



Children Act 1975

1975 CHAPTER 72

PART II

CUSTODY

Custodianship orders

33 Custodianship orders

- (1) An authorised court may on the application of one or more persons qualified under subsection (3) make an order vesting the legal custody of a child in the applicant or, as the case may be, in one or more of the applicants if the child is in England or Wales at the time the application is made.
- (2) An order under subsection (1) may be referred to as a custodianship order, and the person in whom legal custody of the child is vested under the order may be referred to as the custodian of the child.
- (3) The persons qualified to apply for a custodianship order are—
 - (a) a relative or step-parent of the child—
 - (i) who applies with the consent of a person having legal custody of the child, and
 - (ii) with whom the child has had his home for the three months preceding the making of the application;
 - (b) any person—
 - (i) who applies with the consent of a person having legal custody of the child, and
 - (ii) with whom the child has had his home for a period or periods before the making of the application which amount to at least twelve months and include the three months preceding the making of the application;
 - (c) any person with whom the child has had his home for a period or periods before the making of the application which amount to at least three years and include the three months preceding the making of the application.

Status: This is the original version (as it was originally enacted).

- (4) The mother or father of the child is not qualified under any paragraph of subsection (3).
- (5) A step-parent of the child is not qualified under any paragraph of subsection (3) if in proceedings for divorce or nullity of marriage the child was named in an order made under paragraph (b) or (c) of section 41(1) (arrangements for welfare of children of family) of the Matrimonial Causes Act 1973.
- (6) If no person has legal custody of the child, or the applicant himself has legal custody or the person with legal custody cannot be found, paragraphs (a) and (b) of subsection (3) apply with the omission of sub-paragraph (i).
- (7) The Secretary of State may by order a draft of which has been approved by each House of Parliament amend subsection (3)(c) to substitute a different period for the period of three years mentioned in that paragraph (or the period which, by a previous order under this subsection, was substituted for that period).
- (8) Subsection (5) does not apply—
 - (a) if the parent other than the one the step-parent married is dead or cannot be found, or
 - (b) if the order referred to in subsection (5) was made under subsection (1)(c) of section 41 of the Matrimonial Causes Act 1973 and it has since been determined that the child was not a child of the family to whom that section applied.
- (9) For the avoidance of doubt, it is hereby declared that the provisions of section 1 of the Guardianship of Minors Act 1971 apply to applications made under this Part of this Act.
- (10) This section and sections 34 to 46 do not apply to Scotland.

34 Access and maintenance

- (1) An authorised court may, on making a custodianship order or while a custodianship order is in force, by order—
 - (a) on the application of the child's mother or father, make such provision as it thinks fit requiring access to the child to be given to the applicant;
 - (b) on the application of the custodian, require the child's mother or father (or both) to make to the applicant such periodical payments towards the maintenance of the child as it thinks reasonable ;
 - (c) on the application of the child's mother or father, revoke an order requiring the applicant to contribute towards the child's maintenance made (otherwise than under this section) by any court;
 - (d) on the application of the child's mother or father or the custodian, vary an order made (otherwise than under this section) by any court requiring the mother or father to contribute towards the child's maintenance—
 - (i) by altering the amount of the contributions;
 - (ii) by substituting the custodian for the person to whom the contributions were ordered to be made.
- (2) References in subsection (1) to the child's mother or father include any person in relation to whom the child was treated as a child of the family (as defined in section 52(1) of the Matrimonial Causes Act 1973) but the court in deciding whether

- to make an order under subsection (1)(b) against a person who is not the child's mother or father shall have regard (among the circumstances of the case)—
- (a) to whether that person had assumed any responsibility for the child's maintenance and, if he did, to the extent to which and the basis on which he did so, and to the length of time during which he discharged that responsibility;
 - (b) to the liability of any other person to maintain that child.
- (3) No order shall be made under subsection (1)(b) requiring the father of an illegitimate child to make any payments to the child's custodian.
- (4) Subsections (2), (3), (4) and (6) (orders as to supervision, local authority care, maintenance etc. of children) of section 2 of the Guardianship Act 1973 and sections 3 and 4 of that Act (supplementary provisions) shall apply to an application for a custodianship order as they apply to an application under section 9 of the Guardianship of Minors Act 1971, subject to the following modifications, that is to say—
- (a) in section 2(2) (b) and (4)(a) of the Guardianship Act 1973 any reference to a parent of the minor to whom the order relates shall be construed as including a reference to any other individual;
 - (b) section 3(3) of that Act shall have effect as if the words " or the custodian" were inserted after the words " application of either parent ".
- (5) A local authority may make contributions to a custodian towards the cost of the accommodation and maintenance of the child, except where the custodian is the husband or wife of a parent of the child.

35 Revocation and variation of orders

- (1) An authorised court may by order revoke a custodianship order on the application of—
- (a) the custodian, or
 - (b) the mother or father, or a guardian, of the child, or
 - (c) any local authority in England or Wales.
- (2) The court shall not proceed to hear an application made by any person for the revocation of a custodianship order where a previous such application made by the same person was refused by that or any other court unless—
- (a) in refusing the previous application the court directed that this subsection should not apply, or
 - (b) it appears to the court that because of a change in circumstances or for any other reason it is proper to proceed with the application.
- (3) The custodian of a child may apply to an authorised court for the revocation or variation of any order made under section 34 in respect of that child.
- (4) Any other person on whose application an order under section 34 was made, or who was required by such an order to contribute towards the maintenance of the child, may apply to an authorised court for the revocation or variation of that order.
- (5) Any order made under section 34 in respect of a child who is the subject of a custodianship order shall cease to have effect on the revocation of the custodianship order.
- (6) A custodianship order made in respect of a child, and any order made under section 34 in respect of the child, shall cease to have effect when the child attains the age of 18 years.

36 Care etc. of child on revocation of custodianship order

- (1) Before revoking a custodianship order the court shall ascertain who would have legal custody of the child, if, on the revocation of the custodianship order, no further order were made under this section.
- (2) If the child would not be in the legal custody of any person, the court shall, if it revokes the custodianship order, commit the care of the child to a specified local authority.
- (3) If there is a person who would have legal custody of the child on the revocation of the custodianship order, the court shall consider whether it is desirable in the interests of the welfare of the child for the child to be in the legal custody of that person and—
 - (a) if the court is of the opinion that it would not be so desirable, it shall on revoking the custodianship order commit the care of the child to a specified local authority;
 - (b) if it is of the opinion that while it is desirable for the child to be in the legal custody of that person, it is also desirable in the interests of the welfare of the child for him to be under the supervision of an independent person, the court shall, on revoking the custodianship order, order that the child shall be under the supervision of a specified local authority or of a probation officer.
- (4) Before exercising its functions under this section the court shall, unless it has sufficient information before it for the purpose, request—
 - (a) a local authority to arrange for an officer of the authority, or
 - (b) a probation officer,to make to the court a report, orally or in writing, on the desirability of the child returning to the legal custody of any individual, and it shall be the duty of the local authority or probation officer to comply with the request.
- (5) Where the court makes an order under subsection (3)(a) the order may require the payment by either parent to the local authority, while it has the care of the child, of such weekly or other periodical sum towards the maintenance of the child as the court thinks reasonable.
- (6) Sections 3 and 4 of the Guardianship Act 1973 (which contain supplementary provisions relating to children who are subject to supervision, or in the care of local authority, by virtue of orders made under section 2 of that Act) apply in relation to an order under this section as they apply in relation to an order under section 2 of that Act.
- (7) Subsections (2) to (6) of section 6 of the Guardianship Act 1973 shall apply in relation to reports which are requested by magistrates' courts under this section as they apply to reports under subsection (1) of that section.

37 Custodianship order on application for adoption or guardianship

- (1) Where on an application for an adoption order by a relative of the child or by the husband or wife of the mother or father of the child, whether alone or jointly with his or her spouse, the requirements of section 12 or, where the application is for a Convention adoption order, section 24(6) are satisfied, but the court is satisfied—
 - (a) that the child's welfare would not be better safeguarded and promoted by the making of adoption order in favour of the applicant, than it would be by the making of a custodianship order in his favour, and
 - (b) that it would be appropriate to make a custodianship order in the applicant's favour,

the court shall direct the application to be treated as if it had been made by the applicant under section 33, but if the application was made jointly by the father or mother of the child and his or her spouse, the court shall direct the application to be treated as if made by the father's wife or the mother's husband alone.

- (2) Where on an application for an adoption order made—
 - (a) by a person who is neither a relative of the child nor the husband or wife of the mother or father of the child; or
 - (b) by a married couple neither of whom falls within paragraph (a),the said requirements are satisfied but the court is of opinion that it would be more appropriate to make a custodianship order in favour of the applicant, it may direct the application to be treated as if it had been made by the applicant under section 33.
- (3) Where on an application under section 9 (orders for custody and maintenance on application of mother or father) of the Guardianship of Minors Act 1971 the court is of opinion that legal custody should be given to a person other than the mother or father, it may direct the application to be treated as if it had been made by that person under section 33.
- (4) Where a direction is given under this section the applicant shall be treated (if such is not the case) as if he were qualified to apply for a custodianship order and this Part, except section 40, shall have effect accordingly.
- (5) Subsection (1) does not apply to an application made by a step-parent whether alone or jointly with another person in any case where the step-parent is prevented by section 33(5) from being qualified to apply for a custodianship order in respect of the child.
- (6) Subsections (1) and (2) do not apply to an application for an adoption order made by the child's mother or father alone.

38 Disputes between joint custodians

If two persons have a parental right or duty vested in them jointly by a custodianship order or by virtue of section 44(2) but cannot agree on its exercise or performance, either of them may apply to an authorised court, and the court may make such order regarding the exercise of the right or performance of the duty as it thinks fit.

39 Reports by local authorities and probation officers

- (1) A court dealing with an application made under this Part, or an application which is treated as if made under section 33, may request—
 - (a) a local authority to arrange for an officer of the authority, or
 - (b) a probation officer,to make to the court a report, orally or in writing, with respect to any specified matter which appears to the court to be relevant to the application, and it shall be the duty of the local authority or probation officer to comply with the request.
- (2) Subsections (2) to (6) of section 6 of the Guardianship Act 1973 shall apply in relation to reports which are requested by magistrates' courts under this section as they apply to reports under subsection (1) of that section.

40 Notice of application to be given to local authority

- (1) A custodianship order shall not be made unless the applicant has given notice of the application for the order to the local authority in whose area the child resides within the seven days following the making of the application, or such extended period as the court or local authority may allow.
- (2) On receipt of a notice given by the applicant under subsection (1) the local authority shall arrange for an officer of the authority to make a report to the court (so far as is practicable) on the matters prescribed under subsection (3) and on any other matter which he considers to be relevant to the application.
- (3) The Secretary of State shall by regulations prescribe matters which are to be included in a report under subsection (2) and, in particular, but without prejudice to the generality of the foregoing, the prescribed matters shall include—
 - (a) the wishes and feelings of the child having regard to his age and understanding and all other matters relevant to the operation of section 1 (principle on which questions relating to custody are to be decided) of the Guardianship of Minors Act 1971 in relation to the application;
 - (b) the means and suitability of the applicant;
 - (c) information of a kind specified in the regulations relating to members of the applicant's household;
 - (d) the wishes regarding the application, and the means, of the mother and father of the child.
- (4) Subsections (2), (3) and (3A) of section 6 of the Guardianship Act 1973 shall apply to a report under this section which is submitted to a magistrates' court.

41 Restriction on removal of child where applicant has provided home for three years

- (1) While an application for a custodianship order in respect of a child made by the person with whom the child has at the time the application is made had his home for a period (whether continuous or not) amounting to at least three years is pending, another person is not entitled, against the will of the applicant, to remove the child from the applicant's custody except with the leave of a court or under authority conferred by any enactment or on the arrest of the child.
- (2) In any case where subsection (1) applies, and
 - (a) the child was in the care of a local authority before he began to have his home with the applicant, and
 - (b) the child remains in the care of a local authority,the authority in whose care the child is shall not remove the child from the applicant's custody except with the applicant's consent or the leave of a court.
- (3) Any person who contravenes subsection (1) commits an offence and shall be liable on summary conviction to imprisonment for a term not exceeding three months or a fine not exceeding £400 or both.
- (4) The Secretary of State may by order a draft of which has been approved by each House of Parliament amend subsection (1) to substitute a different period for the period mentioned in that subsection (or the period which, by a previous order under this subsection, was substituted for that period).

42 Return of child taken away in breach of section 41

- (1) An authorised court may on the application of a person from whose custody a child has been removed in breach of section 41 order the person who has so removed the child to return the child to the applicant.
- (2) An authorised court may on the application of a person who has reasonable grounds for believing that another person is intending to remove a child from the applicant's custody in breach of section 41 by order direct that other person not to remove the child from the applicant's custody in breach of that section.
- (3) If, in the case of an order made by the High Court under subsection (1), the High Court or, in the case of an order made by a county court under subsection (1), a county court is satisfied that the child has not been returned to the applicant, the court may make an order authorising an officer of the court to search such premises as may be specified in the order for the child and, if the officer finds the child, to return the child to the applicant.
- (4) If a justice of the peace is satisfied by information on oath that there are reasonable grounds for believing that a child to whom an order under subsection (1) relates is in premises specified in the information, he may issue a search warrant authorising a constable to search the premises for the child; and if a constable acting in pursuance of a warrant under this section finds the child, he shall return the child to the person on whose application the order under subsection (1) was made.
- (5) An order under subsection (3) may be enforced in like manner as a warrant for committal.

43 Enforcement of orders made by magistrates' courts

- (1) If at a time when the custodian is entitled to actual custody of the child by virtue of a custodianship order made by a magistrates' court any other person has actual custody of him, a copy of the custodianship order may be served on that person and thereupon the order may, without prejudice to any other remedy open to the custodian, be enforced under section 54(3) of the Magistrates' Courts Act 1952 as if it were an order of a magistrates' court requiring that person to give up the child to the custodian.
- (2) Any person for the time being under an obligation to make payments in pursuance of any order for the payment of money made by a magistrates' court under section 34 shall give notice of any change of address to such person (if any) as may be specified in the order; and if he fails without reasonable excuse to give such a notice he commits an offence and shall be liable on summary conviction to a fine not exceeding £10.
- (3) An order for the payment of money made by a magistrates' court under section 34 may be enforced in like manner as an affiliation order, and the enactments relating to affiliation orders shall apply accordingly with the necessary modifications.

44 Effect of custodianship order on existing custody

- (1) While a custodianship order has effect in relation to a child the right of any person other than the custodian to legal custody of the child is suspended, but, subject to any further order made by any court, revives on the revocation of the custodianship order.

Status: This is the original version (as it was originally enacted).

- (2) Subsection (1) does not apply where the person already having custody is a parent of the child and the person who becomes custodian under the order is the husband or wife of the parent; and in such a case the spouses have the legal custody jointly.

45 Affiliation order on application by custodian

- (1) Where a custodianship order subsists in respect of an illegitimate child, and no affiliation order relating to the child has been made under the Affiliation Proceedings Act 1957, the custodian of the child may apply to a justice of the peace acting for the petty sessions area in which the child or the child's mother resides for a summons to be served under section 1 of that Act.
- (2) The court shall proceed on the application as on a complaint under that section, but the person entitled to any payments under an affiliation order made on the application shall be the custodian.
- (3) An application may not be made under subsection (1)—
- (a) if the custodian is married to the child's mother, or
 - (b) more than three years after the custodianship order was made.

46 Procedure in magistrates' courts

- (1) It is hereby declared that any jurisdiction conferred on a magistrates' court by virtue of this Part is exercisable notwithstanding that the proceedings are brought by or against a person residing outside England and Wales.
- (2) A magistrates' court may, subject to subsection (3), proceed on an application for an order under this Part notwithstanding that the defendant has not been served with the summons, and rules may prescribe matters as to which the court is to be satisfied before proceeding in such a case.
- (3) A magistrates' court shall not—
- (a) make an order under this Part requiring a person to make payments towards the maintenance of a child, or
 - (b) vary an order under this Part so as to increase a person's liability to make payments towards the maintenance of a child,
- unless the person has been served with the summons.
- (4) Rules may make provision as to the persons who are to be made defendants to a complaint for an order under this Part, and where there are two or more defendants to such a complaint the power of the court under section 55(1) of the Magistrates' Courts Act 1952 (power to award costs etc.) shall be deemed to include power, whatever adjudication the court makes, to order any of the parties to pay the whole or part of the costs of all or any of the parties.
- (5) In this section, " rules " means rules made under section 15 of the Justices of the Peace Act 1949.