

WESTERN AUSTRALIA.

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# GUARDIANSHIP OF CHILDREN.

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No. 77 of 1972.

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**AN ACT to consolidate and amend the Law with regard to the Guardianship and Custody of Children.**

[Assented to 20th November, 1972.]

**BE** it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and the Legislative Assembly of Western Australia, in this present Parliament assembled, and by the authority of the same, as follows:—

1. This Act may be cited as the *Guardianship of Children Act, 1972*.

Short title.

2. The Acts specified in the Schedule to this Act are hereby repealed.

Repeals.

Savings.

3. (1) Where a person who has ceased to be a child but has not attained the age of twenty-one years has at any time been the subject of an order under any of the provisions of the repealed Acts, the Court may, on the application of either parent or a guardian of that person or of that person himself, make an order requiring either parent to pay to the other parent, to anyone else for the benefit of that person or to that person himself, in respect of any period not extending beyond the date when he attains the age of twenty-one years, such weekly or other periodical sums towards his maintenance or education as the Court thinks reasonable having regard to the means of the person on whom the requirement is imposed.

(2) Subject to subsection (1) of this section, but without affecting the application of the Interpretation Act, 1918, to this Act, any alteration, by this Act, of the law whether by the repeal of an Act, or otherwise, does not affect—

- (a) any right accrued, or obligation incurred, under the law so altered before the date of the coming into operation of this Act; or
- (b) the validity or invalidity, or any operation, effect or consequence, of any instrument executed or made, or of anything done or suffered before that date; or
- (c) any action, proceeding or thing pending on that date or uncompleted on that date,

and any such instrument shall have effect and every such action, proceeding or thing may be carried on and completed as if the corresponding provision of this Act had been in force when they respectively originated and they had originated thereunder.

Interpreta-  
tion.

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

“child”—

- (a) means any boy or girl under the age of eighteen years; and, in the absence of positive evidence as to age, means any boy or girl under the apparent age of eighteen years;

(b) in relation to any person, includes an illegitimate or adopted child of that person but does not include a child of that person adopted by another person; and

(c) in relation to the parties to a marriage means any child of both parties and any child of either party who has been accepted as one of the family by the other party;

and “mother”, “father” and “parent”, in relation to a child, shall be construed accordingly;

“the Court” means the Supreme Court or a Judge;

“the repealed Acts” means the Acts specified in the Schedule to this Act;

“the Summary Relief Court” means the Summary Relief Court established under the Married Persons and Children (Summary Relief) Act, 1965;

“welfare officer” means an officer of the Department for Community Welfare engaged in the duties of investigating the welfare of children.

5. (1) Where in any proceeding before the Court the appointment or removal of a guardian, the custody or upbringing of a child, or the right of access to a child, or the administration or application of any property or income belonging to or held in trust for a child, is in question, the Court, in deciding that question, shall regard the welfare of the child as the first and paramount consideration.

Principle on which questions to be decided.

(2) The mother of a child has the same right to apply to the Court in respect of any matter affecting the child as is possessed by the father, at common law or otherwise.

(3) The powers of the Court under this Act to make an order as to the custody of a child, or as to the right of access thereto, or as to payments in respect thereof, may be exercised notwithstanding that the parents of the child are then residing together, but any such order shall not be enforced and no liability accrues while they so reside with the child; and the order shall cease to have effect if for a period of three months after it is made the parents of the child continue to reside together with the child.

Who may  
apply.

6. An application to the Court in respect of any matter affecting the welfare of a child may be made under this Act by or on behalf of any of the following persons—

- (a) either parent (who may apply without a next friend);
- (b) any guardian, whether appointed under the provisions of this Act or by will or otherwise;
- (c) any person having custody or control of the child;
- (d) any person authorised under the provisions of section 25 of this Act;
- (e) any person acting in a fiduciary capacity who is, under any will, gift, or settlement, or otherwise by law, possessed of any fund for the maintenance or education of the child, or any fund a portion of which may by law be applied for the maintenance or education of the child; and
- (f) any other person who can establish to the satisfaction of the Court that his paramount interest in the matter is the welfare of the child.

7. A guardian appointed under the provisions of this Act has all the powers over the estate and the person of a child as he would have had if he had been appointed by will or otherwise.

Power of guardian.

8. No agreement made between the parents of a child shall be held to be invalid by reason only of its providing that one of the parents shall give up the custody, control or guardianship of the child to the other; but no such agreement shall be enforced if the Court is of the opinion that it will not be for the benefit of the child to give effect thereto.

Agreements between parents.

9. In any case where—

(a) a decree for judicial separation; or

(b) a decree *nisi* or absolute for divorce,

Parent may be declared unfitted.

is pronounced, or where the Court is asked to make a declaration—

(c) that it is satisfied that proper arrangements in all the circumstances have been made for the welfare and, where appropriate, the advancement and education of a child of the marriage; or

(d) that there are such special circumstances that the decree *nisi* should become absolute notwithstanding that the Court is not satisfied that such arrangements have been made,

the Court may thereby declare the parent by reason of whose misconduct the decree is made to be a person unfit to have the custody of the children of the marriage, and in such case the parent so declared to be unfit is not, upon the death of the other parent, entitled as of right to the custody or guardianship of the children.

Surviving  
parent may  
be guardian.

10. (1) Subject to the provisions of this Act, a surviving parent shall be the guardian of a child, either alone or jointly with any guardian appointed by a deceased parent or by the Court.

(2) When no guardian has been appointed by a deceased parent, or if a guardian appointed by a deceased parent is dead or refuses to act, the Court may appoint a guardian to act jointly with the surviving parent.

Power of  
father and  
mother to  
appoint  
guardians.

11. (1) The father of a child may by deed or will appoint any person to be guardian of the child after his death.

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

Joint  
guardians.

12. (1) Subject to the provisions of this Act a guardian appointed by a deceased parent shall act jointly with the surviving parent so long as the surviving parent does not object.

(2) If a guardian is 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.

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

Disagree-  
ment  
between  
joint  
guardians.

13. Where two or more persons act as joint guardians of a child and they are unable to agree, on any question affecting the welfare of the child, 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 thinks proper.

## 14. If—

Disputes as to appointments.

- (a) a person appointed by a deceased parent to be the guardian of a child is objected to by the surviving parent;
- (b) a person appointed as a guardian by a deceased parent or by the Court considers that the surviving parent is unfit to have the custody of the child or to be a guardian of the child; or
- (c) a person appointed by a deceased parent to be the guardian of a child objects to a joint guardian so acting,

that person may apply to the Court, and the Court may thereupon—

- (d) order that the surviving parent remains sole guardian;
- (e) order that the person so applying shall be the sole guardian; or
- (f) order that the person so applying shall act as guardian of the child jointly with the surviving parent or other guardian.

15. Where no parent is acting as guardian of a child and there is no appointed guardian of the child, or a guardian has been appointed but is dead or cannot be found or refuses to act, the Court may appoint a person to be the guardian of the child.

Power of Court to appoint guardian in default.

16. The Court may, on being satisfied that it is for the welfare of the child, remove from his office any guardian, whether appointed under the provisions of this Act or by will or otherwise, and may also, if it considers it to be for the welfare of the child, appoint another guardian in place of the guardian so removed.

Power of Court to remove guardian.

Court may  
make orders  
as to  
custody.

17. (1) The Court may, upon the application of any person having the right to apply in accordance with the provisions of section 6 of this Act, make such order as it thinks fit regarding the custody of a child, and the right of access thereto of any person (whether a relative of the child or not) having regard to the welfare of the child and to the conduct of the parents, and to the wishes as well of the mother as of the father; and may alter, vary, suspend or discharge the order on the application of any such person; and may make such order as to costs as it thinks just.

(2) Before making, or refusing to make, an order under subsection (1) of this section, the Court may adjourn the proceedings until a report relevant to that matter has been received from a welfare officer and may, for the purposes of this section, receive that report in evidence.

(3) For the purposes of subsection (2) of this section, the Court may grant an order authorising a welfare officer to enter into and inspect the premises where a child is, or is intended to be, housed by a party to the proceedings or other person to whom the custody of the child may for the time being be granted; and a welfare officer acting pursuant to an order made under this subsection shall, for the purposes of this section, be deemed to be an officer of the Court.

Court may  
order pay-  
ments.

18. (1) The Court may, upon the application of any person having the right to apply in accordance with the provisions of section 6 of this Act, make an order that a parent of a child shall pay to the person named in the order towards the maintenance or education of the child such weekly or other periodical sums as the Court, having regard to the means of the person on whom the requirement is imposed, thinks reasonable; and may alter, vary, suspend, or discharge the order on the application of any such person; and may make such order as to costs as it thinks just.



(2) The Court, in making an order under subsection (1) of this section, may direct that the order shall have retrospective effect from—

- (a) the day which the Court determines as being the last date on which, having regard to the then existing means of the person on whom the requirement is imposed, that person had made reasonable provision for the child; or
- (b) a day not earlier than two years prior to the making of the order,

whichever day is the later.

(3) The Court shall not direct that an order made under subsection (1) of this section has retrospective effect where the Court is satisfied that there has been unreasonable delay in bringing the application, in the sense that the person making the application has, with full knowledge of the circumstances, culpably failed or neglected to take any action.

(4) In considering whether any, and if so what, provision should be included in an order made under subsection (1) of this section in respect of a child of the family who is not a child of the party to the marriage on whom the requirement is to be imposed, the Court shall have regard to the extent, if any, to which that party had, on or after the acceptance of that child as one of the family, assumed responsibility for the maintenance or education of that child, and to the liability of any person other than a party to the marriage to make provision for the child.

19. (1) Where on an application under this Act it appears to the Court that in the interests of the welfare of the child some immediate assistance or order is required, but it is not then possible to determine what order, if any, should be made on the application to dispose of the matter, the Court may thereupon order, subject to such conditions or restrictions, if any, as the Court may impose and to any further order of the Court, that such immediate provision is made as to the Court seems reasonable.

*Interim orders.*

(2) In determining what order, if any, should be made under this section the Court shall, so far as the urgency of the case admits, have regard to the same considerations as would be relevant in determining what order should be made on the application; and any subsequent order may provide that sums paid to or for any person by virtue of this section shall be treated as having been paid on account of the provision made by the order disposing of the matter.

Enforcement  
by Summary  
Relief Court.

20. (1) Every order made under this Act for the payment of a weekly or periodic sum by a parent to any person towards the maintenance or education of a child may be registered in the Summary Relief Court.

(2) Every order registered in the Summary Relief Court under subsection (1) of this section; and every order whenever made which under the provisions of the repealed Acts was capable of being registered in, or of being deemed to be an order of, the Summary Relief Court may, in manner provided by Rules of Court, be enforced as though it were an order made by the Summary Relief Court upon a complaint by a parent of the child.

Orders for  
payment of  
money may  
be enforced  
by attach-  
ment.

21. Where a court makes an order for the payment of money under this Act, it has power where there is any pension or income capable of being attached and payable to the person against whom the order is made to order, after giving the person by whom the pension or income is payable an opportunity of being heard, that such part as the court thinks fit of the pension or income be attached and paid to the person named in the order, and that order shall be an authority to the person by whom the pension or income is payable to make the payment so ordered, and the receipt of the person to whom the payment is ordered to be made is a good discharge to the person by whom the pension or income is payable.

22. A person for the time being under an obligation to make payments in pursuance of an order for the payment of money under this Act who fails without reasonable excuse to give notice in writing of any change of address to the person (if any) specified in the order, commits an offence and is liable on summary conviction to a fine not exceeding two hundred dollars, or to imprisonment for a period not exceeding three months.

Change of address.

23. (1) 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 and education of any child, or any fund a portion of which may by law be applied to such maintenance and education, and the Court orders that child to be delivered to, or remain in the custody of any person, the Court may also order such guardian, trustee, executor or person acting in a fiduciary capacity, to pay to the person from time to time having custody of the child, for the purpose of its maintenance and education, such portion of that fund, not exceeding the portion lawfully applicable to maintenance and education, as the Court thinks proper.

Court may order trustees, etc., to pay maintenance during period of custody.

(2) Where the Court is satisfied that any money ordered to be paid for the purpose of the maintenance and education of an infant has been misapplied, the Court may rescind, alter or vary the order.

24. (1) Where a parent of a child applies to the Court for a writ or order for the production of the child, and the Court is of opinion that the parent has abandoned or deserted the child or that he has otherwise so conducted himself that the Court should refuse to enforce his right to the custody of the child, the Court may decline to issue the writ or make the order.

Power of Court as to production of child and re-payment of costs of bringing up child.

(2) If at the time of the application for the writ or order for the production of the child, the child is being brought up by another person, the Court may, if it orders the child to be given up to the parent, further order that the parent shall pay to such person the whole of the costs properly incurred in bringing up the child, or such portion thereof as seems to the Court to be just and reasonable, having regard to all circumstances of the case.

(3) Where a parent has—

- (a) abandoned or deserted his child; or
- (b) allowed his child to be brought up by another person at the expense of that other person for such a length of time and under such circumstances as to satisfy the Court that the parent was unmindful of his parental duties,

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

(4) For the purposes of this section the expression “parent of a child” includes any person legally liable to maintain such child or entitled to his custody; and “person” includes any school or institution.

Powers of  
Director of  
Department  
for Com-  
munity  
Welfare.

25. (1) The Director of the Department for Community Welfare appointed under the Community Welfare Act, 1972, has power (in his official name or style, as if he were a corporation sole) to take or appear in all or any proceedings which it may be necessary or convenient to take or appear in on behalf of that department for the purposes of any provision of this Act or in order to enforce any right conferred on that department under or by virtue of this Act.

(2) The Director of the Department for Community Welfare may by writing signed by him delegate all or any of the powers conferred upon him by this section, with the exception of this power of delegation, to any other officer of the department.

(3) The person to whom power is delegated under subsection (2) of this section may exercise the power in the same manner and with the same effect as if the power were directly conferred upon him by this Act and not by delegation.

(4) Where the exercise of the power is dependent upon the opinion or other state of mind of the Director in relation to any matter, the power when delegated may be exercised by the delegate upon his opinion or state of mind in relation to the matter.

(5) A person who purports to exercise power pursuant to a delegation conferred under the provisions of this section is presumed to do so in accordance with the terms of the delegation in the absence of proof to the contrary.

(6) Every delegation of power pursuant to the provisions of this section may be revoked wholly or partly by the Director at any time, and no delegation shall prevent the Director from exercising the power.

(7) The Governor may by regulations confer on any officer or agent of any school or institution the like powers in respect of that school or institution as are conferred on the Director of the Department for Community Welfare in respect of that department by subsection (1) of this section.

(8) Nothing in this Act shall be deemed to confer on any court power to order the release of any ward under the Child Welfare Act, 1947, from the control of the Department for Community Welfare, or from any institution within the meaning of that Act.

Applicant to give notice of intending application to Director of Department for Community Welfare.

26. Where a person intends to make an application under the provisions of this Act he shall, at least thirty days before the application is filed in the Supreme Court, notify in writing the Director of the Department for Community Welfare of his intention and shall give to the Director or other responsible officer of that department such information as he may require.

Saving of existing jurisdiction.

27. Nothing in this Act contained restricts or affects the jurisdiction of the Court to appoint or remove guardians, or affects the exercise of any jurisdiction, power, or discretion vested in the Court under the Matrimonial Causes Ordinance, 1863 (27 *Victoriæ*, No. 19), or any Act extending or amending the same.

Rules of Court.

28. Rules of Court for regulating the practice, forms, and procedure in any proceedings under this Act may be made by the Judges of the Supreme Court.

S. 2.

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SCHEDULE.

Guardianship of Infants Act, 1920.  
 Guardianship of Infants Act, 1926.  
 Guardianship of Infants Act Amendment Act, 1939.  
 Guardianship of Infants Act Amendment Act, 1948.  
 Guardianship of Infants Act Amendment Act, 1954.  
 Guardianship of Infants Act Amendment Act, 1962.  
 Guardianship of Infants Act Amendment Act, 1965.