

EXPLANATORY STATEMENT

Select Legislative Instrument 2009 No. 17

ISSUED BY THE AUTHORITY OF THE ATTORNEY-GENERAL

FAMILY LAW ACT 1975

FAMILY LAW AMENDMENT REGULATIONS 2009 (No. 1)

Subsection 125(1) of the *Family Law Act 1975* (FLA) provides, in part, that the Governor-General may make regulations, not inconsistent with the Act, prescribing all matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

The purpose of the Regulations is to amend the *Family Law Regulations 1984* (the Principal Regulations) to prescribe matters for the purpose of recent amendments made to the Act by the *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008*.

These amendments recognise the parentage of children born to same-sex de facto couples through artificial conception procedures or born to couples under surrogacy arrangements and amendments, enabling both same-sex and opposite-sex de facto couples on separation to access the federal family law system for their property settlement and maintenance matters.

In particular, the Regulations:

- update the list of State and Territory laws prescribed for the rules in the Act relating to the parentage of children born through artificial conception procedures (including State and Territory laws relating to children born in this way to same-sex de facto couples);
- prescribe laws in Western Australia and the Australian Capital Territory to recognise court orders determining the parentage of children born under surrogacy arrangements;
- prescribe laws in Victoria, Tasmania and the Australian Capital Territory providing for the registration of relationships, and certain kinds of relationships registered under those laws, for the purpose of the recently amended definition of ‘de facto relationship’ in the Act;
- prescribe laws in Victoria, Tasmania and the Australian Capital Territory providing for the registration of relationships, to enable de facto couples who have registered their relationship under those laws to satisfy the requirements for invoking the jurisdiction of the Family Court for making a property settlement or maintenance order under the Act; and
- remove the requirement to file a certificate from a family dispute resolution practitioner when a further application is made in proceedings in which such a certificate has already been filed.

The Regulations have a number of different commencement dates.

Regulations 1 to 3 and Schedule 1 commence on the day after the Regulations are registered on the Federal Register of Legislative Instruments.

Schedule 2 commences on 1 March 2009, to coincide with the commencement of related amendments to the Act. This is the date agreed with the family courts. To give effect to the amendments in the De Facto Act, the family courts needed to prepare to hear these new types of matters and particularly to update their Court rules. The Regulations were also necessary to give effect to some of the provisions in the Act. These matters will be finalised by 1 March 2009, which is when these amendments will commence by Proclamation.

Schedule 3 commences on the commencement of section 21 of the *Surrogacy Act 2008* (WA), which is expected to be in March 2009.

Details of the Regulations are as follows.

Regulation 1 - Name of Regulations

Regulation 1 provides that the name of the Regulations is the *Family Law Amendment Regulations 2009 (No. 1)*.

Regulation 2 – Commencement

Paragraph 2(a) provides for regulations 1, 2 and 3 and Schedule 1 to commence on the day after the Regulations are registered on the Federal Register of Legislative Instruments.

Paragraph 2(b) provides for Schedule 2 to commence on 1 March 2009.

Paragraph 2(c) provides for Schedule 3 to commence on the commencement of section 21 the *Surrogacy Act 2008* (WA).

Regulation 3 - Amendment of the *Family Law Regulations 1984*

Regulation 3 provides that the *Family Law Regulations 1984* (the Principal Regulations) are amended as set out in Schedules 1, 2 and 3.

Schedule 1 – Amendments commencing on the day after registration

Item [1]: Regulations 12C and 12CA

This item substitutes regulations 12C and 12CA to update the State and Territory laws prescribed for the purposes of section 60H of the *Family Law Act 1975* (the Act). This item also inserts new regulations 12CAA and 12CAB.

Formerly, the laws prescribed under regulations 12C and 12CA were contained in Schedules 6 and 7 respectively of the Principal Regulations. The Regulations relocate the laws from their former to within the body of regulations 12C and 12CA. This will assist readers to navigate the Principal Regulations.

Regulation 12C

Regulation 12C prescribes the laws for the purposes of subparagraph 60H(1)(b)(ii) of the *Family Law Act 1975*. Subsection 60H(1) sets out rules relating to the parentage of a child born to married or de facto couples through artificial conception procedures.

The substituted regulation 12C amends the former regulation 12C to:

- replace the existing prescription of the *Artificial Conception Act 1985* (ACT) with section 11 of the *Parentage Act 2004* (ACT). The Artificial Conception Act has been repealed and replaced by the Parentage Act;
- prescribe subsections 14A, 15, 16 and 17 of the *Status of Children Act 1975* (Qld). Currently no Queensland laws are prescribed for the purposes of subsection 60H(1);
- update the Northern Territory laws prescribed, by prescribing new section 5DA of the *Status of Children Act* (NT) in addition to the sections of that Act that were formerly prescribed; and
- simplify the prescription of the Tasmanian laws prescribed, by replacing the former reference to sections 10A, 10B and 10C of the *Status of Children Act 1974* (Tas.) with a reference to Part III of that Act, as Part III contains only those three sections.

Regulation 12CA

This item amends regulation 12CA to update the State and Territory laws prescribed for the purposes of paragraph 60H(2)(b) of the *Family Law Act 1975*. Subsection 60H(2) sets out the circumstances in which the woman who gave birth to a child, as a result of the carrying out of an artificial conception procedure, will be considered the child's mother.

New regulation 12CA amends former regulation 12CA to:

- replace the existing prescription of sections 3, 4 and 6 of the *Artificial Conception Act 1985* (ACT) with subsections 11 (2) and 11(3) of the *Parentage Act 2004* (ACT). The Artificial Conception Act has been repealed and replaced by the Parentage Act
- prescribe section 14 of the *Status of Children Act 1996* (NSW), section 18AB of the *Status of Children Act 1975* (Qld), the *Artificial Conception Act 1985* (WA) and Part III of the *Status of Children Act 1974* (Tas). Currently no New South Wales, Queensland, Western Australian or Tasmanian laws are prescribed for the purposes of subsection 60H(2).

Regulation 12CAA

This item inserts new regulation 12CAA. New regulation 12CAA prescribes, for the purposes of subsection 60HB(1) of the *Family Law Act 1975* providing for the

recognition of court orders determining the parentage of children born under surrogacy arrangements, section 26 of the *Parentage Act 2004* (ACT).

Regulation 12CAB

This item inserts new regulation 12CAB. Regulation 12CAB removes the requirement in section 60I of the *Family Law Act 1975* (the Act) to file a certificate from a family dispute resolution (FDR) practitioner in proceedings for an order under Part VII of the Act when a further application for any other order is made in proceedings in which a certificate of this kind has already been filed.

Under subsection 60I(7) of the Act, a court must not hear an application for an order under Part VII of the Act unless the applicant files a certificate provided by an FDR practitioner under subsection 60I(8). The purpose of this requirement is to ensure that all persons who have a dispute about matters that may be dealt with by an order under Part VII make a genuine effort to resolve that dispute by family dispute resolution before they apply to court for an order under Part VII.

Subsection 60I(8) specifies the types of certificates that an FDR practitioner may provide to the parties.

Subsection 60I(9) specifies the circumstances that constitute an exception to the FDR requirements in subsection 60I(7). Paragraph 60I(9)(f) provides that subsection 60I(7) does not apply if other circumstances satisfied in the regulations are satisfied.

New regulation 12CAB specifies, as an exception in section 60I(9) to the FDR requirements in subsection 60I(7), the circumstance that an application has been made to the court for any other order in proceedings in which a certificate under subsection 60I(8) of the Act has been filed.

New regulation 12CAB clarifies the requirements under section 60I of the FLA for filing a certificate provided by a family dispute resolution provider. As indicated in the Explanatory Memorandum to the Family Law Amendment (Shared Parental Responsibility) Bill 2005, which introduced section 60I, the purpose of requiring parties to file an FDR certificate when applying for orders under Part VII of the FLA, is to ensure that parties attempt to resolve their disputes about children's matters outside the court system before commencing a court process. It was not intended that parties would be required to file a new certificate each time they seek new orders or a variation to orders as part of the proceedings for which an FDR certificate has been filed.

New regulation 12CAB makes it clear that, once proceedings under Part VII are already underway, parties are not required to file another certificate where, as part of those same proceedings, they choose to seek other Part VII orders including interlocutory, interim, procedural, incidental or ancillary orders.

Item [2]: Schedules 6 and 7

This item removes Schedules 6 and 7 to the Principal Regulations. As explained above in relation to item 1 of Schedule 1, the laws specified in regulations 12C and 12CA are relocated by item 1 of Schedule 1 from their former location in Schedules 6

and 7 respectively of the Principal Regulations to within the body of regulations 12C and 12CA. The amendments will assist readers to navigate the Principal Regulations.

Schedule 2 – Amendments commencing on 1 March 2009

Item [1]: After regulation 12BB

This item inserts new regulation 12BC to prescribe the current State and Territory laws providing for the registration of relationships, and certain kinds of relationships that may be registered under those laws, for the purpose of the definition of ‘de facto relationship’ in section 4AA of the *Family Law Act 1975*.

The definition requires all the circumstances of a de facto couple’s relationship to be considered in determining if they have a relationship as a couple living together on a genuine domestic basis including, under paragraph 4AA(2)(g), whether the relationship is or was registered under a prescribed law of a State or Territory as a prescribed kind of relationship.

New regulation 12BC prescribes relationship registers set up under the following State and Territory laws for the purposes of paragraph 4AA(2)(g):

- *Relationships Act 2008* (Vic)
- *Relationships Act 2003* (Tas), and
- *Civil Partnerships Act 2008* (ACT).

New regulation 12BC therefore prescribes each of the existing State and Territory relationships registration schemes.

The intention of section 4AA is to only recognise the registration of ‘de facto relationships’ within the meaning of section 4AA, which is in turn confined by the references of power from States supporting the recent amendments to the *Family Law Act 1975*.

New regulation 12BC is therefore only intended to apply to ‘de facto relationships’ within the meaning of section 4AA and not to caring relationships.

Accordingly, new regulation 12BC prescribes the following kinds of relationships under the Acts listed above:

- under the *Relationships Act 2008* (Vic) – a registered relationships is registered under paragraph 10(3)(a) of that Act
- under the *Relationships Act 2003* (Tas) – a significant relationship as defined in section 4 of that Act, and
- under the *Civil Partnerships Act 2008* (ACT) – a relationship as a couple between 2 adult persons who meet the eligibility criteria mentioned in section 6 of that Act for entry into a civil partnership.

Item [2]: After regulation 15AA

This item inserts new regulation 15AB to prescribe the current State and Territory laws providing for the registration of relationships for the purposes of paragraph 90SB(d) of the *Family Law Act 1975* (the Act).

Section 90SB of the Act sets out four alternative requirements of which the court must be satisfied, before making an order under section 90SE (maintenance of a party to a de facto relationship, 90SG (urgent maintenance) or 90SM (alteration of property interests), or a declaration of property interests under section 90SL.

Paragraph 90SB(d) provides that one of those requirements is that the relationship is or was registered under a prescribed law of a State or Territory.

New regulation 15AB prescribes relationship registers set up under the following State and Territory laws for the purposes of paragraph 90SB(d):

- *Relationships Act 2008* (Vic)
- *Relationships Act 2003* (Tas), and
- *Civil Partnerships Act 2008* (ACT).

New regulation 15AB therefore prescribes each of the existing State and Territory relationships registration schemes.

Schedule 3 – Amendments commencing on the commencement of the *Surrogacy Act 2008* (WA), section 21

Item [1]: Regulation 12CAA

This item substitutes regulation 12CAA on the commencement of section 21 of the *Surrogacy Act 2008* (WA).

The substituted regulation 12CAA prescribes, for the purposes of subsection 60HB(1) of the *Family Law Act 1975* providing for the recognition of court orders determining the parentage of children born under surrogacy arrangements, section 26 of the *Parentage Act 2004* (ACT) and section 21 of the *Surrogacy Act 2008* (WA). The Parentage Act is prescribed on the day after the registration by the amendments made of item 1 of Schedule 1 to the Regulations.

The Regulations incorporate by reference the *Relationships Act 2008* (Vic), the *Relationships Act 2003* (Tas) and the *Civil Partnerships Act 2008* (ACT).

The following Acts may be viewed at the following website addresses:

Relationships Act 2008 (Vic):

[http://www.legislation.vic.gov.au/Domino/Web_Notes/LDMS/PubLawToday.nsf/a12f6f60fbd56800ca256de500201e54/4B92752C0EAC3C00CA2575050078ADC5/\\$FILE/08-12a001.pdf](http://www.legislation.vic.gov.au/Domino/Web_Notes/LDMS/PubLawToday.nsf/a12f6f60fbd56800ca256de500201e54/4B92752C0EAC3C00CA2575050078ADC5/$FILE/08-12a001.pdf)

Relationships Act 2003 (Tas):

http://www.thelaw.tas.gov.au/tocview/index.w3p;cond=;doc_id=44%2B%2B2003%2BAT%40EN%2B20090129120000;histon=;prompt=;rec=;term=

Civil Partnerships Act 2008 (ACT):

<http://www.legislation.act.gov.au/a/2008-14/current/pdf/2008-14.pdf>

Consultation on the content of the Regulations was undertaken under section 17 of the *Legislative Instruments Act 2003* with the New South Wales Attorney-General's Department, the Victorian Department of Justice, the Queensland Department of Justice & Attorney-General, the South Australian Attorney-General's Department, the Western Australian State Solicitor's Office, the Tasmanian Department of Justice, the Australian Capital Territory Department of Justice and Community Safety, the Northern Territory Department of Justice, the Administration of Norfolk Island, the Family Court of Australia and the Federal Magistrates Court. The consultation involved exchange of correspondence and discussions.