

VERITAS GUARDIANSHIP OF MINORS AMENDMENT BILL, 2021

MEMORANDUM

Under the common law of Zimbabwe a father was the natural guardian of his children who were born in wedlock; where children were born out of wedlock, their mother was their natural guardian. The common law has been modified by the Guardianship of Minors Act [*Chapter 5:08*] in several respects, principally by giving the High Court power to award guardianship of children to the mother if their parents are divorced or judicially separated or are living apart. The Act also allows the court to award sole custody to either parent in the event of their divorce or separation, according to the best interests of the children, and states that in the absence of a court order the mother has custody of children if the parents separate.

It is not clear how far the Guardianship of Minors Act applies to persons who are subject to customary law. Whatever its application, it needs to be amended in the light of section 80(2) of the Constitution, which states:

“Women have the same rights as men regarding the custody and guardianship of children, but an Act of Parliament may regulate how those rights are to be exercised.”

This Bill will amend the Guardianship of Minors Act to give effect to section 80(2) and also to make it clear that the Act applies whether parents of children are married under the Marriage Act [*Chapter 5:11*] or under customary law. The Bill will not alter the current position that the mother has custody of children in the event of separation, pending a court order regulating their custody.

In more detail, the provisions of the Bill are as follows:

Clause 1

This clause will set out the Bill’s short title.

Clause 2

This clause will insert a definition of “appropriate court” in section 2 of the Guardianship of Minors Act to cover both the High Court (which has power to deal with cases of divorce, separation and custody of children where the parties were married under the Marriage Act) and magistrates courts (which have power to deal with those cases in relation to parties married under customary law). References to the High Court in other provisions of the Act will be changed to “appropriate court”: see the Schedule to the Bill.

Clause 3

This clause will replace section 3 of the Guardianship of Minors Act with a new section that will give joint guardianship of children to parents who are living together. Parents who are divorced or living apart will also have joint guardianship and will share custody in the absence of a court order to the contrary. In the event of disagreement between parents on any question of guardianship or custody, they will be able to apply to an appropriate court for a ruling.

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Clause 4

Section 4(1) of the Guardianship of Minors Act states that the High Court can give either parent of a minor child sole guardianship of the child, including power to consent to the child's marriage. Marriage of minors has been declared unconstitutional, so paragraph (a) of this clause will remove reference to such consent.

Section 4(4) of the Act allows a parent to whom a court has given sole guardianship or custody of children, to make a will appointing someone to be sole guardian or custodian of the children in the event of that parent's death. Paragraph (b) of this clause will amend subsection (4) of the section to state that a guardian so appointed will not be able to override the surviving parent on questions relating to the welfare of the children concerned, unless an appropriate court orders otherwise.

The clause will also repeal subsection (7) of section 4 of the Act, which states that wives can make applications to court under the section without the assistance of their husbands. The subsection is no longer necessary since the marital power of husbands over their wives was abolished many years ago by the Legal Age of Majority Act.

Clauses 5 and 6

These clauses will repeal sections 5(12) and 6(10) of the Guardianship of Minors Act for the reason stated above in relation to section 4(7): wives no longer need to get assistance from their husbands to make applications to court.

Clause 7 and Schedule

This clause, read with the Schedule to the Bill, will make minor amendments to the Guardianship of Minors Act, changing references to the High Court so that they read "appropriate court" and making references to "father" or "mother" gender neutral.

Second draft: 18th June, 2021

First draft: 16th July, 2015

BILL

To amend the Guardianship of Minors Act [*Chapter 5:08*].

ENACTED by the Parliament and the President of Zimbabwe.

1 Short title

This Act may be cited as the Guardianship of Minors Amendment Act, 2021.

2 Amendment of section 2 of Cap. 5:08

Section 2 (“Interpretation”) of the Guardianship of Minors Act [*Chapter 5:08*] (hereinafter called “the principal Act”) is amended by the insertion of the following definition—

““appropriate court” means—

- (a) the High Court, in relation to any minor;
- (b) a magistrates court, in relation to any minor to whom customary law applies;”.

3 New section substituted for section 3 of Cap. 5:08

Section 3 (“Duty of father to consult mother on question of guardianship of minor”) of the principal Act is repealed and the following is substituted—

3 Parents joint guardians and custodians of minor

“(1) Subject to this Act, where the parents of a minor—

- (a) are living together; 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 a court;

they shall be joint guardians and share custody of the minor, and shall exercise their rights of guardianship and custody in consultation with each other.

(2) Where—

- (a) joint guardians of a minor cannot agree on any matter relating to guardianship of the minor, either guardian may apply to an appropriate court for an order settling the matter; or
- (b) one joint guardian of a minor makes a decision relating to guardianship which is contrary to the wishes of the other joint guardian and that other joint guardian considers the decision may detrimentally affect the minor's life, health or morals, he or she may apply to an appropriate court for the suspension, variation or setting aside of the decision; or
- (c) parents who share custody of a minor cannot agree on any matter relating to the minor's custody, either parent may apply to an appropriate court for an order settling the matter;

and the appropriate court may make such order as it considers to be in the best interests of the minor.”.

4 Amendment of section 4 of Cap. 5:08

Section 4 (“Guardianship and custody of minors”) of the principal Act is amended—

- (a) in subsection (1) by the deletion of “the power to consent to a marriage, or”;
- (b) by the repeal of subsection (4) and the substitution of—
 - “(4) Where a parent and 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 parent on that question shall prevail:
 - Provided that, if the testamentary guardian considers that the parent's decision may detrimentally affect the minor's life, health or morals, he or she may apply to an appropriate court for the suspension, variation or setting aside of the decision.”;
- (c) in subsection (5) by the repeal of paragraph (b) and the substitution of—
 - “(b) where a parent has appointed a guardian as provided in paragraph (c) of subsection (3);”;
- (d) by the repeal of subsection (7).

5 Amendment of section 5 of Cap. 5:08

Section 5 (“Special provisions relating to custody of minors”) of the principal Act is amended by the repeal of subsection (12).

6 Amendment of section 6 of Cap. 5:08

Section 6 (“Enforcement of orders relating to access”) of the principal Act is amended by the repeal of subsection (10).

7 Minor amendments to Cap. 5:08

The provisions of the principal Act specified in the first column of the Schedule are amended to the extent set out opposite thereto in the second column.

SCHEDULE (Section 7)MINOR AMENDMENTS TO GUARDIANSHIP OF MINORS ACT [*Chapter 5:08*]

<i>Provision</i>	<i>Extent of Amendment</i>
Section 4(1) & (5)	By the deletion of “The High Court or a judge thereof” and the substitution of “An appropriate court”.
Section 4(3)(c)	(a) by the deletion of “the father” and the substitution of “a parent”; (b) by the deletion of “the mother” and the substitution of “the other parent”.
Section 4(5)	(a) by the deletion of “other parent or of the guardian or mother, as the case may be,” and the substitution of “surviving parent”; (b) by the deletion of “or judge”.
Section 5(1) & (7)(a)(ii)	By the deletion of “superior”.
Section 5(3)(b)	By the deletion of “custody of the father” and the substitution of “custody to the father”.