

WESTERN AUSTRALIA

**ACTS AMENDMENT AND REPEAL
(FAMILY COURT) ACT 1997**

No. 41 of 1997

AN ACT to amend various Acts and to repeal the —

- ***Matrimonial Causes and Personal Status Code 1948***; and
- ***Matrimonial Causes Ordinance 1863***,

as a consequence of the enactment of the *Family Court Act 1997*.

[Assented to 9 December 1997.]

The Parliament of Western Australia enacts as follows:

PART 1 — PRELIMINARY

Short title

1. This Act may be cited as the *Acts Amendment and Repeal (Family Court) Act 1997*.

Commencement

2. This Act comes into operation on the day on which section 246 of the *Family Court Act 1997* comes into operation.

PART 2 — AMENDMENTS TO THE ADOPTION ACT 1994

Principal Act

3. In this Part the *Adoption Act 1994** is referred to as the principal Act.

[* *Act No. 9 of 1994.*

For subsequent amendments see Act No. 14 of 1996.]

Section 4 amended

4. (1) Section 4 (1) of the principal Act is amended in the definition of “Court” by deleting “created by the *Family Court Act 1975*”.

(2) Section 4 (3) of the principal Act is repealed.

Section 4A inserted

5. After section 4 of the principal Act the following section is inserted —

“

Presumptions of paternity

4A. Schedule 2A has effect.

”.

Section 7 amended

6. Section 7 of the principal Act is amended by deleting “custody” and substituting the following —

“

responsibility for the long-term and day-to-day care, welfare and development

”.

Section 21 amended

7. Section 21 (1) and (2) of the principal Act are repealed and the following subsections are substituted —

“

(1) The Director-General, or in the case of a proposed adoption by a step-parent of the child, the prospective adoptive parent, is to notify, in accordance with subsections (2), (2a) and (2b) —

- (a) any man who might be presumed to be the child's father because of a presumption set out in clause 4 or 5 of Division 2 of Schedule 2A; and
- (b) if applicable, any man (not being a man who could be presumed to be the child's father because of a presumption set out in Division 2 of Schedule 2A) who, to the knowledge of the Director-General or that prospective adoptive parent, is a person who has been named as or has claimed to be the child's father.

(2) The notification referred to in subsection (1) is to inform the man —

- (a) of the consent or consents to the child's adoption;
- (b) that if, before the proposed adoption proceeds, he wishes to apply under the *Family Court Act 1997* or the *Family Law Act 1975* of the Commonwealth (as is applicable to the case) for a parenting order in relation to the child then he must do so within 21 days of service of the notice; and

- (c) that if, before the proposed adoption proceeds, he wishes to apply under Division 3A for a determination of the matter of the child's parentage only then he must do so within 21 days of service of the notice,

but nothing in this section requires all the information to be served at the same time.

(2a) The notification referred to in subsection (1) is to be in writing and served on the man personally or by registered post at the man's last known address.

(2b) The Director-General, or in the case of a proposed adoption by a step-parent of the child, the prospective adoptive parent is to ensure that notification of all the information referred to in subsection (2) is, or has been, served on the man no later than 7 days after the day on which the first completed form of consent to the child's adoption was received.

”.

Section 22 amended

8. Section 22 (3) of the principal Act is amended by inserting after “section 26 (4)” the following —

“ and section 26J ”.

Section 24 amended

9. Section 24 (2) (f) of the principal Act is amended by deleting “custody” and substituting the following —

“ responsibility for the day-to-day care ”.

Section 25 amended

10. Section 25 of the principal Act is amended —

- (a) in subsection (1) (a) by deleting “section 21 (1)” and substituting the following —
“ section 21 (2a) ”;
- (b) in subsection (1) (b) by deleting “section 21 (1)” and substituting the following —
“ section 21 (2b) ”;
- (c) in subsection (2) by deleting “section 21 (1)” and substituting the following —
“ section 21 (2a) ”; and
- (d) in subsection (3) by deleting “section 21 (1)” and substituting the following —
“ section 21 (2b) ”.

Section 26 repealed and a section substituted

11. Section 26 of the principal Act is repealed and the following section is substituted —

“
Application for parenting order

- 26.** (1) On an application mentioned in section 21 (2) (b) for a parenting order in relation to a prospective adoptee (an “**application**”), the Court —
- (a) may make an interim parenting order in relation to the child; and
 - (b) is to have regard to the principle that an application and the final orders arising from the application should be determined expeditiously.

(2) Notice of an application is to be served on —

- (a) a person whose consent to the adoption is required and has not been dispensed with; and
- (b) any other person who is a party to the proposed adoption,

and the person may be joined as a party in the proceedings.

(3) The Court may extend the period of time allowed by section 21 (2) (b) for filing an application.

(4) If an application is made, a person who has consented to the child's adoption may revoke her or his consent, even though the revocation period has expired; but the person may not revoke her or his consent after 14 days from the day on which the final court order arising from the application is made.

”.

Division 3A inserted in Part 3

12. After section 26 of the principal Act the following Division is inserted —

“

Division 3A — Court applications for determinations of parentage

Definitions

26A. In this Division —

“**application**” means an application made under section 26C;

“**parentage testing order**” means an order of the kind mentioned in section 26D (1) (c).

Application of this Division

26B. This Division applies where a person makes an application for a determination of the matter of a child's parentage only and does not apply where a person applies for an order under the *Family Court Act 1997* or the *Family Law Act 1975* of the Commonwealth.

Application for determination of parentage

26C. (1) Before an application for an adoption order in relation to a child is filed, an application may be made to the Court —

- (a) by any man who might be presumed to be the child's father because of a presumption set out in Division 2 of Schedule 2A;
- (b) by a man who has received a notice under section 21 (1);
- (c) by the Director-General;
- (d) in the case of a proposed adoption by a step-parent of the child, by the prospective adoptive parent; or
- (e) on behalf of the child,

for the determination of the matter of the child's parentage.

(2) Notice of an application is to be served on —

- (a) a person whose consent to the adoption is required and has not been dispensed with; and
- (b) any other person who is a party to the proposed adoption.

Orders on application for determination of parentage

26D. (1) On an application the Court —

- (a) may extend the period of time allowed by section 21 (2) (c) for filing the application;
- (b) may make an order requiring any person to give such evidence as is material to the question; or
- (c) may make an order requiring a parentage testing procedure to be conducted in relation to a person mentioned in subsection (2) for the purpose of obtaining information to assist in determining the parentage of the child.

(2) A parentage testing order may be made in relation to —

- (a) the child;
- (b) a person known to be the mother of the child; or
- (c) any other person, if the Court is of the opinion that, if the parentage testing procedure were to be conducted in relation to the person, the information that could be obtained might assist in determining the parentage of the child.

(3) A parentage testing order may be made subject to terms and conditions.

Orders associated with parentage testing orders

26E. (1) If the Court makes a parentage testing order, it may also make orders under subsection (2) or (4).

(2) The Court may make such orders as it considers necessary or desirable —

- (a) to enable the parentage testing procedure to be conducted; or
- (b) to make the parentage testing procedure more effective or reliable.

(3) Some examples of the kinds of orders the Court may make under subsection (2) are as follows —

- (a) an order requiring a person to submit to a medical procedure;
- (b) an order requiring a person to provide a bodily sample;
- (c) an order requiring a person to provide information relevant to the person's medical or family history.

(4) The Court may make such orders as it considers just in relation to costs incurred in relation to —

- (a) conducting the parentage testing procedure or other orders made by the Court in relation to the parentage testing procedure; or
- (b) the preparation of reports relating to the information obtained as a result of conducting the parentage testing procedure.

Orders directed to persons 18 or over

26F. (1) If a person who is 18 or more years of age contravenes a parentage testing order or an order under section 26E, the person is not liable to any penalty in relation to the contravention.

(2) The Court may draw such inferences from the contravention as appear just in the circumstances.

(3) Nothing in subsection (1) prevents an order made under section 26E (4) in relation to costs from being enforced and such order may be enforced as if it were an order made by the Court under the *Family Court Act 1997*.

Orders directed to children under 18

26G. (1) This section applies if a parentage testing order, or an order under section 26E, requires a medical procedure or other act to be carried out in relation to a child who is under 18 years of age.

(2) The procedure or act must not be carried out in relation to the child under the order without the consent of —

- (a) a guardian of the child; or
- (b) a person who is responsible for the child's long-term welfare and development.

(3) The Court may draw such inferences from a failure or refusal to consent as mentioned in subsection (2) as appear just in the circumstances.

No liability if parent etc. consents

26H. (1) A person who conducts, or who assists in conducting, a medical procedure or other act in relation to a child under a parentage testing order is not liable to any civil action in relation to the proper conducting of the procedure or act if it is done with the consent of —

- (a) a guardian of the child; or
- (b) a person who is responsible for the child's long-term welfare and development.

(2) Subsection (1) does not affect any liability of a person for an act done negligently, or negligently omitted to be done, in relation to conducting the medical procedure or act.

Reports of information obtained may be received in evidence

26I. (1) A report made for the purposes of this Division in accordance with regulations may be received in evidence in any proceedings under this Act.

(2) If, under subsection (1), a report is received in evidence in proceedings under this Act, the Court may make an order requiring the person who made the report, or any person whose evidence may be relevant in relation to the report, to appear before the Court and give evidence in relation to the report.

Revocation of consent

26J. If an application is made, a person who has consented to the child's adoption may revoke her or his consent, even though the revocation period has expired; but the person may not revoke her or his consent after 14 days from the day on which the Court determines the matter of the child's parentage.

”.

Section 27 amended

13. Section 27 (2) of the principal Act is amended by deleting “custody” and substituting the following —

“

the responsibility for the long-term and day-to-day care, welfare and development

”.

Section 28 amended

14. Section 28 (2) (b) of the principal Act is amended by deleting “custody” and substituting the following —

“ care and control ”.

Section 48 amended

15. Section 48 (1) of the principal Act is amended by deleting “in the custody of” and substituting the following —

“ with ”.

Section 68 amended

16. Section 68 (1) (c) of the principal Act is amended by inserting after “section 21 (2) (b)” the following —

“ or (c) ”.

Section 71 amended

17. Section 71 of the principal Act is amended —

(a) by deleting “*Family Court Act 1975*” and substituting the following —

“ *Family Court Act 1997* ”; and

(b) by inserting after “25 (1)” the following —

“ 26D, 26E, ”.

Section 72 amended

18. Section 72 (2) of the principal Act is amended —

(a) in paragraph (a) by deleting subparagraph (ii) and substituting the following subparagraph —

“ (ii) exercise its powers under the *Family Court Act 1997* as it thinks fit, to enforce a provision of the plan, as if the provision were an order made by the Court under that Act;

and

(b) by deleting paragraph (b) and substituting the following paragraph —

“ (b) in the case of a breach of any provision of the plan, the Court may deal with the matter as if the person who breached the provision had contravened an order made by the Court under the *Family Court Act 1997* or had been in contempt of the Court.

Section 75 amended

19. Section 75 (6) of the principal Act is repealed.

Section 77 amended

20. (1) Section 77 (5) (c) of the principal Act is deleted and the following paragraph is substituted —

“ (c) guardianship of the adoptee or any other matter affecting the adoptee in relation to the duties, powers, responsibilities and authority which, by law, parents have in relation to children; or

(2) Section 77 (8) (b) of the principal Act is deleted and the following paragraph is substituted —

“ (b) under section 211 (3) of the *Family Court Act 1997*. ”.

Section 115 amended

21. Section 115 (1) of the principal Act is amended by deleting “section 81 (2) of the *Family Court Act 1975*” and substituting the following —

“ section 211 (2) of the *Family Court Act 1997* ”.

Section 119 amended

22. Section 119 of the principal Act is amended by deleting “section 81 (2a) of the *Family Court Act 1975* to appeal from a decree, within the meaning of section 81 (1)” and substituting the following —

“ section 211 (3) of the *Family Court Act 1997* to appeal from a decree, within the meaning of section 211 (1) ”.

Section 124 amended

23. Section 124 (2) (b) of the principal Act is amended by deleting “section 82C (9) of the *Family Court Act 1975*” and substituting the following —

“ section 243 (8) of the *Family Court Act 1997* ”.

Section 138 amended

24. Section 138 (1) (d) (i) of the principal Act is amended by deleting “the custody of the adoptee” and substituting the following —

“ all the duties, powers, responsibilities and authority which, by law, parents have in relation to children ”.

Section 142 amended

25. Section 142 (2) (a) of the principal Act is amended by deleting “*Family Court Act 1975*” and substituting the following —

“ *Family Court Act 1997* ”.

Section 143 amended

26. Section 143 of the principal Act is amended by repealing subsection (2) and substituting the following subsections —

“

(2) Without limiting the generality of subsection (1), regulations may —

- (a) be made for the purpose of prescribing the fees to be payable in relation to proceedings in the Court under this Act;
- (b) provide for the conduct of parentage testing procedures under parentage testing orders; and
- (c) provide for the preparation of reports relating to the information obtained as the result of conducting such procedures.

(2a) If no provision is made by regulation under subsection (1) or (2) in relation to a matter for which regulations may be made under either of those subsections —

- (a) the provisions of the regulations under the *Family Court Act 1997* that are most nearly applicable in relation to the matter are to apply; or

- (b) if there is no provision such as that mentioned in paragraph (a), the regulations under the *Family Law Act 1975* of the Commonwealth that are most nearly applicable in relation to the matter are to apply.

”.

Schedule 2A inserted

27. After Schedule 2 of the principal Act the following Schedule is inserted —

“

SCHEDULE 2A — PRESUMPTIONS OF PATERNITY

[section 4A]

Division 1 — General

Presumptions of paternity set out in Division 2 apply to children and adoptees

1. For the purposes of this Act, a man is to be treated as —
- (a) the father of a person who is a prospective adoptee; or
 - (b) a birth parent of a person who is an adoptee (whether or not the adoptee is 18 or more years of age),

if the man is presumed to be the person's father because of a presumption of paternity set out in Division 2.

Paternity may be proved by other evidence

2. Nothing in clause 1 prevents a man from being proved to be the father of a child or adoptee even though clause 4, 5, 6 or 8 of Division 2 might not apply to him.

Transitional

3. If —
- (a) a child's father's consent to the adoption of the child is required under this Act;

- (b) before this Act was amended by the *Acts Amendment and Repeal (Family Court) Act 1997*, a man to whom section 4 (3) applied had given effective consent to the adoption; and
- (c) the consent had not been revoked by the day on which the *Acts Amendment and Repeal (Family Court) Act 1997* came into operation,

then the effective consent is to be treated as having been given by a man presumed under this Schedule to be the child's father.

Division 2 — Presumptions of paternity and rebuttal of presumptions

Presumptions of paternity arising from marriage

4. (1) If a child is born to a woman while she is married then the woman's husband is presumed to be the child's father.

(2) If —

(a) at a particular time —

- (i) a marriage to which a woman is a party is ended by death; or
- (ii) a purported marriage to which a woman is a party is annulled;

and

(b) a child is born to the woman within 44 weeks after that time,

then the woman's husband or purported husband is presumed to be the child's father.

(3) If —

- (a) the parties to a marriage separated at any time;
- (b) after the separation, they resumed cohabitation on one occasion;
- (c) within 3 months after the resumption of cohabitation, they separated again and lived separately and apart; and

- (d) a child is born to the woman within 44 weeks after the end of the cohabitation, but after the dissolution of the marriage,

then the woman's husband is presumed to be the child's father.

Presumption of paternity arising from cohabitation

5. If —

- (a) a child is born to a woman; and
- (b) at any time during the period beginning not earlier than 44 weeks and ending not less than 20 weeks before the birth, the woman cohabited with a man to whom she was not married,

then the man is presumed to be the child's father.

Presumption of paternity arising from registration of birth

6. If a man's name is entered as the father of a child in a register of births or parentage information kept under a law of the Commonwealth or of a State, Territory or prescribed overseas jurisdiction then the man is presumed to be the child's father.

Presumptions of paternity arising from findings of courts

7. (1) If —

- (a) during the lifetime of a particular man, a court has —
 - (i) found expressly that the man is the father of a particular child; or
 - (ii) made a finding that it could not have made unless the man was the father of a particular child;

and

- (b) the finding has not been altered, set aside or reversed,

then the man is conclusively presumed to be the child's father.

(2) If —

(a) after the death of a particular man, a court has —

- (i) found expressly that the man was the father of a particular child; or
- (ii) made a finding that it could not have made unless the man was the father of a particular child;

and

(b) the finding has not been altered, set aside or reversed,

then the man is presumed to have been the child's father.

(3) For the purposes of this clause —

“**court**” means a federal court, a court of a State or a Territory or a court of a prescribed overseas jurisdiction.

Presumption of paternity arising from acknowledgments

8. If a man acknowledges in a statutory declaration that he is the father of a particular child and the mother of the child endorses the acknowledgment in a statutory declaration then the man is presumed to be the child's father.

Rebuttal of presumptions etc.

9. (1) A presumption arising under this Division is rebuttable by proof on a balance of probabilities.

(2) Where —

- (a) 2 or more presumptions arising under this Division are relevant in any proceedings under this Act; and
- (b) those presumptions, or some of those presumptions, conflict with each other and are not rebutted in the proceedings,

the presumption that appears to the Court to be the more or most likely to be correct prevails.

(3) This clause does not apply to a presumption arising under clause 7 (1).

”.

Postal provisions amended

28. The provisions of the principal Act set out in the Table to this section are amended by deleting in each place where it occurs “certified mail” and substituting the following —

“ registered post ”.

TABLE

s. 33 (4)

s. 58 (1)

s. 59 (2)

PART 3 — AMENDMENTS TO OTHER ACTS

Child Welfare Act 1947

29. (1) In this section the *Child Welfare Act 1947** is referred to as the principal Act.

[* *Reprinted as at 12 July 1995.*
*For subsequent amendments see 1995 Index to
Legislation of Western Australia, Table 1, p. 32 and
Acts Nos. 78 and 79 of 1995.]*

(2) Section 40A (3) of the principal Act is repealed and the following subsection is substituted —

“
 (3) Where an order is made under this section for the payment of maintenance, the court shall cause a certified copy of the order to be sent to the Family Court for registration in accordance with the *Family Court Act 1997* and the order shall, when so registered, be deemed, for all purposes, to be an order of the Family Court.
”

(3) Section 49 (3) of the principal Act is repealed and the following subsection is substituted —

“
 (3) Where an order for the payment of maintenance for a child has been registered under section 40A in the Family Court and the Minister makes an order under this section, the Department shall cause a copy of the order of the Minister to be sent to the Family Court for registration in accordance with the *Family Court Act 1997* and the order shall, when so registered, be deemed, for all purposes, to be an order of the Family Court.
”

(4) Section 66D (3) of the principal Act is repealed and the following subsection is substituted —

“

(3) Where an order is made under this section the court shall cause a certified copy of the order to be sent to —

- (a) the Family Court; or
- (b) a court of a kind referred to in section 39 (a) of the *Family Court Act 1997* that can, under that section, exercise the Family Court’s non-federal jurisdictions,

whichever is nearest to the place at which the order was made, for registration in accordance with the *Family Court Act 1997* and the order shall, when so registered, be deemed, for all purposes, to be an order made under that Act by the Family Court or the court referred to in paragraph (b), as the case requires.

”.

Corporations (Western Australia) Act 1990

30. The *Corporations (Western Australia) Act 1990** is amended —

- (a) in section 52A (2) by deleting “section 88A of the *Family Court Act 1975*” and substituting the following —

“ section 244 of the *Family Court Act 1997* ”; and

- (b) in section 52B (1) by deleting “section 88A of the *Family Court Act 1975*” and substituting the following —

“ section 244 of the *Family Court Act 1997* ”.

[* *Act No. 105 of 1990.*

For subsequent amendments see 1995 Index to Legislation of Western Australia, Table 1, p. 50.]

Equal Opportunity Act 1984

31. Section 66ZN (2) (d) of the *Equal Opportunity Act 1984** is amended by deleting “*Family Court Act 1975*” and substituting the following —

“ *Family Court Act 1997* ”.

[* *Reprinted as at 16 April 1996.*

For subsequent amendments see Acts Nos. 78 of 1995 and 14, 42 and 43 of 1996.]

Guardianship and Administration Act 1990

32. Section 45 (1) of the *Guardianship and Administration Act 1984** is repealed and the following subsection is substituted —

“ (1) Subject to section 43 (3), where a person is appointed as a plenary guardian, or 2 or more persons are appointed as joint plenary guardians, he or they have all of the functions in respect of the person of the represented person that are, under the *Family Court Act 1997*, vested in a person in whose favour has been made —

(a) a specific issues order which confers responsibility for the long-term care, welfare and development of a child; and

(b) a specific issues order which confers responsibility for the day-to-day care, welfare and development of a child,

as if the represented person were a child lacking in mature understanding, but a plenary guardian does not, and joint plenary guardians do not, have the right to chastise or punish a represented person.

”.

[* *Act No. 24 of 1990.*

For subsequent amendments see 1995 Index to Legislation of Western Australia, Table 1, p. 95 and Act No. 7 of 1996.]

Interpretation Act 1984

33. Section 5 of the *Interpretation Act 1984** is amended by deleting the definition of “Family Court” and substituting the following definition —

“**Family Court**” or “**Family Court of Western Australia**” means the Family Court of Western Australia continued by the *Family Court Act 1997*;

[* Reprinted as at 15 March 1996.
For subsequent amendments see Act Nos. 78 of 1995
and 14 of 1996.]

Parliamentary Commissioner Act 1971

34. Section 13 (2) (f) of the *Parliamentary Commissioner Act 1971** is amended by deleting “the Registrar” and substituting the following —

“ the Principal Registrar, a Registrar ”.

[* Reprinted as at 20 January 1997.]

Registration of Births, Deaths and Marriages Act 1961

35. Section 29 (2) of the *Registration of Births, Deaths and Marriages Act 1961** is repealed and the following subsection is substituted —

“
(2) The Registrar General may authorize an alteration or addition to the register under this section —
(a) on the application of one of the parents of the child if the applicant is the sole parent named in the registration of the child’s birth;

- (b) on the application of one of the parents of the child if the other parent is dead;
- (c) on the application of one of the parents of the child if the Family Court has approved the proposed change of name; or
- (d) in the case where both of the parents of the child are dead, cannot be found, or for some other reason cannot exercise their parental responsibilities in relation to the child, on the application of the child's guardian.

”.

[* Reprinted as at 15 April 1994.
For subsequent amendments see 1995 Index to
Legislation of Western Australia, Table 1, p. 188 and
Act No. 2 of 1996.]

Restraining Orders Act 1997

36. Section 5 of the *Restraining Orders Act 1997** is repealed and the following section is substituted —

“

Meaning of “family order”

- 5.** (1) A reference in this Act to a “**family order**” is a reference to —
- (a) a residence order made under the *Family Law Act 1975* of the Commonwealth or the *Family Court Act 1997*, as is relevant to the case;
 - (b) a contact order made under the *Family Law Act 1975* of the Commonwealth or the *Family Court Act 1997*, as is relevant to the case;

- (c) any of the things set out in subsection (2) —
 - (i) to the extent that the thing deals with the person or persons with whom a child is to live; or
 - (ii) to the extent that the thing requires or authorizes (expressly or impliedly) contact between a child and another person or other persons;
- (d) a right or liability within the meaning of the *Family Court of Western Australia (Orders of Registrars) Act 1997* of the Commonwealth that —
 - (i) is in respect of a matter to which paragraph (a), (b) or (c) applies; and
 - (ii) is conferred, imposed or affected by section 5 of that Act¹.

Note: 1. The effects of the transitional provisions of the *Family Law Reform Act 1995* of the Commonwealth apply to rights and liabilities referred to in the *Family Court of Western Australia (Orders of Registrars) Act 1997* of the Commonwealth — s. 4 (5) of the latter Act.

- (2) The things referred to in subsection (1) (c) are —
 - (a) a recovery order, a specific issues order or any other order (however described) made;
 - (b) an injunction granted;
 - (c) an undertaking given to, and accepted by, a court;
 - (d) a parenting plan registered; or

PART 4 — REPEALS

Repeals

38. (1) The *Matrimonial Causes and Personal Status Code 1948* is repealed.

(2) The *Matrimonial Causes Ordinance 1863* is repealed.