

## CHAPTER 5:08

### GUARDIANSHIP OF MINORS ACT

*Acts 34/1961, 43/1973, 42/1978, 19/1980, 29/1981 (s. 59), 39/1983, 9/1997 (s. 10), 22/2001, 23/2001 (s. 49), (s. 4), 14/2002 (s. 5).*

#### **AN ACT to amend the law relating to the guardianship and custody of minors.**

[Date of commencement: 30th June, 1961.]

#### **1 Short title**

This Act may be cited as the Guardianship of Minors Act [*Chapter 5:08*].

#### **2 Interpretation**

In this Act—

“clerk of a children’s court” and “children’s court” shall have the meanings, respectively, given to them by the Children’s Act [*Chapter 5:06*].

[Definition amended by section 49 of act 23 of 2001]

“Minister” means the Minister of Justice, Legal and Parliamentary Affairs or any other Minister to whom the President may, from time to time, assign the administration of this Act.

[Definition inserted by section 4 of Act 14/2002.]

#### **3 Duty of father to consult mother on question of guardianship of minor**

Where the parents of a minor—

- (a) are living together lawfully as husband and wife; or
- (b) are divorced or are living apart and the sole guardianship of the minor has not been granted to either of them by order of the High Court or a judge;

the rights of guardianship of the father shall be exercised in consultation with the mother, and if a decision of the father on any matter relating to guardianship is contrary to her wishes and in her opinion likely to affect the life, health or morals of the minor to his detriment, the mother may apply to a judge in chambers, who may make such order in the matter as he thinks proper.

#### **4 Guardianship and custody of minors**

(1) The High Court or a judge thereof may—

- (a) on the application of either parent of a minor in proceedings for divorce or judicial separation in which an order for divorce or judicial separation is granted; or
- (b) on the application of either parent of a minor whose parents are divorced or are living apart;

if it is proved that it would be in the interests of the minor to do so, grant to either parent the sole guardianship, which shall include the power to consent to a marriage, or sole custody of the minor, or order that on the predecease of the parent named in the order, a person other than the survivor shall be the guardian of the minor, to the exclusion of the survivor or otherwise.

(2) An order under subsection (1) granting the sole guardianship or custody of a minor whose parents are living apart to a parent shall, if the parents become reconciled and live together again as husband and wife, lapse with effect from the date on which the parents commence to live together again.

(3) Subject to any order of court—

- (a) a parent to whom the sole guardianship or custody of a minor has been granted under subsection (1) may, by testamentary disposition, appoint any person to be the sole guardian or to be vested with the sole custody of the minor, as the case may be;
- (b) a parent who has the sole custody of a minor in terms of subsection (1) of section *five* or by virtue of any order made in terms of that section may, by testamentary disposition, appoint any person to be vested with the sole custody of the minor;
- (c) the father of a minor to whom the sole guardianship of the minor has not been granted under subsection (1) shall not be entitled by testamentary disposition to appoint any person as the guardian of the minor in any other manner than to act jointly with the mother.

(4) Where the mother and a testamentary guardian of a minor act as joint guardians and they are unable to agree on any question affecting the welfare of the minor, the wishes of the mother on that question shall prevail:

Provided that the testamentary guardian, if he is of the opinion that the life, health or morals of the minor may be affected to his detriment, may apply to the High Court for directions, and the court may make such order regarding the matters in difference as it may think proper.

(5) The High Court or a judge thereof may—

- (a) where a parent has appointed a guardian or custodian as provided in paragraph (a) or (b) of subsection (3); or

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(b) where a guardian has been appointed to a minor by the father to act jointly with the mother; upon the application of the other parent or of the guardian or mother, as the case may be, made after the death of the testator, make such order in regard to the guardianship or custody of the minor as the court or judge may consider to be in the best interests of the minor.

(6) A disposition made by a parent in terms of paragraph (a) or (b) of subsection (3) shall cease to be of any effect if during his lifetime that parent ceases to be the sole guardian or, as the case may be, is no longer vested with the custody of the minor concerned.

(7) A wife may make any application referred to in this section, and any application to a court in connection therewith, without the assistance of her husband.

## 5 Special provisions relating to custody of minors

(1) Where either of the parents of a minor leaves the other and such parents commence to live apart, the mother of that minor shall have the sole custody of that minor until an order regulating the custody of that minor is made under section *four* or this section or by a superior court such as is referred to in subparagraph (ii) of paragraph (a) of subsection (7).

(2) Where—

(a) the mother of a minor has the sole custody of that minor in terms of subsection (1); and

(b) the father or some other person removes the minor from the custody of the mother or otherwise denies the mother the custody of that minor;

the mother may apply to a children's court for an order declaring that she has the sole custody of that minor in terms of subsection (1) and, upon such application, the children's court may make an order declaring that the mother has the sole custody of that minor and, if necessary, directing the father or, as the case may be, the other person to return that minor to the custody of the mother.

[Subsection amended by section 49 of act 23 of 2001]

(3) Where the mother of a minor has the sole custody of that minor in terms of subsection (1), a children's court may at any time, upon the application—

(a) of the mother, make an order directing the father to pay, either weekly or monthly, to the applicant such reasonable sum for the maintenance of that minor as the court thinks fit; or

(b) of the father, make an order depriving the mother of the sole custody of the minor and granting the sole custody of the father if the court is satisfied that it is in the best interests of that minor that the father be granted the sole custody of that minor and, further, make such order relating to the payment of maintenance by the mother and the right of the mother to have access to that minor as the court thinks fit; or

(c) of the father, make an order for the father to have such access to that minor as the court specifies as being reasonable in the circumstances, unless the court is of the opinion that it would be detrimental to the welfare or interests of that minor for the father to have any right to access; or

(d) of either parent, make such order in regard to the custody of that minor, the payment of maintenance for and the right of access to that minor as will give effect to the terms of any settlement reached between the parents of that minor.

[Subsection amended by section 49 of act 23 of 2001]

(4) An application in terms of subsection (2) or (3) may be made to any children's court and that court may, at any stage of the proceedings—

(a) remit the matter to another children's court for the taking of evidence; or

(b) transfer the application to another children's court for the determination of that application by that children's court.

[Subsection amended by section 49 of act 23 of 2001]

(5) The Maintenance Act [*Chapter 5:09*] shall apply, *mutatis mutandis*, in relation to an order for maintenance referred to in subsection (3) as if it were an order for maintenance referred to in section 6 of the Maintenance Act [*Chapter 5:09*].

(6) If, upon an application made in terms of subsection (2) or (3), the children's court is satisfied that both parents are unfit to have custody of the minor, it may make an order in terms of subparagraph (i), (ii), (iv), (v) or (vi) of subsection (1) of section 20 of the Children's Act [*Chapter 5:06*] in respect of the minor.

[Subsection amended by section 49 of act 23 of 2001]

(7) An order of a children's court made in terms of subsection (2) or (3) shall cease to be of effect—

(a) if and when any order regulating the custody of the minor concerned is made—

(i) in terms of section *four*; or

(ii) by a superior court of competent jurisdiction outside Zimbabwe as a result of proceedings for divorce or judicial separation before such court; or

(b) if the parents become reconciled and live together again as husband and wife, with effect from the date on which the parents commence to live together again.

[Subsection amended by section 49 of act 23 of 2001]

(8) Subject to section *six*, a children's court which has made an order in terms of subsection (2) or (3) may, upon the application of either parent of the minor concerned, after affording the other parent an opportunity of opposing the application and adducing reasons therefor, vary, suspend or rescind the order or revive the order after it has been rescinded.

(9) Where a person has been vested with the sole custody of a minor by a parent in terms of paragraph (b) of subsection (3) of section *four*, this section shall apply, *mutatis mutandis*, as if that person were the parent who had sole custody of the minor:

Provided that no order for the payment of maintenance shall be made against such person.

(10) Any person who is aggrieved by—

- (a) an order of a children's court made in terms of subsection (2) or (3) or the variation, suspension, rescission or revival thereof; or
- (b) the refusal of a children's court to grant an application made in terms of this section;

may appeal against such order, variation, suspension, rescission, revival or refusal to a judge of the High Court who may refer the matter to the High Court for argument.

[Subsection amended by section 49 of act 23 of 2001]

(11) The judge of the High Court or the High Court, as the case may be, may, in an appeal in terms of subsection (10), confirm, vary or set aside the decision appealed against or give any judgment or make any determination or order which the circumstances may require.

(12) A wife may make any application in terms of this section, and any application to a court in connection therewith, without the assistance of her husband.

## **6 Enforcement of orders relating to access**

(1) In this section—

“access order” means an order of any court, including the High Court, which confers, expressly or impliedly, rights of access to a minor upon a parent who does not have the custody of that minor;

“custodial parents” means—

- (a) the parent of a minor who has the lawful custody of that minor; or
- (b) a person who has been vested with the sole custody of a minor in terms of subsection (3) of section *four*;

“non-custodial parent” means the parent of a minor who has had rights of access to that minor conferred upon him by an access order.

(2) Upon application being made to the clerk of a children's court by either a custodial parent or a non-custodial parent for the rescission or variation of rights of access conferred by an access order, the clerk may, subject to the directions of the officer presiding over the children's court, issue a summons requiring the other parent to appear before the children's court and show cause why an order should not be made in terms of subsection (4).

[Subsection amended by section 49 of act 23 of 2001]

(3) The clerk of the children's court referred to in subsection (2) may, on the direction of the officer presiding over the children's court, refer the application in terms of that subsection to the clerk of any other children's court and subsection (2) shall apply, *mutatis mutandis*, thereafter.

[Subsection amended by section 49 of act 23 of 2001]

(4) On the day specified in the summons issued in terms of subsection (2), the children's court shall inquire into the matter and may do any or all of the following—

- (a) if it is satisfied that the custodial parent has, without reasonable excuse, failed or refused to allow the non-custodial parent access to the minor as required by an access order, order the custodial parent to pay a fine of an amount not exceeding level three;
- (b) if it is satisfied that the non-custodial parent has abused the rights of access conferred on him by the access order, order him to pay a fine of an amount not exceeding level three;
- (c) if it thinks fit, by order rescind or vary—
  - (i) the rights of access conferred by the access order; and
  - (ii) subject to section *five*, any order for the payment of maintenance for the minor.

[Paragraphs (a) and (b) amended by s. 4 of Act 22/2001.]

[Subsection amended by section 49 of act 23 of 2001]

(5) An inquiry in terms of subsection (4) shall be held in the presence of the custodial parent or in his absence upon proof of the service upon him of the summons requiring him to appear:

Provided that an order in terms of paragraph (a) or (b) of subsection (4) shall not be made in the absence of the parent against whom the order is to be made.

(6) An order in terms of paragraph (a) or (b) of subsection (4) shall not take effect until—

- (a) the record of the inquiry has been forwarded for review in terms of section 57 of the Magistrates Court Act [*Chapter 7:10*] as if the order were a sentence referred to in subsection (1) of that section; and

(b) a judge of the High Court has certified that the order is in accordance with real and substantial justice.

(7) Section 348 and of section 358, other than paragraph (a) of subsection (2) thereof, of the Criminal Procedure and Evidence Act [Chapter 9:07] shall apply, *mutatis mutandis*, in respect of an order in terms of paragraph (a) or (b) of subsection (4) as though the fine were one imposed by a magistrates court.

(8) An appeal shall lie to the High Court against an order in terms of subsection (4) and provisions of the Magistrates Court Act [Chapter 7:10] and the High Court Act [Chapter 7:06] and the rules made thereunder shall, *mutatis mutandis*, apply to such appeal as if it were an appeal against a judgment in a civil suit by a magistrate.  
(Subsection as amended by s. 10 of Act 9 of 1997)

(9) Where an appeal in terms of subsection (8) is noted, the order of the children's court against which the appeal is noted shall be suspended until the appeal lapses for want of prosecution or is withdrawn, abandoned or dismissed.

[Subsection amended by section 49 of act 23 of 2001]

(10) A wife may make an application in terms of this section, and any application to a court in connection therewith, without the assistance of her husband.

## **7 Enforcement of orders relating to custody**

(1) When making an order in terms of section *five* the effect of which will be to remove a minor from the custody, whether lawful or not, of any person, a children's court may—

(a) direct a police officer to enforce the order; and

(b) authorize any person named in the order to accompany the police officer who is to enforce the order.

[Subsection amended by section 49 of act 23 of 2001]

(2) A police officer who is directed to enforce an order in terms of subsection (1) may, accompanied by any person named in terms of paragraph (b) of that subsection and by the exercise of such force as is reasonably necessary in the circumstances, enter any premises wherein the minor who is the subject of the order is suspected to be and remove the minor to the custody of the person entitled thereto in term of the order.

(3) Any person who hinders or obstructs a police officer in the enforcement of an order in terms of this section shall be guilty of an offence and liable to a fine not exceeding level four or to imprisonment for a period not exceeding three months or to both such fine and such imprisonment.

[Subsection amended by s. 4 of Act 22/2001.]

## **8 Penalty for failure to obey process of juvenile**

(1) If a person who has been served with a summons or other process requiring his attendance at a hearing of a children's court for the purpose of this Act fails to attend and remain in attendance at the hearing, unless he is excused by the children's court, the officer presiding over the children's court may—

(a) issue a warrant for the apprehension of that person;

(b) order that person to pay a fine not exceeding level three or to imprisonment for a period not exceeding one month or to both such fine and such imprisonment;

[Paragraph amended by s. 4 of Act 22/2001.]

(c) on cause shown, remit any penalty imposed in terms of paragraph (b).

[Subsection amended by section 49 of act 23 of 2001]

(2) Any person arrested in terms of subsection (1) may be detained in any prison and compelled to attend the hearing of the children's court until the determination thereof.

[Subsection amended by section 49 of act 23 of 2001]

(3) Section 348 and of section 358, other than paragraph (a) of subsection (2) thereof, of the Criminal Procedure and Evidence Act [Chapter 9:07] shall apply, *mutatis mutandis*, in respect of an order in terms of paragraph (b) of subsection (1) as though the fine were one imposed by a magistrates court.

(4) An appeal shall lie to the High Court against an order in terms of paragraph (b) of subsection (1) and the Magistrates Court Act [Chapter 7:10] and the High Court Act [Chapter 7:06] and the rules made thereunder shall apply, *mutatis mutandis*, to such an appeal as if it were an appeal against the judgment in a criminal trial by a magistrate.

(Subsection as amended by s. 10 of Act 9 of 1997)

(5) Where an appeal in terms of subsection (4) is noted, the order of the children's court against which the appeal is noted shall be suspended until the appeal lapses for want of prosecution or is withdrawn, abandoned or dismissed.

[Subsection amended by section 49 of act 23 of 2001]

## **9 Appointment of guardian by children's court**

(1) Without prejudice to the rights, powers and privileges of the High Court as upper guardian of minor children, and the Master in terms of section 74 of the Administration of Estates Act [Chapter 6:01], the children's court may, on application in terms of this section, appoint a fit and proper person to be the guardian of a minor who has no natural guardian or tutor testamentary.

[Subsection amended by section 49 of act 23 of 2001]

- (2) Where a minor has no natural guardian or tutor testamentary—
- (a) a relative or person having the care and custody of the minor; or
  - (b) a probation officer;

may apply to the children's court by way of an application lodged with the clerk of that court for the appointment of a person as guardian of the minor, and such application may propose the appointment of a specified person as the guardian.

[Subsection amended by section 49 of act 23 of 2001]

(3) Upon receipt of an application in terms of subsection (2) the clerk of the children's court shall, notwithstanding subsection (5) of section 5 of the Children's Act [*Chapter 5:06*], publish in the *Gazette* and in a newspaper circulating in the area where the minor resides a notice which—

- (a) calls upon any person who has an interest in the matter to appear before the children's court on a date to be specified in the notice, which shall be not less than seven days and not more than thirty days after publication of the notice; and
- (b) specifies the name of the person, if any, proposed for appointment as the guardian.

[Subsection amended by section 49 of act 23 of 2001]

(4) On the date specified in a notice published in terms of subsection (3), or any later date fixed by the children's court, that court shall inquire into the matter and, having regard to the welfare and interests of the minor, may appoint such person as it thinks fit and proper to be the guardian of the minor with all or such of the rights, powers and privileges of guardianship, or on such conditions, as the court may specify:

Provided that where a different person has already been appointed a tutor dative by the Master in terms of the Administration of Estates Act [*Chapter 6:01*], any appointment of guardianship in terms of this section shall be subject to the rights, powers and privileges of such tutor dative and shall not derogate therefrom.

[Subsection amended by section 49 of act 23 of 2001]

(5) The clerk of the children's court shall issue to a person who has been appointed a guardian in terms of subsection (4) a letter of appointment which shall—

- (a) specify the powers, rights and privileges conferred upon him in terms of subsection (4); and
- (b) be sufficient proof of his authority to exercise such powers, rights and privileges.

[Subsection amended by section 49 of act 23 of 2001]

(6) Whenever the children's court appoints a person as guardian in terms of subsection (4), the clerk of the children's court shall, within seven days thereof, submit the record of the proceedings in the matter to the registrar of the High Court, who shall lay the record before a judge in chambers.

[Subsection amended by section 49 of act 23 of 2001]

(7) A judge before whom a record of proceedings has been laid in terms of subsection (6) may—

- (a) confirm, vary or set aside the decision of the children's court; or
- (b) remit the matter to the children's court with such instructions as to the further proceedings to be had in such matter as he thinks fit; or
- (c) give such other order or make such other direction, including an order for the production of further evidence before him, as he thinks fit.

[Subsection amended by section 49 of act 23 of 2001]

(8) Any person who is aggrieved by the decision of the children's court in making an appointment in terms of subsection (4) may appeal against that decision to the High Court.

[Subsection amended by section 49 of act 23 of 2001]

(9) An application may be made to the children's court for the variation of any appointment of a person as a guardian in terms of subsection (4) and this section shall apply, *mutatis mutandis*, in relation to any such application.

## 10 Regulations

(1) The Minister may make regulations prescribing anything which, in his opinion, is necessary or convenient to be prescribed for carrying out or giving effect to this Act.

(2) Regulations made in terms of subsection (1) may provide for—

- (a) the form of applications in terms of this Act;
- (b) fees and charges for applications and orders made, documents issued or any other thing done in terms of this Act.

[Section inserted by section 5 of Act 14/2002.]