

HUMAN RIGHTS COMMISSION

REPORT NO. 3

**TESTAMENTARY GUARDIANSHIP IN  
THE  
AUSTRALIAN CAPITAL TERRITORY**

APRIL 1983

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Human Rights Commission  
G.P.O. Box 629  
Canberra, A.C.T. 2601

15 APRIL 1983

Senator the Hon. Gareth Evans  
Attorney-General  
Parliament House  
Canberra, A.C.T. 2600

Dear Attorney-General,

Pursuant to paragraph 9 (1) (c) of the *Human Rights Commission Act 1981* this report is presented to you following the Human Rights Commission's examination of the law in the Australian Capital Territory relating to testamentary guardianship.

Yours sincerely,

A handwritten signature in black ink on a light-colored rectangular background. The signature is written in a cursive style and reads "Roma Mitchell".

*Chairman*  
for and on behalf of the  
Human Rights Commission

**Members of the Human Rights Commission**

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## THE FUNCTIONS OF THE COMMISSION

Section 9 of the *Human Rights Commission Act 1981* reads:

9. (1) The functions of the Commission are—
- (a) to examine enactments, and (when requested to do so by the Minister) proposed enactments, for the purpose of ascertaining whether the enactments or proposed enactments are, or would be, inconsistent with or contrary to any human rights, and to report to the Minister the results of any such examination;
  - (b) to inquire into any act or practice that may be inconsistent with or contrary to any human right, and—
    - (i) where the Commission considers it appropriate to do so—endeavour to effect a settlement of the matters that gave rise to the inquiry; and
    - (ii) where the Commission is of the opinion that the act or practice is inconsistent with or contrary to any human right, and the Commission has not considered it appropriate to endeavour to effect a settlement of the matters that gave rise to the inquiry or has endeavoured without success to effect a settlement of those matters—to report to the Minister the results of its inquiry and of any endeavours it has made to effect such a settlement;
  - (c) on its own initiative or when requested by the Minister, to report to the Minister as to laws that should be made by the Parliament, or action that should be taken by the Commonwealth, on matters relating to human rights;
  - (d) when requested by the Minister, to report to the Minister as to the action (if any) that, in the opinion of the Commission, needs to be taken by Australia in order to comply with the provisions of the Covenant, of the Declarations or of any relevant international instrument;
  - (e) on its own initiative or when requested by the Minister, to examine any relevant international instrument for the purpose of ascertaining whether there are any inconsistencies between that instrument and the Covenant, the Declarations or any other relevant international instrument, and to report to the Minister the results of any such examination;
  - (f) to promote an understanding and acceptance, and the public discussions, of human rights in Australia and the external Territories;
  - (g) to undertake research and educational programs, and other programs, on behalf of the Commonwealth for the purpose of promoting human rights and to co-ordinate any such programs undertaken by any other persons or authorities on behalf of the Commonwealth;
  - (h) to perform—
    - (i) any functions conferred on the Commission by any other enactment;
    - (ii) any functions conferred on the Commission pursuant to any arrangement in force under section 11; and
    - (iii) any functions conferred on the Commission by any State Act or Northern Territory enactment, being functions that are declared by the Minister, by notice published in the *Gazette*, to be complementary to other functions of the Commission; and

- (j) to do anything incidental or conducive to the performance of any of the preceding functions.
- (2) The Commission shall not —
  - (a) regard an enactment or proposed enactment as being inconsistent with or contrary to any human right for the purposes of paragraph (1) (a) or (b) by reason of a provision of the enactment or proposed enactment that is included solely for the purpose of securing adequate advancement of particular persons or groups of persons in order to enable them to enjoy or exercise human rights equally with other persons; or
  - (b) regard an act or practice as being inconsistent with or contrary to any human right for the purposes of paragraph (1) (a) or (b) where the act or practice is done or engaged in solely for the purpose referred to in paragraph (a).
- (3) For the purpose of the performance of its functions, the Commission may work with and consult appropriate non-governmental organizations.





## I. INTRODUCTION

1. This report considers the present law in the Australian Capital Territory concerned with the appointment of testamentary guardians in the context of the International Covenant on Civil and Political Rights (ICCPR) and the Declaration of the Rights of the Child (the Children's Declaration).

2. The attention of the Commission has been drawn to a particular legal problem facing all women, and certain men, in the Australian Capital Territory. This problem, the legal basis of which is described at paragraphs 6 and 7 *infra*, is that female parents in the Australian Capital Territory and male parents of ex-nuptial children are unable to appoint testamentary guardians of their children. A number of female sole parents have complained to the Commission through the Legal Aid Office (A.C.T.) that, because they are women, they are unable to appoint a testamentary guardian for their child or children. This highlights the inequalities and discrimination involved in the present law. The Commission considers (see paragraph 10) that in the context of the ICCPR and the Children's Declaration, the present law is inconsistent with Articles 3, 23.4 and 24.1 of the ICCPR and Principles 2 and 6 of the Children's Declaration (the text of these Articles and Principles is reproduced in Appendixes 1 and 2 respectively).

3. The Commission is aware that, in 1974, the then Law Reform Commission of the Australian Capital Territory presented a report to the then Attorney-General on the Law of Guardianship and Custody of Infants in the Australian Capital Territory. In that report, the Commission (through Mr Justice Blackburn and Mr N. M. Macphillamy) advocated reform of the law relating to testamentary guardianship in the Australian Capital Territory (see paragraph 8).

4. Further, the Commission is aware that in 1978 there was a Committee appointed by the Attorney-General to examine the steps necessary to enable the Family Court to exercise certain additional jurisdiction in the Australian Capital Territory. The report of the Committee (referred to as the Ellis Committee) was presented to the Attorney-General in May 1980. In the report, this Committee considered the question of guardianship and custody of children in the Australian Capital Territory including the question of testamentary guardianship, and also advocated reform (see paragraph 9).

5. Eight years have now elapsed since the initial recommendations were made relating to the situation of women not being able to appoint testamentary guardians for their children, but it appears that the position remains unchanged. Bearing in mind that the Commission is now receiving complaints on the matter and that the complaints, in the view of the Commission, based on its charter, are well founded; and having regard to the heightened awareness in the community generally on matters relating to discrimination against women, the Commission considers that it is timely for the law on the subject to be brought up to date in this respect. Further delay, in the Commission's view, could not be justified and would not be acceptable to the community generally. Accordingly, the Commission, in making this report, proposes ways in which the law relating to testamentary guardianship in the Australian Capital Territory should be changed to bring it into line with the ICCPR and the Children's Declaration.

## II. THE LAW IN THE AUSTRALIAN CAPITAL TERRITORY RELATING TO TESTAMENTARY GUARDIANSHIP

6. At present, the Tenures Abolition Act 1660 (Imp.) governs both the appointment of testamentary guardians in the Australian Capital Territory (section 8) and their duties upon appointment (section 9). (The text of these sections of the Act is reproduced in Appendix 3.) The effect of section 8 is that a father may by will, or other testamentary deed, appoint a guardian for his legitimate children. However, if he does this but does not appoint the guardian to act jointly with the children's mother, she will lose all rights of guardianship which she would otherwise have. Further, such a father may appoint a guardian to act jointly with the mother whether she is content with such a joint guardianship or not. There is no provision for a mother to appoint a testamentary guardian or for a father to appoint a guardian of his ex-nuptial children. Section 9 of the Act deals with the powers and duties of a testamentary guardian over the child's property.

7. Therefore, the effect of the present law is that all women living in the Australian Capital Territory, whether they are married, unmarried, separated, divorced or widowed, are unable to make such provision for their children and that men living in the Australian Capital Territory are unable to make such provision in respect of their ex-nuptial children. The Commission is especially concerned that parents caring alone for their children be able to make adequate and proper arrangements for the guardianship of their children in the event of their death.

8. The then Law Reform Commission of the Australian Capital Territory, in reviewing the Act concerned, recommended, in effect, that the superiority in the position of the father should be abolished: both parents of a legitimate child should have equal rights to appoint testamentary guardians; and the mother of an ex-nuptial child should be able to appoint a testamentary guardian of that child. In considering the position of the father of an ex-nuptial child, the Commission noted that there was 'no merit in giving to the father of an illegitimate child the right to appoint during the life of the mother a testamentary guardian with effect from his death, when during his life he had no right to custody'. It also recommended that the powers of a testamentary guardian, notwithstanding anything to the contrary in the will appointing him/her, should be exercisable only on the death of the survivor of the parents but with some qualification in relation to a parent who has been deprived of custody by order of the court. It recommended that the court retain its inherent powers relating to the protection of children, including powers to appoint and remove guardians and resolve any disagreement between guardians. In relation to section 9 of the 1660 Act, the Law Reform Commission recommended that it cease to apply in the Australian Capital Territory and that it needed no replacement as the modern law of trusteeship was a complete substitute. (The text of the relevant recommendations of the report has been reproduced in Appendix 4.)

9. The Ellis Committee endorsed the proposed abolition of sections 8 and 9 of the Tenures Abolition Act 1660 and further recommended that the proposed A.C.T. legislation should include provisions authorising each parent (including the father of an ex-nuptial child whose paternity had been established) to appoint testamentary guardians provided that the court also had powers to remove guardians and resolve disputes between guardians. The Committee, in considering the position of the father of an ex-nuptial child, noted on the one hand the Report of the Law Reform Commission of the

Australian Capital Territory, which recommended against placing the father of an ex-nuptial child in an equal position with the mother in the absence of an order, and, on the other hand, the Guardianship of Infants Act 1940-1975 of South Australia which extended rights of guardianship and custody to such a father, once his paternity of the child had been established. The Ellis Committee then recommended that the father of an ex-nuptial child should have rights of guardianship and custody in respect of the child jointly with the mother in the absence of a court order, provided his paternity had been established by:

- (a) an acknowledgment by the father contained in the registration of the birth of the child, provided the acknowledgment was agreed to in writing by the mother;
- (b) an acknowledgment of paternity filed pursuant to the proposed Birth (Equality of Status) Ordinance by the father, provided it was agreed to in writing by the mother; or
- (c) a judicial determination that he is the father of the child, being a determination that is recognised in the A.C.T.

It was proposed that these recommendations be included in the draft of the proposed new A.C.T. Family Law Ordinance. (The text of the relevant recommendations is reproduced in Appendix 5.)

10. The Human Rights Commission considers that the present law of testamentary guardianship in the Australian Capital Territory is inconsistent with Articles 3, 23.4 and 24.1 of the ICCPR. Article 3 guarantees the equal rights of men and women to the enjoyment of all the civil and political rights in the Covenant. Article 23.4 requires equality of rights and responsibilities as between the partners to a marriage. Article 24.1 gives the child the right to such measures of protection as are required by his status as a minor. The present law relating to testamentary guardianship in the Australian Capital Territory does not give equal rights to both partners. The inability of a mother or a father to appoint a testamentary guardian for an ex-nuptial child has the effect of depriving that child of a measure of protection that would otherwise be available to the child.

11. Further, Principle 2 of the Children's Declaration states that the best interests of the child shall be paramount and that the enactment of laws shall protect the child in order that he may develop in a normal manner in conditions of freedom and dignity. Principle 6 further makes provision for the harmonious development and caring of a child. The rights contained within these Principles can only be fulfilled if both parents of a child, whether legitimate or ex-nuptial, are able to make proper arrangements for the care and support of such a child on their death.

12. For the reasons set out in paragraphs 10 and 11 the Human Rights Commission endorses the relevant recommendations of the Law Reform Commission, subject to incorporation of the recommendation of the Ellis Committee that, in effect, the father of an ex-nuptial child, once paternity has been established, be able to appoint a testamentary guardian for that child.

13. Bearing in mind the underlying principles traditionally applied by the courts, which require that the interests of the child should be paramount in any question of guardianship, and Principle 2 of the Children's Declaration, the Commission also considers that the courts should retain their inherent powers relating to the protection of children and recommends below accordingly.

### III. RECOMMENDATIONS

14. The Commission generally endorses the recommendations for reform of the law of testamentary guardianship put forward by the Law Reform Commission of the Australian Capital Territory in 1974 but would incorporate the recommendation of the Ellis Committee that, in effect, the father of an ex-nuptial child, once paternity has been established, be able to appoint a testamentary guardian for that child. As noted above (paragraph 5), the Commission is of the view that further delay in implementing those recommendations cannot be justified and would not be acceptable to the community generally. Those recommendations which involve Articles 3, 23.4 and 24.1 of the ICCPR and principles 2 and 6 of the Children's Declaration and the recommendations of the Commission are set out below and the Commission recommends that they be implemented forthwith.

- (1) Sections 8 and 9 of the Tenures Abolition Act 1660 (Imp.) cease to apply to the Australian Capital Territory.
- (2) (i) Each parent of a legitimate child may by will or codicil and not otherwise appoint a testamentary guardian of the child, and, if more than one guardian is appointed, they shall be joint guardians.
  - (ii) The mother of an ex-nuptial child may by will or codicil and not otherwise appoint a testamentary guardian of the child, and, if more than one guardian is appointed, they shall be joint guardians.
  - (iii) The father of an ex-nuptial child may, once his paternity has been established, by will or codicil and not otherwise, appoint a testamentary guardian of the child, and, if more than one guardian is appointed, they shall be joint guardians.
  - (iv) A father may establish his paternity of the ex-nuptial child by the following means:
    - (a) an acknowledgment by the father contained in the registration of the birth of the child, provided the acknowledgment was agreed to in writing by the mother;
    - (b) an acknowledgment of paternity filed pursuant to the proposed Birth (Equality of Status) Ordinance by the father, provided it was agreed to in writing by the mother; or
    - (c) a judicial determination that he is the father of the child, being a determination that is recognised in the A.C.T.
- (<sup>3</sup>) An appointment of a testamentary guardian by a person who immediately before his death is by virtue of an order of a court not entitled to the custody of a child shall be void.
  - (4) The powers of a testamentary guardian shall be exercisable:
    - (a) where a parent survives the death of the appointing parent, upon the death of such surviving parent;
    - (b) where the appointing parent is immediately before his death the survivor of the parents, upon the death of such appointing parent; and
    - (c) where immediately before the death of the appointing parent the other parent is by virtue of the order of a court not entitled to the custody of the child, upon the death of such appointing parent.
- (<sup>5</sup>) If two testamentary guardians of an illegitimate child are appointed, then such testamentary guardians shall act jointly in the interests of the child.

- (6) The court shall retain its inherent powers relating to the protection of children, including the following powers in relation to testamentary guardians:
- (a) to settle any disagreements between guardians whether appointed by the court or testamentary guardians;
  - (b) to remove any guardian, whether appointed by the court or a testamentary guardian; and
  - (c) to appoint another guardian or other guardians.

## APPENDIX 1

### International Covenant on Civil and Political Rights

(Relevant Articles)

#### *Article 3*

The States Parties to the present Covenant undertake to ensure the equal rights of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.

#### *Article 23*

1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.
2. The right of men and women of marriageable age to marry and to found a family shall be recognised.
3. No marriage shall be entered into without the free and full consent of the intending spouses.
4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution; in the case of dissolution, provision shall be made for the necessary protection of any children.

#### *Article 24*

1. Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.
2. Every child shall be registered immediately after birth and shall have a name.
3. Every child has the right to acquire a nationality.

## APPENDIX 3

### Tenures Abolition Act 1660 (Imp.) (Relevant Sections)

#### *Section 8*

8. Fathers may dispose of the custody of children during their minority; except popish recusants. Actions of ravishment of ward for guardians. —And . . . where any person hath or shall have any child or children under the age of twenty-one yeares and not married at the time of his death that it shall and may be lawfull to and for the father of such child or children, [whether borne at the time of the decease of the father or at that time in ventre sa mere, or whether such father be within the age] of twenty one yeares or of full age by his deed executed in his life time, or by his last will and testament in writeing in the presence of two or more credible witnesses in such manner and from time to time as he shall respectively thinke fitt to dispose of the custody and tuition of such child or children for and dureing such time as he or they shall respectively remaine under the age of twenty one yeares or any lesser time to any person or persons in possession or remainder other than popish recusants, and that such disposition of the custodie of such childe or children made since the twenty fourth of February one thousand six hundred forty five or hereafter to be made shall be good and effectual against all and every person or persons claiming the custody or tuition of such childe and children as guardian in soccage or otherwise; and that such person or persons to whom the custodie of such childe or children hath beene or shall be soe disposed or devised as aforesaid shall and may maintaine an action of ravishment of ward or trespasse against any person or persons which shall wrongfully take away or detaine such child or children for the recovery of such childe or children and shall and may recover damages for the same in the said action for the use and benefit of such childe or children.

#### *Section 9*

9. Custody of lands and personal estate of children, in guardians, who may bring action, etc. Proviso for London and other places as to orphans; and for apprentices.— And . . . that such person or persons to whom the custody of such childe or children hath beene or shall be soe disposed or devised shall and may take into his or their custody to the use of such childe or children the proffitts of all lande tenements and hereditaments of such childe or children, and alsoe the custody tuition and management of the goode chattells and personall estate of such childe or children till their respective age of twenty one yeares or any lesser time according to such disposition aforesaid, and may bring such action or actions in relation thereunto as by law a guardian in common soccage might doe provided alsoe that this Act or any thing therein contained shall not extend to alter or prejudice the custome of the city of London, nor of any other city or towne corporate, or of the towne of Berwicke on Tweede concerning orphans, nor to discharge any [apprentice] from his [apprentiship].

## APPENDIX 2

### Declaration of the Rights of the Child

(Relevant Principles)

#### *Principle 2*

The child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose, the best interests of the child shall be the paramount consideration.

#### *Principle 6*

The child, for the full and harmonious development of his personality, needs love and understanding. He shall, wherever possible, grow up in the care and under the responsibility of his parents, and, in any case, in an atmosphere of affection and of moral and material security; a child of tender years shall not, save in exceptional circumstances, be separated from his mother. Society and the public authorities shall have the duty to extend particular care to children without a family and to those without adequate means of support. Payment of State and other assistance towards the maintenance of children of large families is desirable.



## APPENDIX 5

### The Ellis Committee Report 1980

(Relevant Recommendations Relating to Testamentary Guardianship)

**20.** That the proposed Family Law Ordinance provide that the father of an ex-nuptial child is to have, in the absence of a court order, rights of guardianship and custody jointly with the mother if his paternity has been established by—

- (a) an acknowledgment by the father contained in the registration of the birth of the child, provided the acknowledgment was agreed to in writing by the mother;
- (b) an acknowledgment of paternity filed pursuant to the proposed Birth (Equality of Status) Ordinance by the father, provided it was agreed to in writing by the mother; or
- (c) a judicial determination that he is the father of the child, being a determination that is recognised in the A.C.T.

**22.** That ss, 8 and 9 of the Tenures Abolition Act 1660 in their application to the A.C.T. be repealed and replaced with provisions in the proposed Family Law Ordinance—

- (a) to permit either parent of a child to appoint a testamentary guardian; and
- (b) to enable the court to remove guardians and resolve disputes between them.

## APPENDIX 4

### **Report on the Law of Guardianship and Custody of Infants**

*Law Reform Commission of the Australian Capital Territory, 1974*

(Relevant Recommendations Relating to Testamentary Guardianship)

9. Sections 8 and 9 of the Tenures Abolition Act 1660 (Imp.) cease to apply to the Australian Capital Territory.
10. (1) A parent of a legitimate child may by will or codicil and not otherwise appoint a testamentary guardian of the child, and all guardians so appointed shall be joint guardians.
- (2) The mother of an illegitimate child may by will or codicil and not otherwise appoint a testamentary guardian of the child, and all guardians so appointed shall be joint guardians.
11. An appointment of a testamentary guardian by a person who immediately before his death is by virtue of an order of a Court not entitled to the custody of a child shall be void.
12. The powers of a testamentary guardian shall begin to be exercisable—
- (a) where a parent survives the death of the appointing parent, upon the death of such surviving parent;
  - (b) where the appointing parent is immediately before his death the survivor of the parents, upon the death of such appointing parent;
  - (c) where immediately before the death of the appointing parent the other parent is by virtue of the order of a court not entitled to the custody of the child, upon the death of such appointing parent.