

Family Law Amendment Regulations 2000 (No. 2) 2000 No. 81

EXPLANATORY STATEMENT

Statutory Rules 2000 No. 81

Issued by the Authority of the Attorney- General

Family Law Act 1975

Family Law Amendment Regulations 2000 (No. 2)

Section 125 of the *Family Law Act 1975* (the Act) provides that the Governor-General may make Regulations for the purposes of the Act. Section 110 of the Act provides that regulations may be made for, or in relation to, the registration and enforcement of overseas maintenance orders, and the institution of court proceedings on behalf of persons overseas entitled to maintenance.

Section 111 of the Act provides that regulations may make such provisions as is necessary to enable the performance of the obligations of Australia under the United Nations Convention on the Recovery Abroad of Maintenance 1956.

Section 124A of the Act provides for regulations to be made for, or in relation to, the following matters:

- (a) giving effect to an international agreement that relates to maintenance obligations arising from family relationship, parentage or marriage;
- (b) maintenance obligations arising from family relationship, parentage or marriage, where:
 - (i) the maintenance is claimed by or on behalf of a person who is in a reciprocating jurisdiction; or
 - (ii) the person from whom the maintenance is claimed is in a reciprocating jurisdiction.

The purpose of the Regulations is to provide for Australian courts to enforce overseas maintenance orders, or to make maintenance orders for the benefit of persons in countries with which Australia is entering new international maintenance agreements. These agreements are:

- (a) an agreement with New Zealand on child and spousal maintenance;
- (b) an agreement with the United States of America on the enforcement of family maintenance (support) obligations; and
- (c) the Hague Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations 1973.

The Regulations also amend existing Family Law Regulations dealing with the implementation of international maintenance agreements or arrangements to which Australia is already a party, including the United Nations Convention on the Recovery Abroad of Maintenance 1956. These amendments are consequential upon the making of the *Child Support (Registration and Collection) (Overseas-related Maintenance Obligations) Regulations 2000* and the *Child Support (Assessment) (Overseas-related Maintenance Obligations) Regulations 2000*.

The regulations:

- * add a number of countries to the list of reciprocating jurisdictions from which Australia will accept applications for enforcement of child and spousal maintenance liabilities;
- * provide for overseas maintenance decisions to be registered by the Registrar of the Child Support rather than by Australian Courts;
- * prevent courts in Australia issuing maintenance orders in overseas maintenance

cases where administrative assessments of child support could be issued by the Registrar of Child Support;

- * prevent courts in Australia issuing maintenance orders in cases where New Zealand courts have jurisdiction to make decisions in conformity with an Australia-New Zealand treaty on child and spousal maintenance;
- * enable the Secretary of the Attorney-General's Department, and persons authorised by the Secretary, to undertake functions carried out by the office of Controller of Overseas Maintenance and court registrars; and
- * make provision for determination of parentage disputes in court proceedings in overseas maintenance cases.

Details of the Regulations are set out in the Attachment.

The Regulations commence on 1 July 2000.

ATTACHMENT

FAMILY LAW AMENDMENT REGULATIONS 2000

Part 1 - Introductory

Regulation 1

Regulation 1 provides that these Regulations are the *Family Law Amendment Regulations 2000*.

Regulation 2

Regulation 2 provides that these Regulations commence on 1 July 2000.

Regulation 3

Regulation 3 provides that Schedule 1 in the Regulations amends the Family Law Regulations 1984.

Schedule 1

Item 1

Item 1 inserts a definition of Child Support Registrar in regulation 3 for the purposes of new regulation 21 (item 3 of the regulations) and new regulation 53 (item 32 of the regulations).

Item 2

Item 2 amends regulation 3 of the Family Law Regulations to replace the definition of Secretary. The new definition extends the definition to include a person authorised by the Secretary to perform the Secretary's functions under the Regulations. In practice the Secretary's functions will be carried out by officers of the Attorney-General's Department (carrying out administrative functions), the Australian Government Solicitor, State and Territory legal aid bodies, or private legal practitioners (representing overseas parties in maintenance proceedings in Australian courts) and private process servers (serving documents on request by overseas maintenance authorities).

Item 3

Item 3 substitutes regulation 21 of the Family Law Regulations to replace an existing provision relating to the determination of the conversion rate for overseas maintenance liabilities which are expressed in foreign currency. The revised regulation allows the use of a calculation of the conversion rate by the Child Support Registrar. In addition in the new regulation, references to 'registrar of a court' are replaced by references to 'the Secretary'. The purpose of this change is to enable the Secretary of the Attorney-General's Department, or a person acting for and on behalf of the Secretary, to take action formerly taken by court registrars in dealing with requests for enforcement of overseas maintenance liabilities.

Item 4

Item 4 inserts a new heading before regulations 24 and 25 of the Family Law Regulations to make clear that those provisions deal with custody matters.

Item 5

Item 5 repeals existing regulation 22 of the Family Law Regulations. This repeal is consequential upon the insertion of new regulation 24A (item 7 of the Regulations).

Item 6

Item 6 inserts a new heading before regulations 24A to 39 of the Family Law Regulations to make clear that those provisions deal with maintenance matters.

Item 7

Item 7 inserts a new section 24A in the Family Law Regulations to replace existing regulation 22 (item 4 of the Regulations). New section 24A repeats the definitions of 'maintenance order' and 'reciprocating jurisdiction' from existing regulation 22 and inserts new definitions of 'overseas maintenance entry liability' and 'registered maintenance liability' for the purposes of new regulations 30, 36 and 37.

Item 8

Item 8 repeals existing regulation 26 of the Family Law Regulations. Existing regulation 26 provides for the registration of overseas maintenance orders in Australian courts. Regulation 26 is repealed consequentially upon the making of regulations 12 and 22 of the *Child Support (Registration and Collection) (Overseas-related Maintenance Obligations) Regulations 2000*, which provide for registration of overseas maintenance liabilities in Australia.

Item 9

Item 9 repeals existing regulation 27 of the Family Law Regulations. Existing regulation 27 provides for the transmission of Australian maintenance orders to overseas countries for enforcement. Regulation 27 is repealed consequentially upon the making of regulation 31 of the *Child Support (Registration and Collection) (Overseas-related Maintenance Obligations) Regulations 2000*, which provides for the transmission by the Child Support Registrar of maintenance liabilities to overseas countries for enforcement.

Item 10

Item 10 inserts new regulations 28, 28A and 28B to replace existing regulation 28 of the Family Law Regulations relating to confirmation of provisional overseas maintenance orders. New regulation 28A(4) prevents an Australian court confirming provisional overseas maintenance order in any case in which a child support assessment could be issued under the *Child Support Assessment Act 1989*. This is consequential upon regulations 10, 11 and 12 of the *Child Support (Assessment) (Overseas-related Maintenance Obligations) Regulations 2000* which permit Australian child support assessments to be issued and enforced for the benefit of overseas payees, instead of provisional overseas maintenance orders being confirmed and enforced by Australian courts.

In new regulations 28, 28A and 28B, references to 'registrar of a court' are replaced by references to 'the Secretary'. The purpose of this change is to enable the Secretary of the Attorney-General's Department, or a person acting for and on behalf of the Secretary, to take action formerly taken by court registrars to obtain maintenance for overseas payees.

Item 11

Item 11 inserts new regulations 28C, 28D and 28E to replace existing regulation 28A of the Family Law Regulations relating to the making of maintenance orders in response to petitions filed in US courts. New regulation 28D(3) prevents an Australian court making a maintenance order in response to a petition filed in a US court in any case in which a child support assessment could be issued under the *Child Support Assessment Act 1989*. This is consequential upon regulations 10, 11 and 12 of the *Child Support (Assessment) (Overseas-related Maintenance Obligations) Regulations 2000* which permit

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child support assessments to be issued instead of making maintenance orders.

In new regulations 28C, 28D and 28E, references to 'registrar of a court' are replaced by references to 'the Secretary'. The purpose of this change is to enable the Secretary of the Attorney-General's Department, or a person acting for and on behalf of the Secretary, to take action formerly taken by court registrars to obtain maintenance for overseas payees.

Item 12

Item 12 inserts new regulations 29, 29A, 29B and 29C to replace existing regulation 29 of the Family Law Regulations relating to the making of provisional Australian maintenance orders. New regulation 29(4) prevents an Australian court issuing a provisional maintenance order in any case in which a child support assessment could be issued under the *Child Support Assessment Act 1989*. This is consequential upon the making of regulation 31 of the *Child Support (Registration and Collection) (Overseas-related Maintenance Obligations) Regulations 2000*, which provides for the transmission of Australian child support assessments to overseas countries for enforcement instead of provisional maintenance orders being issued by Australian courts for confirmation by overseas courts.

Item 13

Item 13 inserts a new regulation 30 to replace existing regulation 30 of the Family Law Regulations relating to proceedings in Australian courts for the enforcement of overseas maintenance orders. In new regulation 30(4)(b), references to 'registrar of a court' are replaced by references to 'the Secretary'. The purpose of this change is to enable the Secretary of the Attorney-General's Department, or a person acting for and on behalf of the Secretary, to take action formerly taken by court registrars to enforce overseas maintenance orders for the benefit of overseas payees.

Item 14

Item 14 amends regulation 32 of the Family Law Regulations, relating to cancellation of the registration of overseas maintenance orders, to make clear that it refers only to orders registered before 1 July 2000 (the commencement date of the Regulations). This amendment is consequential upon item 8 of the regulations. Item 8 repeals existing regulation 26 of the Family Law Regulations, which provides for the registration of overseas maintenance orders in Australian courts.

Items 15

Item 15 repeals existing regulation 33 of the Family Law Regulations. Existing regulation 33 provides for the registration of overseas maintenance agreements in Australian courts. Regulation 33 is repealed consequentially upon the making of regulations 12 and 22 of the *Child*

Support (Registration and Collection) (Overseas-related Maintenance Obligations) Regulations 2000, which provide for the registration of overseas maintenance liabilities in Australia.

Items 17 and 18

Items 17 and 18 amend regulation 34 of the Family Law Regulations, relating to cancellation of the registration of overseas maintenance agreements, to make clear that it refers only agreements registered before 1 July 2000 (the commencement date of the Regulations). The amendments are consequential upon item 15 of the regulations. Item 15 repeals existing regulation 33 of the Family Law Regulations which provides for the registration of overseas maintenance agreements in Australian courts.

Item 18

Item 18 repeals existing regulation 35 of the Family Law Regulations. Existing regulation 35 provides for the transmission of Australian maintenance agreements to overseas countries for enforcement. Regulation 35 is repealed consequentially upon the making of regulation 31 of the *Child Support (Registration and Collection) (Overseas-related Maintenance Obligations) Regulations 2000*, which provides for the transmission of Australian maintenance liabilities to overseas countries for enforcement.

Item 19

Item 19 inserts a new regulation 36 to replace existing regulation 36 of the Family Law Regulations, relating to applications to vary or discharge overseas maintenance liabilities being enforced in Australia.

New regulation 36(1)(c) enables an application to be made to a court in Australia for the variation or discharge of a liability which is an 'overseas maintenance entry liability'. Item 6 inserts a definition of these liabilities in new regulation 24A as meaning liabilities the details of which are included in the Child Support Register under regulation 22 of the *Child Support (Registration and Collection) (Overseas-related Maintenance Obligations) Regulations 2000*. In effect this means that an Australian court may hear an application to vary overseas liabilities enforceable under regulation 30 (inserted by item 13 of the Regulations) such as lump sum overseas orders, agreements, assessments or an agency reimbursement liabilities.

New regulation 36(1)(d) enables an application to be made to a court in Australia for the variation or discharge of a liability which is a 'registrable maintenance liability'. Item 6 inserts a definition of these liabilities in new regulation 24A as meaning liabilities registrable under regulation 11 of the *Child Support (Registration and Collection) (Overseas-related Maintenance Obligations) Regulations 2000*. In effect this means that an Australian court may hear an application to vary or discharge an overseas liability registered by the Child Support Registrar for enforcement (including an

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overseas child support or spousal maintenance order, agreement or assessment; or an agency reimbursement liability).

In new regulation 36(2)(b), a reference to 'registrar of a court' is replaced by a reference to 'the Secretary'. The purpose of this change is to enable the Secretary of the Attorney-General's Department, or a person acting for and on behalf of the Secretary, to take action formerly taken by court registrars to represent overseas payees in Australian court proceedings relating to overseas maintenance matters.

Item 20

Item 20 inserts a new regulation 37 to replace existing regulation 37 of the Family Law Regulations relating to applications to vary or discharge overseas maintenance liabilities in respect of which a payer was not served with notice of the overseas proceedings. New regulation 37(1) makes provision for the grounds of review available when an overseas administrative assessment is registered, or included in the Child Support Register under regulations 11 and 22 of the *Child Support (Registration and Collection) (Overseas-related Maintenance Obligations) Regulations 2000*.

Item 21

Item 21 inserts new regulations 38, 38A and 38B to replace existing regulation 38 of the Family Law Regulations relating to provisional variations or discharges of overseas maintenance liabilities. New regulation 38(1) makes provision for the provisional variation and discharge of liabilities registered, or included in the Child Support Register, under regulations 11 and 22 of the *Child Support (Registration and Collection) (Overseas-related Maintenance Obligations) Regulations 2000*.

Item 22

Item 22 inserts a new regulation 39 to replace existing regulation 39 of the Family Law Regulations relating to confirmation by Australian courts of provisional variations made by overseas courts of Australian maintenance orders. In new regulation 39 references to 'registrar of a court' are replaced by references to 'the Secretary'. The purpose of this change is to enable the Secretary of the Attorney-General's Department, or a person acting for and on behalf of the Secretary, to take action formerly taken by court registrars to obtain confirmation by an Australian court of overseas provisional variations.

Item 23

Item 23 inserts a new Part IIIA in the Regulations. In effect Part MA (new regulation 39A) provides that an Australian court must not make or vary a maintenance order under Part VII of the Act (relating to child maintenance), Part VIII of the Act (relating to spousal maintenance) or under the Family Law Regulations in any case in which the person seeking payment of the maintenance is habitually resident in New Zealand. This new regulation implements article 4 of the agreement between the Government of Australia and the Government of New Zealand on Child and Spousal Maintenance signed at Canberra on 12 April 2000. Under Article 4, the jurisdiction of Australian and New Zealand courts to make or vary maintenance orders is determined by reference to which country the payee habitually resides in.

Item 23 also inserts a new Part IIIB in the Regulations. Part IIIB (regulation 39B) provides that in proceedings relating to an international agreement or arrangement to which Australia is a party, certain provisions of the Family Law Act (subdivisions D and E of Part VII) apply. Those provisions relate to evidence of the results of parentage testing and presumptions of parentage. In particular new regulation 39B(2) provides that, for the purposes of provisions in the Family Law Act (sections 69R, 69S and 69T relating to presumptions of parentage arising from overseas court orders, birth registrations and statutory acknowledgments), the relevant overseas jurisdictions are listed in schedules 2 and 4 of the Family Law Regulations.

New regulation 39B(4) provides that, for the purposes of sections 69S of the Family Law Act, the presumption of parentage arising from a finding by an overseas court that a person is a parent of a child, is a presumption which is rebuttable by evidence that establishes that the person is not the parent.

For the purpose of discouraging false denials of parentage (which may be made to delay the payment of child support or to raise a financial barrier to an overseas party obtaining support for a child), new sub regulation 39B(6) provides that the cost of parentage testing is to be paid by the person who contests parentage. New sub regulation 39B(7) provides that the Secretary of the Attorney-General's Department is to pay the cost of the testing if the testing establishes that the person contesting parentage is not the parent.

Item 23 also inserts new Part IIIC in the Regulations. Part IIIC (regulation 39C) confers jurisdiction on courts to hear proceedings under the Regulations. New regulation 39C operates to supplement sections 39(5), 39(6) and 69H of the Family Law Act which confer jurisdiction on courts in other international family law proceedings.

Item 23 also inserts new a new regulation 39D to prevent the making of orders for security for costs in overseas maintenance proceedings under the Regulations. The purpose of this provision is to implement article 16 of the Hague Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations 1973. Article 16 prevents Australia requiring a payee in a Hague Convention country to guarantee the payment of costs and expenses of proceedings for the recovery of maintenance.

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Items 24 and 25

Items 24 and 25 repeal existing regulations 40, 41, 42, 43 and 44 of the Family Law Regulations. The existing regulations provide for an office of Controller of Overseas Maintenance Claims to take proceedings for the establishment of maintenance orders for the benefit of claimants in countries which are parties to the United Nations Convention on the Recovery Abroad of Maintenance 1956. The regulations are repealed consequentially upon the provision in new regulation 50 for the Secretary of the Attorney-General's Department to replace the Controller in relation to the function of instituting proceedings in Australian courts for the purpose of the Convention (item 30 of the Regulations).

Item 26

Item 26 inserts a new regulation 45 to replace existing regulation 45 of the Family Law Regulations. Existing regulation 45 provides for the Office of Controller of Overseas Maintenance to be immune from costs orders in performing functions under the Regulations. The regulation is substituted consequentially upon the provision in new regulation 50 for the Secretary of the Attorney-General's Department to replace the Controller in relation to the function of instituting proceedings in Australian courts for the purpose of the United Nations Convention on the Recovery Abroad of Maintenance 1956 (item 30 of the Regulations).

Items 27, 28 and 29

Items 27, 28 and 29 repeal existing regulations 46, 47 and 49 of the Family Law Regulations. These regulations provide for authorised persons to take proceedings for the establishment of maintenance orders for the benefit of claimants in countries which are parties to the United Nations Convention on the Recovery Abroad of Maintenance 1956. The regulations are repealed consequentially upon the provision in new regulation 50 for the Secretary of the Attorney-General's Department to undertake the function of instituting proceedings in Australian courts for the purpose of the Convention (item 30 of the Regulations).

Item 30

Item 30 inserts new regulations 50, 50A and 50B to replace existing regulation 50 of the Family Law Regulations relating to the making of maintenance orders for the benefit of claimants in countries which are parties to the United Nations Convention on the Recovery Abroad of Maintenance 1956. The major change is that new regulation 50A(3) prevents an Australian court issuing a maintenance order in any case in which a child support assessment could be issued under the Child Support Assessment Act 1989. This is consequential upon regulations 10, 11 and 12 of the Child Support (Assessment) (Overseas-related Maintenance Obligations) Regulations 2000 which permit child support assessments to be issued instead of making maintenance orders.

In new regulations 50, 50A and 50B, references to the 'Controller' are replaced by references to 'the Secretary'. The purpose of this change is to enable the Secretary of the Attorney-General's Department, or a person acting for and on behalf of the Secretary, to take action formerly taken by the Controller of Overseas Maintenance and authorised persons under existing regulation 50 to perform functions for the purpose of the Convention.

Item 31

Item 31 repeals existing regulation 52 of the Family Law Regulations. Regulation 52 provides for moneys, paid under maintenance orders obtained for the benefit of claimants in countries which are parties to the United Nations Convention on the Recovery Abroad of Maintenance 1956, to be paid to a court for transmission to overseas authorities. Regulation 52 is repealed consequentially upon the making of regulations 12 and 22 of the Child Support (Registration and Collection) (Overseas-related Maintenance Obligations) Regulations 2000, which provide for registration of overseas maintenance liabilities in Australia, and regulations 10, 11 and 12 of the Child Support (Assessment) (Overseas-related Maintenance Obligations) Regulations 2000 which permit child support assessments to be issued instead of making maintenance orders. Payments to overseas payees will in future be channelled to the Child Support Registrar who will, in accordance with section 76 of the Child Support (Registration and Collection) Act 1988, make payments to payees overseas.

Item 32

Item 32 inserts new regulation 53 to replace existing regulation 53 of the Family Law Regulations relating to the taking of evidence for use in overseas court proceedings under the United Nations Convention on the Recovery Abroad of Maintenance 1956. The major change is that in new regulation 53 references to the 'Controller' are replaced by references to 'the Secretary'. The purpose of this change is to enable the Secretary of the Attorney-General's Department, or a person acting for and on behalf of the Secretary, to take action formerly taken by the Controller of Overseas Maintenance under existing regulation 50 to carry out functions for the purpose of the Convention.

Item 33

Item 33 replaces references in regulation 54 of the Family Law Regulations to the 'Controller' with references to 'the Secretary'. Regulation 54 relates to the taking of evidence for use in Australian court proceedings under the United Nations Convention on the Recovery Abroad of Maintenance 1956. The amendments are consequential upon the provision in new regulation 50 for the Secretary of the Attorney-General's Department to take action formerly taken by the

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Controller of Overseas Maintenance under existing regulation 50 to carry out functions for the purpose of the Convention.

Item 34

Item 34 inserts a new regulation 81 in the Family Law Regulations to make provision for transitional arrangements under the regulations. The effect of new regulation 81 is that (after the commencement date) courts, court registrars, officers of courts, Collectors of Maintenance and the Secretary of the Attorney-General's Department may continue to deal with applications, documents, orders and proceedings in existence prior to that date as if the regulations had not been made.

Item 35

Item 35 replaces existing Schedule 2 in the Family Law Regulations. Existing Schedule 2 lists countries which are reciprocating jurisdictions for the purposes of the enforcement of overseas maintenance orders in Australia. The major changes are to include in Schedule 2 references to countries which are parties to the Hague Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations 1973 (Belgium, Czech Republic, Denmark, Finland, Estonia, France, Germany, Italy, Luxembourg, Netherlands, Norway, Portugal, Slovak Republic, Spain and Turkey), to include countries which have recently become parties to the United Nations Convention on the Recovery Abroad of Maintenance 1956 (Belarus, Colombia, Kazakstan) and to replace references to individual US States with a single reference to the 'United States of America'.