

Infants' Custody and Settlements Act 1899 No 39

[1899-39]



New South Wales

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Provisions in force

The provisions displayed in this version of the legislation have all commenced.

Notes—

- **Previously named**
Infants' Custody and Settlements Act of 1899
- **Does not include amendments by**
[Miscellaneous Acts \(Local Court\) Amendment Act 2007 No 94](#) (not commenced)

Authorisation

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Infants' Custody and Settlements Act 1899 No 39



New South Wales

An Act to consolidate the law relating to the custody of infants and the settlement of the property of infants.

Part 1A Preliminary

1 Name of Act

- (1) This Act may be cited as the *Infants' Custody and Settlements Act 1899*.
- (2) (Repealed)

2 Repeals

The Acts mentioned in the Schedule are, to the extent therein expressed, hereby repealed.

3 Definitions

In this Act, unless the context or subject matter otherwise indicates or requires:

Parent of a child includes the father and mother and any person at law liable to maintain such child or entitled to custody of the child.

Person includes any school or institution.

Court means the Supreme Court.

Maintenance includes education.

Minor means a person under the age of eighteen years.

4 Rules

- (1) Such rules may be made under the *Supreme Court Act 1970* as from time to time seem necessary for better carrying the provisions and objects of this Act into effect, and for regulating the practice and procedure in the Supreme Court and upon appeals thereto under this Act.

- (1A) Subsection (1) does not limit the rule-making powers conferred by the *Supreme Court Act 1970*.
- (2) The district court judges or any four of them may make rules for regulating the practice and procedure upon applications made under Part 1 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 1 to a Local Court and for the enforcement of orders made upon such applications, and for regulating the practice and procedure upon appeals to the District Court under this Act.
- (4)-(6) (Repealed)

Part 1 Custody of minors

4A Custody to end at 18 years

- (1) A person shall, upon reaching the age of eighteen years, cease to be under the custody in infancy of any other person, whether under the common law, under any Act, or under the order of any court.
- (2) An order of any court for access to a minor shall cease to have effect when the minor reaches the age of eighteen years.
- (3) A court shall not make any order for the custody in infancy of, or access to, a person who has reached the age of eighteen years.
- (4) This section does not affect the power of any court under any Act to make an order relating to the maintenance of an infant.

5 Custody of minor

- (1) The Supreme Court may, upon the application of the mother of any minor, make such order as it may think fit regarding the custody of the minor and the right of access thereto of either parent, having regard to the welfare of the minor, and to the conduct of the parents, and to the wishes as well of the mother as of the father.

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 minor or depriving such parent thereof if the court is satisfied that the welfare of the minor 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 a minor and the right of access thereto may be exercised notwithstanding that the mother of the minor is then residing with the father of the minor.
- (3) Where the court under this section makes an order giving the custody of the minor 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 minor such weekly or other periodical sum as the court, having regard to the means of the father, may think reasonable.

- (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 minor resides with the father.
- (5) (Repealed)
- (6) The powers of the court under this section to make orders regarding the custody of a minor, and the right of access thereto of either parent, may be exercised upon the application of the father of a minor in like manner as those powers may be exercised upon the application of the mother of the minor.
- (7) In any case in which a parent of a minor is dead, the court may, on the application of any relative of that parent, make such order as to access to the minor 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 minor, be varied or discharged by a subsequent order.
- (9) (Repealed)

6 Power of Court as to production of minor

Where the parent of a minor applies to the Supreme Court for a writ or order for the production of the minor, or for any order under the last preceding section, and the Court is of opinion:

- (a) that the parent has abandoned or deserted or neglected the minor, or
- (b) that the parent has otherwise so conducted himself or herself that the Court should refuse to enforce the parent's right to the custody of the minor, or
- (c) that the tender age of the minor or its state of health render it expedient that it should remain with its mother or some other person

the Court may decline to issue the writ or make the order.

7 Power to Court to order repayment of costs of bringing up minor

If at the time of the application for a writ or order for the production of the minor the minor is being brought up by another person, or is boarded out by any State board or other board, the Court may, in its discretion, if it orders the minor to be given up to the parent, further order as a condition precedent or upon such terms as it may think fit that

the parent shall pay to such person, or board, the whole of the costs properly incurred in bringing up the minor, or such portion of the said costs as shall seem to the Court to be just and reasonable, having regard to all the circumstances of the case.

8 Court in making order to have regard to conduct of parent

Where a parent of a minor has:

- (a) abandoned or deserted or neglected the minor, or
- (b) allowed the minor to be brought up by another person at that person's expense, or at the expense of any State board or other board, for such a length of time and under such circumstances as to satisfy the Court that the parent neglected his or her parental duties,

the Court shall not make an order for the delivery of the minor to the parent, unless the parent has satisfied the Court that, having regard to the welfare of the minor, the parent is a fit person to have the custody of the minor.

9 Power of Court as to minor's religious education

- (1) Upon any application by the parent of a minor for the production or custody of the minor, if the Court is of opinion that the parent ought not to have the custody of the minor, and that the minor is being brought up in a different religion from that in which the parent has a legal right to require that the minor should be brought up, the Court may make such order as it may think fit to secure that the minor shall be brought up in the religion in which the parent has a legal right to require that the minor should be brought up.
- (2) Nothing in this Act contained shall interfere with or affect the power of the Court to consult the wishes of the minor in considering what order ought to be made, or diminish the right which a minor now possesses to exercise free choice.

10 Court may order custody of minors in certain cases

- (1) Whenever the Court is satisfied that the parent or person having the custody of a minor is unfit to continue to have such custody by reason of cruelty or neglect to the minor the Court may order that the minor shall be given up to the custody of some near relative or other person willing to accept such custody, and may by such order impose terms for the maintenance of the minor chargeable upon the parent.
- (2) Such order may be varied or revoked from time to time at the discretion of the Court.

10A Extension of jurisdiction

- (1) The jurisdiction conferred on the Supreme Court 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 Local Court nearest to the place of residence of the respondent or

respondents or any of them:

Provided that:

- (a) such Local Court shall be constituted by a Magistrate sitting alone, and
- (b) such Local Court shall not be competent:
 - (i) to entertain any application relating to a minor who has attained the age of sixteen years, unless the minor 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 Local Court, or
 - (ii) to entertain any application involving the administration or application of any property belonging to or held in trust for a minor, or the income thereof, or
 - (iii) to award the payment of sums towards the maintenance of a minor exceeding the sum of two dollars 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.
- (b) Where a Local Court makes or refuses to make such an order an appeal shall lie to the District Court, and Parts 5A and 5B 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, or where any such application is made to a Local Court and such court considers that the matter is one which would be dealt with more conveniently by the Supreme Court 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 Local Court 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 Local Court as the case may be and shall, subject to subsections (3A) and (3B), be enforceable by process of court as in pursuance of such judgment.
- (3A) Any order for the payment of a weekly or other periodical sum made by a Local Court in the exercise of the powers and authorities conferred by this Part shall have effect as an order for the payment, at the weekly or other periods stated in the order, of successive amounts of money equal to the sums specified in the order.
- (3B) If default is made in the payment of any one or more of the weekly or other periodical sums referred to in subsection (3A), the order for the payment of that sum

or the total of those sums then in default for any period not exceeding 6 months may be enforced as if the order were an order for the payment of a sum of money equal to that sum or the total of those sums made under the *Civil Procedure Act 2005* by the Local Court which made the order.

- (4) Where an order under this Part contains a provision committing to the applicant or any other person the legal custody of a minor, a copy of the order may be served on any person in whose actual custody the minor may for the time being be, and if such person makes default in complying with such provision the person shall be liable on summary conviction to a penalty not exceeding 0.1 penalty unit per day for each day the person makes default in complying with such provision.
- (5) The provisions of sections 10 and 11 of the *Children (Criminal Proceedings) Act 1987* apply to proceedings under this Act in a Local Court in the same way as they apply to criminal proceedings.

10B Removal of proceedings

When any application has been made under this Part to a district court or to a Local Court, the Supreme Court may, at the instance of any party to such application, order such application to be removed to the Supreme Court and there proceeded with upon such terms as to costs of removal as it thinks proper.

10C Enforcement of orders for payment of money

- (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 0.5 penalty unit.
- (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 Rules of equity to prevail

In any question relating to the custody or education of a minor 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.

11 Agreement to give up minor not to be invalid

No agreement contained in any separation deed made between the father and mother of a minor shall be held to be invalid by reason only of its providing that the father of the minor shall give up the custody or control thereof to the mother:

Provided always that no Court shall enforce any such agreement if it is of opinion that it will not be for the benefit of the minor to give effect thereto.

Part 2

12-15 (Repealed)

Part 3 Settlement of damages

16 Court may appoint trustees for settlements for the benefit of minors in certain cases

- (1) Whenever a verdict is recovered or a judgment entered for any amount as damages in any action or other proceedings for tort brought by or on behalf of a minor, the Court may order that a settlement of the same shall be made for the benefit of the minor, and may appoint a trustee or trustees for such settlement.
- (2) The terms of such settlement shall be fixed by the Court, or subject to its approval by some officer of the Court appointed so to do.
- (3) This power shall extend to the District Court as well as the Supreme Court.

Part 4 General

17 Custody, upbringing, and property of minor

Where in any proceeding before any court (whether or not a court within the meaning of this Act) the custody or upbringing of a minor, or the administration of any property belonging to or held in trust for a minor, or the application of the income thereof, is in question, the court, in deciding that question, shall regard the welfare of the minor 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.

18 Equal right of mother to apply to court

The mother of a minor shall have the like powers to apply to any court in respect of any

matter affecting the minor as are possessed by the father.

Schedule

Act	Title of Act	Extent of repeal
20 Vic No 2	An Act to enable Infants, with the approbation of the Supreme Court in its Equitable Jurisdiction, to make binding settlements of their real and personal property.	The whole Act.
39 Vic No 16	An Act to amend the law as to the Custody of Infants.	The whole Act.
57 Vic No 10	<i>The Custody of Children and Children's Settlements Act of 1891.</i>	The whole Act.