

South Australia

Guardianship of Infants Act 1940

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

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Legislative history

The Parliament of South Australia enacts as follows:

1—Short title

This Act may be cited as the *Guardianship of Infants Act 1940*.

3—Interpretation

(1) In this Act, unless the context otherwise requires—

child born outside marriage includes a child born to a married woman of which a man other than her lawful spouse is the father;

infant includes an infant born outside marriage;

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.

- (2) A person shall not be recognised under this Act as the father of a child born outside marriage unless he is so recognised under the provisions of the *Family Relationships Act 1975*.

4—Rights of guardianship and custody of infant

Subject to this Act, and any other enactment, the mother and father of an infant shall jointly have the guardianship and custody of the infant, and each parent shall have equal powers, authority, rights and responsibilities with regard to the infant.

6—Power to make orders as to custody etc

- (1) The court may, upon the application of a person who has a proper interest in the welfare of an infant, make such orders for the custody of, and access to, the infant as it thinks fit.
- (2) The court may upon the application of any person who has the guardianship of an infant jointly with some other person (whether or not one or both of those persons are parents of the infant) make any order that it thinks proper in relation to a matter in dispute between those guardians affecting the upbringing or welfare of the infant.
- (3) In exercising its powers under this section, the court shall have regard to the conduct of the parents of the infant, and of any other person who may be a party to the application.
- (4) The court may vary or discharge an order made under this section.
- (5) The fact that a person who seeks an order for the custody of an infant under this section is resident outside this State, or contemplates leaving this State, shall not of itself constitute a ground for denying custody of the infant to that person.
- (6) The court may make such orders for costs in relation to proceedings under this section as it thinks fit.
- (7) For the purposes of this section a person has a proper interest in the welfare of an infant if that person—
 - (a) is the mother or father of the infant; or
 - (b) is a guardian of the infant; or
 - (c) is a person who, in the opinion of the court, has in the circumstances of the case a proper interest in the welfare of the infant.

7—Provisions as to orders

- (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.

- (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) Where the court makes an order giving the custody of an infant to a person other than a parent, the court may order either or both of the parents to pay to that person such weekly or other periodical sums towards the maintenance of the infant as the court, having regard to the means of the parents, may think reasonable.
- (4) Any order made under this section may, upon the application of any person interested in the order, be varied or discharged by a subsequent order.

8—Power of court as to production of infant

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.

9—Power of court to order repayment of costs of bringing up infant

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 a person who is not the parent of the infant, 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.

10—Duty of court to have regard to conduct of parent

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.

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

- (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.

12—Right of surviving parent as to guardianship

- (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—Power of father or mother to appoint testamentary guardians

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

15—Powers of guardian

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.

16—Power to remove guardian

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.

17—Payment of maintenance

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 makes an order for the custody of the infant, the court may also order any such guardian, trustee, executor, curator or person acting in a fiduciary capacity to pay from time to time (during the continuance of the custody) to the person to whom custody of the infant has been granted, 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—Provision as to separation agreement

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.

20—Power of married woman to sue as next friend

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.

20A—Enforcement of maintenance orders

Where the court has ordered the payment of any sum towards the maintenance of an infant under this Act that order may be enforced in the same manner as a maintenance order under the *Community Welfare Act 1972* in all respects as if it were a maintenance order made under that Act.

21—Saving provision

Nothing in this Act restricts or affects—

- (a) the equitable jurisdiction of the Supreme Court to appoint or remove guardians; or
- (b) the jurisdiction of any court in a matrimonial cause.

22—Rules of court

- (1) The power to make rules conferred by the *Supreme Court Act 1935* shall include power to make rules regulating the practice, form, and procedure in proceedings in the Supreme Court under this Act.
- (2) The powers conferred by section 28 of the *Local Courts Act 1926* shall include power to frame rules regulating the practice, form and procedure in proceedings in local courts of full jurisdiction under this Act.

Legislative history

Notes

- Amendments of this version that are uncommenced are not incorporated into the text.
- For further information relating to the Act and subordinate legislation made under the Act see the Index of South Australian Statutes or www.legislation.sa.gov.au.

Legislation repealed by principal Act

The *Guardianship of Infants Act 1940* repealed the following:

Guardianship of Infants Act 1887

Principal Act and amendments

New entries appear in bold.

Year	No	Title	Assent	Commencement
1940	55	<i>Guardianship of Infants Act 1940</i>	5.12.1940	5.12.1940
1975	116	<i>Guardianship of Infants Act Amendment Act 1975</i>	4.12.1975	29.1.1976 (<i>Gazette 29.1.1976 p356</i>)
1984	102	<i>Family Relationships Act Amendment Act 1984</i>	20.12.1984	14.2.1985 (<i>Gazette 14.2.1985 p366</i>)
2016	35	<i>Statutes Amendment (Gender Identity and Equity) Act 2016</i>	4.8.2016	Pt 9 (s 34)—uncommenced

Provisions amended since 3 February 1976

- Legislative history prior to 3 February 1976 appears in marginal notes and footnotes included in the consolidation of this Act contained in Volume 4 of The Public General Acts of South Australia 1837–1975 at page 498.

New entries appear in bold.

Entries that relate to provisions that have been deleted appear in italics.

Provision	How varied	Commencement
<i>s 2</i>	<i>omitted under Legislation Revision and Publication Act 2002</i>	
<i>s 3</i>		
<i>s 3(1)</i>		
child born outside marriage	substituted by 102/1984 s 8(3) (Sch Pt 3)	14.2.1985