

GUARDIANSHIP OF INFANTS ACT.

Act No. 20, 1934.

George V,
No. 20, 1934.

An Act to amend the law with respect to the guardianship and custody and marriage of infants; to amend the Infants' Custody and Settlements Act of 1899, the Marriage Act, 1899, the Testator's Family Maintenance and Guardianship of Infants Act, 1916, and certain other Acts; and for purposes connected therewith. [Assented to, 31st October, 1934.]

BE it enacted by the King's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and Legislative Assembly of New South Wales in Parliament assembled, and by the authority of the same, as follows:—

Short title. **1.** This Act may be cited as the "Guardianship of Infants Act, 1934."

2.

2. The Infants' Custody and Settlements Act of 1899 is amended—

No. 20, 1934.

Amendment of
Act No. 39, 1899.

Substituted s. 5.

(a) by omitting section five and by inserting in lieu thereof the following new section :—

5. (1) The Supreme Court in its equitable jurisdiction, may, upon the application of the mother 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.

Custody of
infant.

49 & 50 Vic.,
c. 27, s. 5.

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

(2) The power of the court under this section to make an order as to the custody of an infant and the right of access thereto may be exercised notwithstanding that the mother of the infant is then residing with the father of the infant.

15 & 16 Geo.
V, c. 45, s. 3
(1)

(3) Where the court under this section makes an order giving the custody of the infant to the mother, then, whether or not the mother is then residing with the father, the court may further order that the father shall pay to the mother towards the maintenance of the infant such weekly or other periodical sum as the court, having regard to the means of the father, may think reasonable.

Ibid. s. 3 (2).

(4) No such order, whether for custody or maintenance, shall be enforceable and no liability shall accrue while the mother resides with the father, and any such order shall cease to have effect if for any continuous period of three months after it is made the mother of the infant resides with the father.

Ibid. s. 3 (3)

(5)

No. 20, 1934.

49 & 50 Vic.,
c. 27, s. 5.

18 & 19 Geo.
V, c. 26, s. 16.

15 & 16 Geo.
V, c. 45, s. 3
(4).

(5) In every case under this section the court may make such order respecting the costs of the mother and the liability of the father for the same or otherwise as to costs as it thinks just.

(6) The powers of the court under this section to make orders regarding the custody of an infant, and the right of access thereto of either parent, may be exercised upon the application of the father of an infant in like manner as those powers may be exercised upon the application of the mother of the infant.

(7) In any case in which a parent of an infant is dead, the court may, on the application of any relative of that parent, make such order as to access to the infant by such relative as to the court seems fit.

(8) Any order made under this section may, on the application either of the father or the mother or any guardian of the infant, be varied or discharged by a subsequent order.

(9) Orders may be made and enforced under this Act notwithstanding that proceedings may have been instituted under the Matrimonial Causes Act, 1899, by the father or the mother, or that an order has been made in the proceedings :

Provided that no order shall be made or enforced under this Act in respect of any matter where any order in relation to such matter has already been made by the Supreme Court in its matrimonial causes jurisdiction or where at the date of any application made under this Act in respect of any matter, an application has already been filed in that Court and is then pending in respect of such matter :

Provided also that orders made under this Act may be subsequently varied by the Supreme Court in its matrimonial causes jurisdiction where the same subject matter arises in any proceedings within its jurisdiction instituted in that Court. (b)

- (b) by inserting next after section ten the following new sections :—

No. 20, 1934.
New ss. 10A,
10B, 10c, 10d.

10A. (1) The jurisdiction conferred on the Supreme Court in its equitable jurisdiction by this Part may also be exercised by the district court of the district in which the respondent or respondents or any of them reside, or by a court of petty sessions nearest to the place of residence of the respondent or respondents or any of them :

Extension of jurisdiction to district courts and courts of petty sessions holden before stipendiary or police magistrates.
cf. 49 & 50 Vic., c. 27, s. 9, and 15 & 16 Geo. V, c. 45, s. 7.

Provided that—

- (a) such court of petty sessions shall be constituted by a stipendiary or police magistrate sitting alone; and
- (b) such court of petty sessions shall not be competent—
 - (i) to entertain any application relating to an infant who has attained the age of sixteen years, unless the infant is physically or mentally incapable of self support, or the application is one for the variation or discharge of a then subsisting order of a court of petty sessions; or
 - (ii) to entertain any application involving the administration or application of any property belonging to or held in trust for an infant, or the income thereof; or
 - (iii) to award the payment of sums towards the maintenance of any infant exceeding the sum of twenty shillings per week.

(2) (a) Where a district court makes or refuses to make an order on an application under this section an appeal shall lie to the Supreme Court in its equitable jurisdiction in the manner prescribed by the rules of that court.

(b)

(b) Where a court of petty sessions makes or refuses to make such an order an appeal shall lie to a court of quarter sessions, and Part V of the Justices Act, 1902, shall be deemed to extend to such an appeal :

Provided that where the application is made to a district court, and such court considers that the matter is one which would be dealt with more conveniently by the Supreme Court in its equitable jurisdiction, or where any such application is made to a court of petty sessions and such court considers that the matter is one which would be dealt with more conveniently by the Supreme Court in its equitable jurisdiction or a district court, the court to which the application is made may refuse to make any order, and in such case no appeal shall lie to any court against such refusal.

(3) An order of a district court or of a court of petty sessions for the payment of money under this Part shall have the effect of and be deemed to be a judgment of the district court or of the court of petty sessions as the case may be and shall be enforceable by process of court as in pursuance of such judgment.

(4) Where an order under this Part contains a provision committing to the applicant or any other person the legal custody of any infant, a copy of the order may be served on any person in whose actual custody the infant may for the time being be, and if such person makes default in complying with such provision he shall be liable on summary conviction to a penalty not exceeding five pounds per day for each day he makes default in complying with such provision.

10B. When any application has been made under this Part to a district court or to a court of petty sessions, the Supreme Court in its equitable jurisdiction may, at the instance of any

any party to such application, order such application to be removed to the Supreme Court in its equitable jurisdiction and there proceeded with upon such terms as to costs of removal as it thinks proper.

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10c. (1) Any person for the time being under an obligation to make payments in pursuance of any order for the payment of money under this Part shall give notice of any change of address to such person (if any) as may be specified in the order, and any person failing without reasonable excuse to give such a notice shall be liable on summary conviction to a penalty not exceeding ten pounds.

Enforcement of orders for payment of money.

15 & 16 Geo. V, c. 45, s. 8 (1).

(2) Where any order for the payment of money has been made in exercise of the powers contained in this Part, the court making the order shall, in addition to any other powers for enforcing compliance with the order, have power in any case where there is any pension or income payable to the person against whom the order is made and capable of being attached, after giving the person by whom the pension or income is payable an opportunity of being heard, to order that such part as the court may think fit of any such pension or income be attached and paid to the person named by the court, and such further order shall be an authority to the person by whom such pension or income is payable to make the payments so ordered, and the receipt of the person to whom the payment is ordered to be made shall be a good discharge to the person by whom the pension or income is payable.

10d. In any question relating to the custody or education of an infant in which is any conflict or variance between the rules of equity and the rules of the common law with reference to the same matter the rules of equity shall prevail in all courts exercising jurisdiction under this Act.

Rules of equity to prevail. cf. 15 & 16 Geo. V, c. 49, s. 44.

(c)

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(c) by inserting at the end of section three the following new definition:—

“ Maintenance ” includes education.

cf. 22 & 23,
Geo. V. c. 46,
s. 79 (3).Further
amendment of
Act No. 39,
1899.**3.** The Infants' Custody and Settlements Act of 1899 is further amended—

New Part IV.

(a) by inserting next after section sixteen the following new Part:—

PART IV.

*Provisions applicable in all courts.*Custody,
upbringing,
and property
of infant.15 & 16 Geo.
V, c. 45, s. 1.

17. Where in any proceeding before any court (whether or not a court within the meaning of this Act) 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 by 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.

In this section “ upbringing ” includes religious instruction.

Equal right of
mother to apply
to court.
Ibid. s. 2.

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

Sec. 1.
(Division
into Parts.)

(b) by inserting at the end of section one the following words and figures:—

PART IV.—*Provisions applicable in all courts—ss. 17, 18.*

4. (1) The Infants' Custody and Settlements Act of 1899, is further amended—

No. 20, 1934.
Further
amendment
of Act No.
39, 1899, s. 4.
(Rules.)

(a) by inserting in section four after the word "procedure" the words "in the Supreme Court and upon appeals thereto";

(b) by inserting at the end of the same section the following new subsections:—

(2) The district court judges or any four of them may make rules for regulating the practice and procedure upon applications made under Part I of this Act to district courts and for the enforcement of orders made upon such applications.

(3) The Governor may make rules for regulating the practice and procedure upon applications made under Part I of this Act to courts of petty sessions and for the enforcement of orders made upon such applications, and for regulating the practice and procedure upon appeals to courts of quarter sessions under this Act.

(4) Any rules made under this Act shall—

(a) be published in the Gazette;

(b) take effect from the date of publication, or from a later date specified in the rules;

(c) be laid before both Houses of Parliament within fourteen sitting days if Parliament is then in session, and if not, then within fourteen sitting days after the commencement of the next session.

If either House of Parliament passes a resolution of which notice has been given at any time within fifteen sitting days after the rules have been laid before such House disallowing any rule or part thereof, the rule or part shall thereupon cease to have effect.

(2) The Infants' Custody and Settlements Act of 1899, as amended by this Act may be cited as the Infants' Custody and Settlements Act, 1899-1934.

Citation of Act
No. 39, 1899, as
amended,

5.

No. 20, 1934.

Amendment of
Act No. 41, 1916,
ss. 12-16.Substituted ss.
13, 14.Rights of
surviving
parent as to
guardianship.
15 & 16 Geo.
V, c. 45, s. 4.Power of
mother and
father to
appoint
guardians.
Ibid. s. 5.

5. (1) The Testator's Family Maintenance and Guardianship of Infants Act, 1916, is amended—

(a) by omitting sections thirteen, fourteen, fifteen, and sixteen, and by inserting in lieu thereof the following new sections:—

13. (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.

Where 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.

Where 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.

14. (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)

(4) If the mother or father so objects, or if the guardian so appointed considers that the mother or father is unfit to have the custody of the infant, the guardian may apply to the court.

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The court may either refuse to make an 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.

Where the court makes an order that the guardian so appointed shall be the sole guardian of the infant, the court 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 and education 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 by this subsection may be exercised at any time and shall include power to vary or discharge any order previously made in virtue of those powers.

of. 22 and 23
Geo. V, c. 46,
s. 79 (2).

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

(b)

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Sec. 17.
 (Guardians may
 apply to court
 for directions.)

cf. 22 & 23
 Geo. V,
 c. 46, s. 79
 (1) (3).

(b) by inserting at the end of section seventeen the following new subsection:—

(2) The power conferred by the foregoing provisions of this section shall include power to vary or discharge any order made under this section or made by any court under the Infants' Custody and Settlements Act, 1899-1934, and, where one of the guardians is the mother or father of the infant, shall also include power—

(a) to make such orders regarding the custody of the infant and the right of access thereto 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 or education 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.

(2) Any question as to the validity of any order made before the commencement of this Act under the Testator's Family Maintenance and Guardianship of Infants Act, 1916, shall be determined as if this Act had commenced immediately after that Act.

Further
 amendment
 of Act No. 41,
 1916, s. 18.

6. (1) The Testator's Family Maintenance and Guardianship of Infants Act, 1916, is further amended—

(a) by omitting from section eighteen the words "of the Act" and by inserting in lieu thereof the words "of this Act";

(b) by inserting at the end of section eighteen the following new paragraph:—

The powers of the court under this section extend to the removal of either parent from guardianship under this Act.

Citation of
 Act No. 41,
 1916, as
 amended.

(2) The Testator's Family Maintenance and Guardianship of Infants Act, 1916, as amended by this Act

Act may be cited as the Testator's Family Maintenance and Guardianship of Infants Act, 1916-1934. No. 20, 1934.

7. (1) The Marriage Act, 1899, is amended—

Amendment of
Act No. 15, 1899.

(a) by omitting section nine and by inserting in lieu thereof the following new section:— Substituted
s. 9.

9. (1) If either party to any intended marriage, not having been previously married or not being a widower or widow, is under the age of twenty-one years, such marriage shall not take place without production to the person about to celebrate the same of the written consent of the person or persons mentioned in the Fifth Schedule to this Act: Consent in
case of
minority.

Provided that—

- (a) if the person about to celebrate the marriage is satisfied that the consent of any person whose consent is so required cannot be obtained by reason of absence or inaccessibility, or by reason of his being under any disability, the necessity for the consent of that person shall be dispensed with if there is any other person whose consent is also required and has been obtained, and if the consent of no other person is required, or if so required cannot for any of the reasons abovementioned be obtained, a stipendiary or police magistrate or some justice of the peace appointed for that purpose may in writing consent to the marriage;
- (b) if any person whose consent is required refuses his consent, the court may, on application in the prescribed form, consent to the marriage.

(2) Before a consent is given pursuant to paragraphs (a) and (b) of subsection one of this Inquiry by
court,
magistrate, or
justice.

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this section an inquiry shall be made on oath or solemn affirmation as to the facts and circumstances of the case.

Effect of consent of court, magistrate, or justice.

(3) The consent of the court or of a stipendiary or police magistrate or justice of the peace to any marriage pursuant to this section shall have the same effect as if it had been given by the person whose consent cannot be so obtained or, as the case may be, is so refused.

Definition of court.

(4) For the purposes of this section "the court" shall mean the Supreme Court in its equitable jurisdiction or a judge thereof, the district court of the district in which the minor resides, or the court of petty sessions nearest to the place of residence of the minor which is holden before a stipendiary or police magistrate sitting alone.

Every court exercising jurisdiction under this section shall sit in camera unless the court shall otherwise order.

(5) The form of applications to the Supreme Court or a district court and the procedure thereon shall be as prescribed by rules of court, or in the case of applications to a court of petty sessions shall be as prescribed by general rules made under the Justices Act, 1902.

Sec. 10.

- (b) (i) by omitting from subsection one of section ten the words "Judges of the Supreme Court" and by inserting in lieu thereof the words "Registrar-General";
- (ii) by omitting from subsection two of the same section the words "said Judges" and by inserting in lieu thereof the words "Registrar-General";
- (c) by omitting from the Fourth Schedule the words "Marriage Act, No. , 1899," wherever occurring and by inserting in lieu thereof the words "Marriage Act, 1899-1934."

(d)

(d) by inserting after Fourth Schedule the following new Schedule :—

No. 20, 1934.

New Sched.
Five.

FIFTH SCHEDULE.

CONSENTS REQUIRED TO THE MARRIAGE OF AN INFANT.

Sec. 9.
cf. 15 & 16
Geo. V,
c. 45, Sch.

Circumstances.	Person whose consent is required.
<i>I.—Where the infant is legitimate.</i>	
1. Where both parents are living—	
(a) if the parents are living together;	Both parents.
(b) if the parents are divorced or separated by order of court or by agreement;	The parent to whom the custody of the infant is committed by order of any court or by the agreement, or if the custody of the infant is so committed to one parent during a period of time and to the other parent during another period or periods of time, both parents.
(c) if one parent has been deserted by the other;	The parent who has been deserted.
(d) if both parents have been deprived of the custody of the infant by order of any court.	The person to whose custody the infant is committed by order of any court.
2. Where one parent is dead—	
(a) if there is no other guardian;	The surviving parent.
(b) if a guardian has been appointed by the deceased parent.	The surviving parent and the guardian if acting jointly, or the surviving parent or the guardian if the parent or guardian is the sole guardian of the infant.
3. Where both parents are dead.	The guardians or guardian appointed by the deceased parents or by any court, or if no such guardian has been appointed, a stipendiary or police magistrate or justice of the peace appointed in that behalf in accordance with section ten of this Act.

FIFTH SCHEDULE—*continued.*CONSENTS REQUIRED TO THE MARRIAGE OF AN INFANT—*continued.*

Circumstances.	Person whose consent is required.
II.— <i>Where the infant is illegitimate.</i>	
If the mother of the infant is alive.	The mother, or if she has by order of any court been deprived of the custody of the infant, the person to whom the custody of the infant has been committed by order of the court.
If the mother of the infant is dead.	The guardian appointed by the mother or by any court, or if no such guardian has been appointed, a stipendiary or police magistrate or justice of the peace appointed in that behalf in accordance with section ten of this Act.

(2) The Marriage Act, 1899, as amended by the Marriage (Amendment) Act, 1924, the Marriage (Amendment) Act, 1925, the Marriage (Amendment) Act, 1934, and this Act, may be cited as the Marriage Act, 1899-1934.

(3) Any person appointed pursuant to section ten of the Marriage Act, 1899, prior to the commencement of this section and whose appointment is at such commencement in force shall be deemed to have been appointed pursuant to the Marriage Act, 1899-1934.

(4) This section shall commence on a day to be appointed by the Governor and notified by proclamation published in the Gazette.