

GUARDIANSHIP OF INFANTS ORDINANCE 1972

1141

No. 37 of 1972

An Ordinance to amend the law relating to the guardianship and custody of infants and for other purposes

[Assented to 31 July, 1972]

BE it ordained by the Legislative Council for the Northern Territory of Australia as follows:—

1. This Ordinance may be cited as the *Guardianship of Infants Ordinance 1972*. Short title

2.—(1.) The *Guardianship of Infants Act 1887* of the State of South Australia ceases to have effect in the Northern Territory as a law of the Northern Territory. Repeal

(2.) Section 8 of the *Acts Interpretation Act 1901-1966*, in its application to Ordinances by virtue of section 4 of the *Interpretation Ordinance 1931-1969*, has effect as if the *Guardianship of Infants Act 1887* of the State of South Australia were an Ordinance and had been repealed by this Ordinance.

3. In this Ordinance, unless the contrary intention appears— Interpretation

- “infant” means a person who has not attained the age of eighteen years;
- “maintenance” includes education;
- “parent”, in relation to an infant, means the father or the mother;
- “the court” means the Supreme Court of the Northern Territory or a Judge of that Court;
- “the father”—
 - (a) in relation to an adopted infant, means the adoptive father; and
 - (b) in relation to an illegitimate infant, means the person, if any, who has been recognized under section 3A, section 3B or section 3C of this Ordinance as the father of the infant for the purposes of this Ordinance;
- “the mother”, in relation to an adopted infant, means the adoptive mother.

Recognition of
father of
illegitimate infant
for purposes
of this Ordinance

4.—(1.) Where, in relation to an illegitimate infant, the name of a person is entered in a Register of Births that is kept under the *Registration of Births, Deaths and Marriages Ordinance* 1962 as the name of the father of that infant and, in relation to that infant, an instrument that complies substantially with the form in the Schedule to this Ordinance, duly executed and attested, is furnished to the Registrar of Births, Deaths and Marriages holding office under that Ordinance, the person whose name is entered in the Register of Births as the name of the father of the infant is recognized as the father of the infant for the purposes of this Ordinance.

(2.) An instrument that complies substantially with the form in the Schedule to this Ordinance is duly executed and attested if—

- (a) a person who is a member of one of the classes of persons listed in the last paragraph of that form reads the first paragraph of that form to the mother of the infant in relation to whom the instrument is being executed and satisfies himself that she understands the meaning of the paragraph and that she is not signing the instrument under duress;
- (b) the mother signs the instrument in the presence of that person; and
- (c) that person signs the instrument.

Application to the
Supreme Court
for recognition as
father of
illegitimate infant

5.—(1.) A person who claims paternity of an illegitimate infant may make an application to the court for an order that he be recognized as the father of the infant for the purposes of this Ordinance.

(2.) Upon an application under the last preceding subsection, the court may, if it is satisfied that the applicant is the father of the infant and that he is a fit and proper person to have guardianship and custody of the infant, make the order applied for.

(3.) A person who makes an application under sub-section (1.) of this section may, at the same time as he makes that application, make any other application under this Ordinance that he would be entitled to make if he were the father of the infant, but the court shall not hear that other application unless it first makes an order under the last preceding sub-section.

Application to
Court of
Summary Juris-
diction for
recognition as
father of
illegitimate infant

6.—(1.) A person who claims paternity of an illegitimate infant may make an application to a court of summary jurisdiction for an order that he be recognized as the father of the infant for the purposes of this Ordinance.

(2.) Upon an application under the last preceding subsection, a court of summary jurisdiction may, if it is satisfied that the applicant is the father of the infant and that he is a fit and proper person to have guardianship and custody of the infant, make the order applied for.

7.—(1.) 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.

Right of mother to guardianship and custody of infant

(2.) Where an infant is illegitimate and no person is recognized as the father under this Ordinance, the mother of the infant shall have the guardianship and custody of the infant while an infant.

8.—(1.) 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 of a legitimate infant.

Equal right of mother to apply to court

(2.) The father of an illegitimate 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 of a legitimate infant.

9.—(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.

Power to make orders as to custody

(2.) The court may alter, vary or discharge an order made under the last preceding sub-section on the application of either parent or after the death of either parent, of any guardian appointed under this Ordinance.

(3.) The court may make such order as to the costs of an application under this section as it thinks just.

(4.) The fact that a parent of an infant contemplates leaving the Territory 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.

10.—(1.) The power of the court under section 6 of this Ordinance 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

(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 order providing for custody or maintenance of an infant 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 made under sub-section (2.) of this section may, on the application either of the father or the mother of the infant, be varied or discharged by a subsequent order.

Power of court
as to production
of infant

11. Where the parent of an infant, or any other person at law liable to maintain the infant or entitled to his custody, applies to the court for a writ or order for the production of the infant and the court is of the opinion that the applicant 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

12. 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, or by an institution, the court to which the application is made may in its discretion, if it orders the infant to be given up to the parent, or to any other person at law liable to maintain the infant or entitled to his custody, further order that the person to whom the infant is to be given up shall pay to the person who or the institution which has been bringing up the infant 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 before
making order for
delivery of infant
to parent

13. Where a parent of an infant, or any other person at law liable to maintain an infant or entitled to his custody, has abandoned or deserted the infant, or allowed the infant to be brought up by another person or by an institution at that or another person's or institution's expense for such length of time and in such circumstances as to satisfy the court that the parent of the infant, or the person at law liable to maintain the infant or entitled to his custody, was unmindful of his duties towards the infant, the court shall not make an order for the delivery of

the infant to the person who was so unmindful of his duties unless the court is satisfied that—

- (a) that person is a fit person to have the custody of the infant; and
- (b) it is in the interests of the infant that he should be delivered to that person.

14.—(1.) Where in any proceeding before the court 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.

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

(2.) In this section “upbringing” includes religious instruction.

15.—(1.) On the death of the father of an infant, the mother, if surviving, shall, subject to the provisions of this Ordinance, be guardian of the infant, either alone or jointly with any guardian appointed by the father.

Right of surviving parent as to guardianship

(2.) 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.

(3.) On the death of the mother of an infant, the father, if surviving, shall, subject to the provisions of this Ordinance, be guardian of the infant, either alone or jointly with any guardian appointed by the mother.

(4.) 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.

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

Power of father or mother to appoint testamentary guardians

(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 surviving parent of the infant so long as the surviving parent remains alive unless the surviving parent objects to his so acting.

Guardianship of Infants

(4.) If the surviving parent so objects, or if the guardian so appointed as aforesaid considers that the surviving parent is unfit to have the custody of the infant, the guardian may apply to the court for an order as to the custody of the infant.

(5.) Upon such an application the court may—

- (a) refuse to make any order (in which case the mother or father shall remain sole guardian);
- (b) make an order that the guardian so appointed shall act jointly with the surviving parent; or
- (c) make an order that the guardian so appointed shall be sole guardian of the infant.

(6.) Where an order is made under paragraph (c) of the last preceding sub-section the court may make such order—

- (a) as to the right of access of the surviving parent as, having regard to the welfare of the infant, the court may think fit; and
- (b) as to payment by the surviving parent to the guardian towards the maintenance of the infant of such weekly or other periodical sum as, having regard to the means of the surviving parent, the court may consider reasonable.

(7.) The court may vary or discharge an order made under the last preceding sub-section.

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

(9.) If 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.

Disputes between
joint guardians

17.—(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 give such directions on the application 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.

18. Every guardian appointed under this Ordinance 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.

Powers of guardian

19. The court may, on being satisfied that it is for the welfare of the infant—

Power to remove guardian

- (a) remove from his office any testamentary guardian, or any guardian appointed or acting by virtue of this Ordinance; and
- (b) appoint another guardian in place of the guardian so removed.

20.—(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 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.

Payment of maintenance

(2.) If the court is satisfied that money paid in accordance with the last preceding sub-section for the purpose of maintenance of an infant has been misapplied the court may, upon application, rescind, alter or vary any order made under the last preceding sub-section.

21. 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 the opinion that it will not be for the benefit of the infant to give effect thereto.

Provision as to separation agreement

Power of
married woman
to sue as next
friend

22. 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.

Rules of Court

23. The senior Judge of the court may make Rules of Court, not inconsistent with a law in force in the Northern Territory, for regulating the practice, form and procedure in proceedings in the court under this Ordinance.

THE SCHEDULE

Section 4

THE NORTHERN TERRITORY OF AUSTRALIA

Guardianship of Infants Ordinance 1972

GRANTING OF GUARDIANSHIP AND CUSTODY TO
FATHER OF AN ILLEGITIMATE CHILD

The father of an illegitimate child has no rights to guardianship or custody of the child unless the mother signs this document or the court is satisfied that he is a fit and proper person to have those rights. The mother is under no obligation to sign this document. She may obtain maintenance for the child without signing it. The effect of signing it is to give to the father guardianship and custody of the infant jointly with the mother, so that each parent has equal authority, rights and responsibilities with regard to the infant.

I
(Name of mother in block letters)
of
(Address of mother in block letters)
acknowledge that
(Name of father in block letters)
of
(Address of witness in block letters)
is the father of my child
(Name of child in block letters)
and it is my wish that he should have guardianship and custody of the child jointly with me, so that each parent has equal authority, rights and responsibilities with regard to the child.

.....
(Signature of mother).

I
(Name of witness in block letters)
of
(Address of witness in block letters)
am
(Indicate to which of the classes of persons listed in the next paragraph the witness belongs).

I certify that I have read the first paragraph of this form to
.....
(Name of mother)

and I am satisfied that she understands the meaning of that paragraph and that she did not sign this form under duress.

.....
(Signature of witness)

NOTE: The witness must read the first paragraph of this form to the woman who signs the form and he must satisfy himself that she understands the meaning of the paragraph and that she is not signing the form under duress. The witness must be a Justice of the Peace, a Commissioner for Oaths, a Commissioner for Affidavits, a Notary Public, a Commissioner for Declarations, a member of the Police Force of the Northern Territory, the person for the time being in charge of a Post Office, the person for the time being in charge of a branch of a bank, an authorized marriage celebrant, a barrister or a solicitor.
