now only amount to the expression of a wish with no legal effect.

The Bill is designed to re-instate this power, to allow parents to make a legally effective appointment of a person as a guardian of a child in the event of their death.

Alternatives to this Bill

Section 90 of the repealed Act provided the only power for parents to make the decision about the guardianship of their children in the event of their death. Without this power, an application will now have to be made either to the Children's Court for a care and protection order granting the long term guardianship of a child under the *Child Protection Act 1999*, or to the Family Court for an order under the *Family Law Act 1975*.

It is considered that it is more appropriate to provide parents with the capacity to make the essentially private decision about the person that they would like to care for their children in the event of their death.

Administrative cost to Government

There will be little or no administrative cost to Government in implementing the proposed legislation.

Consistency with Fundamental Legislative Principles

The Bill is consistent with the fundamental legislative principles contained in the *Legislative Standards Act 1992*. Although it is proposed that the legislation will have retrospective effect in that it will apply from 23 March 2000, this effect will be for the benefit of the individuals concerned and does not breach fundamental legislative principles.

Consultation

- ***Community***

The Succession Law Committee, Queensland Law Society was heavily consulted during the development of this Bill and supports the proposed legislation.

- ***Government***

The Department of Justice and Attorney-General developed the Bill in conjunction with Families, Youth and Community Care Queensland. The Department of the Premier and Cabinet was also consulted.

NOTES ON PROVISIONS

PART 1—PRELIMINARY

Clause 1 provides that the short title of the proposed Act is the Succession and Other Acts Amendment Act 2000.

Clause 2 states that the Act, other than part 4, is taken to have commenced on 23 March 2000. This is the date of commencement of the *Child Protection Act 1999* and the date of repeal of the *Children's Services Act 1965*.

Part 4 amends the *Child Protection Act 1999* by inserting a new section 259A. The amendment is not made retrospectively, but the new section inserted by the amendment is expressed, in subsection (4), to have retrospective effect to 23 March 2000.

This approach has been taken because of the renumbering of the *Child Protection Act 1999* in reprint 1. If the Act were amended retrospectively (to have effect from 23 March), the numbering of the new section and the description of where it was to be inserted would need to take account of the renumbering. This avoids the potential uncertainty of a retrospective amendment of the Act.

PART 2—AMENDMENT OF SUCCESSION ACT 1981

Clause 3 states that Part 2 of the proposed Act amends the *Succession Act 1981*.

Clause 4 inserts new **Part 5A—Testamentary Appointment of Guardians of Children** immediately following section 61 of the *Succession Act 1981*.

Division 1—Preliminary

Proposed Section 61A contains a number of definitions for the purposes of Part 5A:

The definition of “child” excludes individuals who are, or have been married as it would be inappropriate to authorise the appointment of a testamentary guardian for a person who is, or has been, married.

The definition of “guardian” excludes a person who has guardianship of a child through that person’s official capacity as the right to appoint a testamentary guardian should be a private right.

The term “parent” is defined to include a person regarded as the parent of a child under Aboriginal tradition or Island custom. However, a person is not considered to be a parent of a child if a decision or order of a court has ended the person’s parental responsibility for the child.

A “testamentary guardian” is a guardian of a child appointed by will.

Proposed **Section 61B** provides that part 5A applies to a child regardless of where or when the child was born. It will also apply regardless of when a will was made. This is appropriate because the power to appoint a testamentary guardian was previously provided under the repealed *Children’s Services Act 1965*.

Division 2—Appointment of testamentary guardian

Proposed **Section 61C** provides that a parent or guardian of a child may, by will, appoint a person as a guardian of a child. Subsection (2) provides that this appointment takes no effect if the person making the appointment was not a parent or guardian of the child immediately before the person’s death. This means that if a person was the parent or guardian of a child but then had the guardianship of the child removed before the person’s death, for example, by order of a court, the appointment will not take effect.

Proposed **Section 61D** states when an appointment of a guardian by will takes effect. This section provides that an appointment may take effect in three ways.

Firstly, if there is no parent of a child alive at the time of the appointer’s death, the appointment takes effect on the death of the appointer (subsection (2)).

Secondly, if one or more parents of the child are alive at the time of the appointer's death, and the appointer has expressed an intention in the will that the appointment take effect on the appointer's death, the appointment takes effect on the death of the appointer (subsection (3)(a)).

Thirdly, if one or more parents of the child are alive at the time of the appointer's death, and the appointer has not expressed an intention in the will that the appointment take effect on the appointer's death, the appointment takes effect on the death of the last remaining parent of the child (subsection (3)(b)).

Proposed **Section 61E** states the effect of appointment as a testamentary guardian.

This section distinguishes between decisions about the long-term care, welfare and development of a child, and decisions about the child's daily care.

On appointment, a testamentary guardian has all the powers, rights and responsibilities, for making decisions about the long-term care, welfare and development of the child, that are ordinarily vested in a guardian. (subsection (1)).

A testamentary guardian will only be given the right to care for the child, and the right and responsibility to make decisions about the child's daily care, ("daily care authority"), if the child has no surviving parent and no-one else has been given these rights under a decision or order of a court.

This means that the appointment as a testamentary guardian will not allow a person to interfere with the rights of a parent or other person who has been granted daily care authority for the child.

Proposed **Section 61F** provides that if a person is appointed as the testamentary guardian of a child who has 1 or more other guardians, the testamentary guardian is to act jointly with the other guardian or guardians.

Division 3—Applications to the Supreme Court

Proposed **Section 61G** provides that where an appointment of a testamentary guardian has not taken effect because the child has a surviving parent, the person may apply to the Supreme Court for an order that the appointment should take effect immediately.

Proposed **Section 61H** provides that where an appointment of a testamentary guardian of a child has taken effect, a surviving parent of the child may apply to the Supreme Court for an order that the appointment be revoked or suspended.

Proposed **Section 61I** provides that in considering an application made under Sections 61G or 61H, the Supreme Court may make the orders that it considers appropriate.

Proposed **Section 61J** provides that Division 3 does not limit the powers of the Supreme Court under another law. This means, for example, that the division is not intended to affect the Court's power under its inherent jurisdiction.

PART 3—AMENDMENT OF COMMONWEALTH POWERS (FAMILY LAW—CHILDREN) ACT 1990

Clause 5 states that the part amends the *Commonwealth Powers (Family Law-Children) Act 1990*.

Clause 6 amends section 3 of that Act. Subsection (1) makes a minor amendment to the section to remove to a reference to “schedule 1” and replace this with “the schedule” as there is only 1 schedule in the Act.

Subsection (2) provides that a reference to “an Act” includes a reference to a part of an Act. This is necessary because it is only Part 5A of the *Succession Act 1981* that is relevant to the operation of the *Commonwealth Powers (Family Law-Children) Act 1990*.

Clause 7 amends the schedule to the *Commonwealth Powers (Family Law-Children) Act 1990*. Subsection (1) makes a minor amendment to change the title of the schedule from “Schedule 1” to “Schedule”, as there is only one schedule in the Act.

Subsection (2) inserts proposed part 5A of the *Succession Act 1981* into the schedule. This has the effect of excluding the new provisions relating to testamentary guardianship from the general referral by the State to the Commonwealth of legislative powers relating to children. This will resolve any doubt about the State's capacity to legislate in the area of testamentary guardianship.

PART 4—AMENDMENT OF CHILD PROTECTION ACT 1999

Clause 8 states that part 4 amends the Child Protection Act 1999.

Clause 9 inserts a new section 259A into the Child Protection Act 1999.

Proposed Section 259A applies to appointments of a guardian of a child by deed under the *Children's Services Act 1965* if the deed was in force prior to the repeal of that Act.

Subsection (2) states that the deed has effect to the same extent as if the repealed Act had not been repealed.

Notwithstanding the effect of Section 20 of the *Acts Interpretation Act 1954*, there is a need to ensure that any relationships created between a child and a person appointed as a guardian of a child by deed are not affected by the repeal of the *Children's Services Act 1965*. Subsection (2) puts this beyond doubt.

Subsection (3) states that subsection (2) does not limit section 20 of the *Acts Interpretation Act 1954*.

Subsection (4) states that proposed section 259A has effect from 23 March 2000.

As discussed under clause 2, this avoids the potential uncertainty of a retrospective amendment of the Act.