

Changing Children's Names & Legal Issues Around Birth Certificates



This fact sheet summarises the Ask LOIS webinar on this topic, presented by Jess Hannam, Solicitor, Women's Legal Services NSW on 28 April 2015. This webinar can be viewed for free at www.asklois.org.au/webinars/past-webinars.

This fact sheet covers:

- What is a birth certificate? Who should be on it?
- What if the parents can't agree on the child's name
- What happens if one parent is left off the birth certificate
- What are the legal options for changing a child's name

What is a birth certificate?

An official document issued to record a person's birth and identify them by name, place, date of birth and parentage.

Did you know: A person does not have to be classified as either male or female on a birth certificate. Since the 2014 High Court Norrie Decision birth certificates can recognise those who don't identify as male or female (e.g. intersex) by listing them as 'sex not specified'

Who should be on the birth certificate?

- 'Legal parent/s' should be placed on the birth certificate, i.e. adoptive parents, heterosexual couples, lesbian couples, mother and mother's heterosexual partner when artificial insemination has occurred
- Also intended parents following a parentage order in relation to a child who is the subject of a (lawful) surrogacy arrangement
- Note the distinction between 'legal parent/s' not 'biological parent/s'
- If a mother knows who the birth father is then his name should be placed on the birth certificate
- It is an offence to knowingly place the wrong parent's name down on a birth certificate!

Did you know: it is illegal to put a sperm donor on the birth certificate. Even though they are the 'biological' parent they are not the 'legal' parent.

What happens if the parent's can't agree on the child's name?

- The Registrar at Birth, Deaths and Marriages (BDM) has the power to decide the name of the child (s 21 *Births, Deaths and Marriages Registration Act 1995* (NSW))
- The registrar also can assign the child a name if the name chosen by the parents is a *prohibited* name
- Time to register birth
 - You have 60 days from the date of the child's birth to registrar his/her birth with BDM
 - Penalty of \$1,100 for registering outside of the 60 days

Prohibited Names

Under s 4 *Births, Deaths and Marriages Registration Act 1995* (NSW) "prohibited names" include names that:

- Are obscene or offensive
- Are too long
- Includes symbols without phonetic significance
- Includes or resembles an official title or rank

- Are contrary to the public interest for some other reason



What happens if one parent is left off the birth certificate?

- It is an offence to make a representation in a birth registration that the person knows is false or misleading (maximum penalty 100 units or 2 years imprisonment, or both) - s 57 *Births, Deaths and Marriages Registration Act 1995* (NSW). If the mother left the father off the birth certificate because she was unsure of who the father was, this is not an offence
- If parties are married BDM will sometimes apply pressure for the father's name to be placed on the birth certificate (parenting presumptions)
- Parent's can agree by consent to amend the birth certificate to add a parent's name and can fill out the BDM form (available the BDM website) to add a parent to a birth registration
- If no consent, a court order will be needed to add the other parent to the birth certificate

Child Support Implications

- Not having a parent's name on a birth certificate has implications for child support
- For child support, a parent on the birth certificate is presumed to be a legal parent with responsibilities of making child maintenance payments (if the child does not live with them), so if they are left off the birth certificate, it may be more difficult to chase them for money
- A parent can sign a statutory declaration for child support purposes declaring they are a parent of a child if their name does not appear on the birth certificate
- If a parent or carer cannot prove parentage by one of the ways accepted by Child Support, she/he can make an application to the Federal Circuit Court or Local Court seeking a declaration under s106A of the *Child Support (Assessment) Act 1989* (Cth) that she/he is entitled to a child support assessment for the child.
- The Registrar can then apply presumption of parentage principles (s 29), which can include, for example, presuming a person is the father where he was married to the mother at the time of the child's birth

Did you know: both parents listed on a child's birth certificate must consent to (and sign the paperwork) for a child being issued with an Australian passport. If one parent does not agree, the other parent needs court orders to obtain a passport for the child without the other parent's signature

Did you know: if a mother leaves the father off the birth certificate, this does not mean he loses his family law rights. There are special legal parentage presumptions under the *Family Law Act* (below) that apply. The father (legal parent) can still apply to court for parenting orders, but paternity may be raised as an issue at court.

Legal Parentage Presumptions *Family Law Act 1975* (Cth)

- For the purposes of the *Family Law Act*, even if a parent is left off a birth certificate, they may still be presumed to be a parent for the purpose of the Act. If they are presumed to be a parent, then it is considered in the child's best interest to have a meaningful relationship with that parent (unless rebutted)
- A presumption of parentage can be overturned if evidence is presented to the court to prove it is incorrect (eg, a DNA test)
- Sections 69P – 69T set out the presumptions of parentage. For example, a party is presumed to be a parent, for example, due to:
 - Marriage
 - Cohabitation before the birth of the child
 - Entry as a parent in a register of births or parentage information
 - A court finding of parentage; and
 - Execution of an instrument acknowledging paternity



Did you know: even if one parent has a court order for sole parental responsibility, they still need the other parent's consent to change a child's name (unless they want to take the matter to court)

Legal options for changing a child's name

- If a child's name is placed on a birth certificate and one parent subsequently wants to change the child's name, this can be done:
 - By consent; or
 - By court order
- If a court order is needed for a change of name, a party can file in either the District Court or the Family Law Courts
 - District Court – file a Summons and an Affidavit in Support
 - Family Law Courts –
 - First attempt family dispute resolution (FDR), unless an exception applies
 - If FDR not successful, file Initiating Application and Affidavit in Response
 - Unlike the Family Law Courts, the District Court will not consider other parenting issues if the other parent tries to raise them and there are no FDR requirements, although mediation is encouraged

Things to address in an affidavit:

- Personal details
- History of relationship with other parent
- Any existing court orders
- Contact child has with each parent
- The name the child was born with
- The current birth certificate
- How long the original name was used for
- Why the name change is proposed
- Views of the child
- Evidence of usage such as school reports, medical records
- Perceived detriment to the child in using the original name
- Family or cultural ties to the name
- Attempts to resolve the issue

How does a court decide change of name cases?

- Best interests of the child principles
- Judges have given guidance on the type of things to be considered, such as:
 - Need to retain a connection with the parent the child does not live with
 - The likelihood of the child experiencing confusion of identity
 - Any embarrassment to the child caused by having a different surname from the parent they live with
- A child must give their consent to any name change, unless it can be proven that they can not understand the meaning and implications of the change of name

Changing a child's name if born interstate or overseas

To have a name changed in NSW where the child is born interstate or overseas, you will need to provide BDM with proof of that the child resides in NSW. For example, by providing copies of school reports, invoices for childcare/daycare/school, letters from Centrelink etc.

Interstate:

- Usually, to change a child's name in NSW through BDM, the child must be born in NSW

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- If the child was born interstate, BDM will normally refer you to the BDM equivalent in the state the child was born to have the details changed
- However, if there is domestic violence involved and there is an order for the parent or child's protection, NSW BDM can change the name of a child in NSW (a copy of the order must be provided to BDM)

Overseas:

- If the child was born overseas, BDM can change their name if they have been resident in NSW for 3 consecutive years (less if registrar satisfied there is a good reason or AVO for protection of child/parent (s 29C))

Did you know: Married women do not need to apply to have their names legally changed if they get married and want to take their partner's surname. This also applies if they get divorced. A woman can change her name back to her maiden name at any time without going through the formal procedures!

Referrals

Always refer your clients for legal advice!

Women's Legal Contact Advice Line:

- (02) 8745 6988 (Sydney)
- 1800 801 501 (regional areas)

Law Access:

- 1300 888 529

Find your local community legal centre:

- www.clcnsw.org.au

For more information on changing a child's name or birth certificate and for forms, visit:

Births, Deaths and Marriages

- www.bdm.nsw.gov.au
- Call: 13 77 88

For issues of proving parentage for child support purposes, contact:

Legal Aid Child Support Service

- 02 9633 9916 (Sydney)
- 1800 451 784 (regional areas)