

# Parents and children

## In what circumstance is that relationship established?

It's not uncommon for a will-maker to leave a gift "to my children and, if more than one, in equal shares", or something similar. When administering the estate the executor has the responsibility of deciding who meets the description of the will-maker's children. Depending on the circumstances, the executor's task may be harder than initially imagined. That is because each of the following may create the relationship of parent and child:



### Presumptions of parentage

First, there are circumstance where the law presumes parentage. These arise where:

1. A married woman or a woman in a de facto relationship gives birth. The couple are presumed to be the parents of the child.
2. A child is born within 44 weeks of the death of the man in a married or de facto relationship. The man is presumed to be the father of the child, and the woman the mother.
3. A child is born within 44 weeks of the annulment of a couple's marriage. The man is presumed to be the father, and the woman the mother.
4. A child is born within 44 weeks of the end of a

couple's cohabitation. The man is presumed to be the father, and the woman the mother.

5. A child is born within 20 to 44 weeks of the cohabitation of a couple. The man is presumed to be the father.
6. A person's name is registered as a child's parent in the NSW Registry of Births, Deaths and Marriages, or a similar interstate or overseas register. The persons registered are presumed to be the parents of the child.
7. A man formally acknowledges that he is the father of a specified child. The man is presumed to be the father.
8. A man, married to a woman who gives birth following a fertilization procedure, consents to the procedure. The man is presumed to be the father of the child born as a result of the procedure, even when he did not provide all or any of the sperm used in the procedure.
9. A woman gives birth following a fertilization procedure. She is presumed to be the mother of the child born as a result of the procedure, even if she did not provide the ovum used in the procedure.



10. A woman who gives birth following a fertilization procedure has a female partner who consented to the procedure. The woman who gave birth is presumed to be the mother, and the female partner is presumed to be a parent of the child born as a result of the procedure.

### Actual parentage

Presumptions 1 to 7 above may be rebutted. This usually occurs by the acceptance of evidence which establishes different parentage. This founds the first basis for the second way parentage may be established, actual parentage. Examples are:

11. Where a court determines the paternity or (less commonly, because the issue is less often in dispute) the maternity of a child.

But there are other instances, such as:

12. if a child is adopted after entry of names of parents on the Register (see 6 above). The Register is amended. The adoptive parents become the legal parents of the adopted child, and the originally registered parents cease to be either presumed or legal parents of that child.
13. if a child is born as a result of the sexual relations of a man and a woman. The man and woman are, respectively, the father and mother of the child.
14. where a court makes a parentage order in relation to a child of a surrogacy arrangement. The child becomes the child of the intended parent(s) named in the order.

### Deemed parentage

Thirdly, some legislation, whilst not creating parentage – either presumed or actual – treats a person as equivalent to a child for the purpose of the legislation. An example is the *Succession Act* which treats a person over whose long term welfare a deceased had responsibility at the time of the deceased's death as the deceased's child for the purpose of family provision claims.

### Parentage by affinity

Fourthly, there are circumstances where a person acts as if another is their child or parent because of the closeness of the relationship, even though there is no legal relationship of parent and child. An example is a step-child who, whilst never adopted,



has been part of the step-parent's household, and treated the same as the step-parent's (legal) children, for years. Similarly with grand-parents and grand-children. Some culture (eg Islamic with nieces and nephews, or indigenous) treat "relatives" as part of the immediate "family" without any legal connection of parent and child. From an executor's perspective, the question is whether the step-child, grandchild or other person was considered "children" by the will-maker when preparing the will.



### Presumptions against parentage

On the other hand, there are also presumptions against parentage. For instance:

- the woman who provided the ovum for the procedure referred to in examples 9 and 10 is presumed to not be the mother of any child born as a result of the pregnancy arising from the procedure.
- the sperm 'donor' is not the father of a child unless the sperm donor and mother of the child are in a relationship.
- the 'ovum provider' is not the mother of a child unless she bears the child during pregnancy.

There are also legal impediments to parentage.

Examples are adopting a child to another person, and the birth parent(s) involved in a surrogacy arrangement after a parentage order has been made (see 14 above).

### Moral

The foregoing proves the correctness of comments made by a High Court judge in a landmark decision in 1997:

"Because wills are legal documents involving many technicalities, attending to their preparation and execution requires the exercise of professional skill and care."



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