



ANNO QUARTO

## GEORGI VI REGIS.

A.D. 1940.

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## No. 55 of 1940.

An Act to amend the law relating to the guardianship and custody of infants, and for other purposes.

[Assented to 5th December, 1940.]

BE IT ENACTED by the Governor of the State of South Australia, with the advice and consent of the Parliament thereof, as follows :

Short title.

1. This Act may be cited as the "Guardianship of Infants Act, 1940".

Repeal.

2. The Guardianship of Infants Act, 1887, is hereby repealed.

Interpretation.

400, 1887, s. 13.  
Cf. U.K. 54  
and 55, Vict.  
c. 3, s. 5.  
Cf. U.K. 22  
and 23, Geo. 5,  
c. 46, s. 79 (3).

3. In this Act, unless the context otherwise requires—

"infant" does not include an illegitimate infant :

"maintenance" includes education :

"parent" of an infant, in sections 8, 9, and 10, includes any person at law liable to maintain the infant or entitled to his custody :

"person", in sections 8, 9, and 10, includes any school or institution :

"the court" means the Supreme Court or any judge thereof or the local court of full jurisdiction nearest to the residence of the infant.

Right of  
mother to  
guardianship  
and custody of  
infant.

4. The mother of an infant shall have the guardianship and custody of the infant while an infant jointly with the father and each parent shall have equal authority, rights and responsibilities with regard to the infant.

Equal right of  
mother to  
apply to  
court.

Cf. U.K. 15  
and 13, Geo.  
5, c. 45, s. 2.

5. The mother of an infant shall have the like powers to apply to the court in respect of any matter affecting the infant as are possessed by the father.

6. (1) The court may, upon the application of the mother or the father of any infant, make such order as it may think fit regarding the custody of the infant, and the right of access thereto of either parent, having regard to the welfare of the infant and to the conduct of the parents, and to the wishes as well of the mother as of the father, and may alter, vary or discharge any such order on the application of either parent, or, after the death of either parent, of any guardian under this Act, and in every case may make such order respecting the costs of the parent who made application and the liability of the other parent for the same, or otherwise as to costs, as it may think just.

Power to make orders as to custody.  
Cf. 400, 1887, s. 7.  
Cf. U.K. 49 and 50, Vict. c. 27, s. 5.  
Cf. N.S.W. 20, 1934, s. 2 (a).

(2) The fact that a parent of an infant contemplates leaving the State shall not of itself be regarded as a reason for denying that parent the custody of the infant or depriving that parent thereof if the court is satisfied that the welfare of the infant will best be served by allowing that parent to have or retain such custody.

7. (1) The power of the court under the provisions of section 6 to make an order as to the custody of an infant and the right of access thereto may be exercised notwithstanding that the mother and the father of the infant are then residing together.

Provisions as to orders.  
Cf. U.K. 15 and 16, Geo. 5, c. 45, s. 3.

(2) Where the court makes an order giving the custody of the infant to one parent, then, whether or not the mother and the father are residing together, the court may further order that the other parent shall pay to the parent having the custody of the infant such weekly or other periodical sums towards the maintenance of the infant as the court, having regard to the means of both parents, may think reasonable.

(3) No such order, whether for custody or maintenance, shall be enforceable and no liability thereunder shall accrue while the mother and the father are residing together, and any such order shall cease to have effect if, for a period of three months after it is made, the mother and the father continue to reside together.

(4) Any order so made may, on the application either of the father or the mother of the infant, be varied or discharged by a subsequent order.

s. 6. *JOBSON v. JOBSON* (1921) S.A.S.R. 88; 11 Austn. Digest 37. In determining the right to custody of children the court should have regard to the welfare of the children, and the conduct and wishes of the parents. Held, that if a wife has left her husband without justification, she is not entitled to the custody of their children even though they be of tender years.

In *re KILGARIFF* (1925) S.A.S.R. 405; 8 Austn. Digest 17. If a local court has disposed of a summons for custody of children, the matter is *res judicata* and cannot be litigated in the Supreme Court.

In *re H——*, AN INFANT (1932) S.A.S.R. 252; 11 Austn. Digest 36. In determining the right to custody of children, the paramount matter to be considered is the welfare of the children.

Power of court as to production of infant.

Cf. U.K. 54 and 55, Vict. c. 3, s. 1.

8. Where the parent of an infant applies to any court of competent jurisdiction for a writ or order for the production of the infant and the court is of opinion that the parent has abandoned or deserted the infant or that he has otherwise so conducted himself that the court should refuse to enforce his right to the custody of the infant, the court may in its discretion decline to issue the writ or make the order.

Power of court to order repayment of costs of bringing up infant.

Cf. U.K. 54 and 55, Vict. c. 3, s. 2.

9. If at the time of the application for a writ or order for the production of the infant, the infant is being brought up by another person, the court to which the application is made may, in its discretion, if it orders the infant to be given up to the parent, further order that the parent shall pay to such person the whole of the costs, charges and expenses properly incurred in bringing up the infant or such portion thereof as seems to the court to be just and reasonable having regard to all the circumstances of the case.

Duty of court to have regard to conduct of parent.

Cf. U.K. 54 and 55, Vict. c. 3, s. 3.

10. Where a parent has abandoned or deserted his infant, or allowed his infant to be brought up by another person at that or some other person's expense for such length of time and in such circumstances as to satisfy a court of competent jurisdiction that the parent was unmindful of his parental duties, the court shall not make an order for the delivery of the infant to the parent unless the parent has satisfied the court that having regard to the welfare of the infant he is a fit person to have the custody of the infant, and that it is in the interests of the infant that he should be delivered to the parent.

Principles upon which questions relating to custody, upbringing, etc., of infants are to be decided.

Cf. U.K. 15 and 16, Geo. 5, c. 45, s. 1.

Cf. N.S.W. 20, 1924, s. 3 (a).

11. (1) Where in any proceeding before the court or any other court of competent jurisdiction the custody or upbringing of an infant, or the administration of any property belonging to or held in trust for an infant, or the application of the income thereof, is in question, the court in deciding that question shall regard the welfare of the infant as the first and paramount consideration, and shall not take into consideration whether from any other point of view the claim of the father, or any right at common law possessed by the father, in respect of such custody, upbringing, administration or application is superior to that of the mother, or the claim of the mother is superior to that of the father.

(2) In this section "upbringing" includes religious instruction.

Right of surviving parent as to guardianship.

Cf. 15 and 16, Geo. 5, c. 45, s. 4.

12. (1) On the death of the father of an infant, the mother, if surviving, shall, subject to the provisions of this Act, be guardian of the infant, either alone or jointly with any guardian appointed by the father. When no guardian has been appointed by the father or if the guardian or guardians appointed by the father is or are dead or refuses or refuse to

act, the court may if it thinks fit appoint a guardian to act jointly with the mother.

(2) On the death of the mother of an infant, the father, if surviving, shall, subject to the provisions of this Act, be guardian of the infant, either alone or jointly with any guardian appointed by the mother. When no guardian has been appointed by the mother or if the guardian or guardians appointed by the mother is or are dead or refuses or refuse to act, the court may if it thinks fit appoint a guardian to act jointly with the father.

13. (1) The father of an infant may by deed or will appoint any person to be guardian of the infant after his death.

(2) The mother of an infant may by deed or will appoint any person to be guardian of the infant after her death.

(3) Any guardian so appointed shall act jointly with the mother or father, as the case may be, of the infant so long as the mother or father remains alive unless the mother or father objects to his so acting.

(4) If the mother or father so objects, or if the guardian so appointed as aforesaid considers that the mother or father is unfit to have the custody of the infant, the guardian may apply to the court, and the court may either refuse to make any order (in which case the mother or father shall remain sole guardian) or make an order that the guardian so appointed shall act jointly with the mother or father, or that he shall be sole guardian of the infant, and in the latter case may make such order regarding the custody of the infant and the right of access thereto of its mother or father as, having regard to the welfare of the infant, the court may think fit, and may further order that the mother or father shall pay to the guardian towards the maintenance of the infant such weekly or other periodical sum as, having regard to the means of the mother or father, the court may consider reasonable.

The powers conferred on the court by this subsection, in cases where the appointed guardian is to be the sole guardian of an infant to the exclusion of its mother or father, may be exercised at any time and shall include power to vary or discharge any order previously made in virtue of those powers.

(5) Where guardians are appointed by both parents, the guardians so appointed shall after the death of the surviving parent act jointly.

(6) If under the preceding section a guardian has been appointed by the court to act jointly with a surviving parent, he shall continue to act as guardian after the death of the surviving parent; but if the surviving parent has appointed a

Power of father or mother to appoint testamentary guardians.  
Cf. U.K. 15 and 16, Geo. 5, c. 45, s. 5.  
Cf. U.K. 22 and 23, Geo. 5, c. 46, s. 79 (2).

guardian, the guardian appointed by the court shall act jointly with the guardian appointed by the surviving parent.

Disputes  
between  
joint  
guardians.  
Cf. U.K. 15  
and 16, Geo.  
5, c. 45, s. 6.  
Cf. U.K. 22  
and 23, Geo.  
5, c. 46,  
s. 79 (1).

**14.** (1) Where two or more persons are the joint guardians of an infant and they are unable to agree on any question affecting the welfare of the infant, any of them may apply to the court for its direction, and the court may make such order regarding the matters in difference as it may think proper.

(2) The power of the court under this section shall, where one of the joint guardians is the mother or father of the infant, include power—

- (a) to make such order relating to the custody of the infant and the right of access thereto of its mother or father as, having regard to the welfare of the infant, the court may think fit; and
- (b) to order the mother or father to pay towards the maintenance of the infant such weekly or other periodical sum as, having regard to the means of the mother or father, the court may consider reasonable; and
- (c) to vary or discharge any order previously made under this section.

Powers of  
guardian.  
400, 1887,  
s. 6.  
Cf. U.K. 49  
and 50, Vict.  
c. 27, s. 4.

**15.** Every guardian under this Act shall have all such powers over the estate and the person, or over the estate, as the case may be, of an infant as any guardian appointed by will or otherwise has.

Power to  
remove  
guardian.  
400, 1887,  
s. 7.  
Cf. U.K. 49  
and 50, Vict.  
c. 27, s. 6

**16.** The court may, in its discretion, on being satisfied that it is for the welfare of the infant, remove from his office any testamentary guardian, or any guardian appointed or acting by virtue of this Act, and may also, if it deems it to be for the welfare of the infant, appoint another guardian in place of the guardian so removed.

Payment of  
maintenance.  
Cf. 800, 1887,  
s. 9.

**17.** Where any guardian, trustee, executor, or person acting in a fiduciary capacity is, under any will, gift or settlement, or otherwise by law, possessed of any fund for the maintenance of any infant, or any fund a portion of which may by law be applied to such maintenance and the court orders the infant to be delivered to, or to remain in the custody of one parent, the court may also order any such guardian, trustee, executor, curator or person acting in a fiduciary capacity to pay to such parent from time to time during the continuance of such custody, for the purpose of the maintenance of the infant, such portion of such fund, not exceeding the portion lawfully applicable to such maintenance

as the court may deem proper: Provided always that on proof that any money so paid for the purpose of such maintenance has been misapplied, the court may rescind, alter, or vary any order made as aforesaid.

18. No agreement contained in any separation deed made between the father and mother of an infant shall be held to be invalid by reason only of its providing that either parent of the infant shall give up the custody and control thereof to the other parent, but no such agreement shall be enforced if the court is of opinion that it will not be for the benefit of the infant to give effect thereto.

Provision as to separation agreement.  
Cf. 800, 1887, s. 10.  
Cf. U.K. 36 and 37, Vict. c. 12, s. 2.

19. In any case where an order for judicial separation, or an order either *nisi* or absolute for divorce is made, the court making the order may thereby declare the parent by reason of whose misconduct the order is made, to be a person unfit to have the custody of the children, if any, of the marriage, and in such case the parent so declared to be unfit shall not upon the death of the other parent be entitled as of right to the custody or guardianship of such children.

Guardianship in case of divorce or judicial separation.  
800, 1887, s. 11.  
Cf. U.K. 49 and 50, Vict. c. 27, s. 7.

20. A married woman shall be capable of suing as next friend and of being appointed guardian *ad litem* on behalf of her own children or any other infants whatsoever.

Power of married woman to sue as next friend.

21. Nothing in this Act contained shall restrict or affect the jurisdiction of the Supreme Court to appoint or remove guardians, or shall affect the exercise of any jurisdiction, power, or discretion vested in the Supreme Court, or any judge thereof, under the Matrimonial Causes Act, 1929-1938.

Saving provision.  
800, 1887, s. 12.  
Cf. U.K. 49 and 50, Vict. c. 27, s. 13.

22. (1) The power to make rules conferred by the Supreme Court Act, 1935-1936, shall include power to make rules regulating the practice, form, and procedure in proceedings in the Supreme Court under this Act.

Rules of court.  
Cf. 800, 1887, s. 14.

(2) The powers conferred by section 28 of the Local Courts Act, 1926-1936, shall include power to frame rules regulating the practice, form and procedure in proceedings in local courts of full jurisdiction under this Act.

In the name and on behalf of His Majesty, I hereby assent to this Bill.

C. M. BARCLAY-HARVEY, Governor.