



AN BILLE UM CHAOMHNOIREACHT NAION, 1963

GUARDIANSHIP OF INFANTS BILL, 1963

EXPLANATORY MEMORANDUM

I—PURPOSE OF THE BILL

1. The purpose of the Bill is (1) to consolidate and amend the existing law on guardianship and custody of infants which is contained in the Tenures Abolition Act, 1662, the Custody of Infants Act, 1873, the Guardianship of Infants Act, 1886, and the Custody of Children Act, 1891, (2) to give statutory effect to the following principles:

(a) that in any proceedings concerning an infant or his property the welfare of the infant is to be the first and paramount consideration, and

(b) that both parents should have equal rights to guardianship and custody,

and (3) to provide for the guardianship and custody of illegitimate infants.

II—PART I OF THE BILL

2. *Part I* (sections 1 to 4) is the preliminary and general Part.

3. *Section 1* provides for the short title.

4. *Section 2* is the interpretation section. "Father" and "mother" are defined as including, respectively, a male and female adopter. "Father" specifically excludes the natural father of an illegitimate infant except where the context otherwise requires. The context so requires only at *subsection (4) of section 11* where the natural father is given the right to apply to the court for orders concerning the custody of, or the right of access to, his illegitimate infant. "Mother" does not exclude the mother of an illegitimate infant. "Infant" means a person under 21 years of age; this gives statutory effect to what has long been the common law position. "Illegitimate infant" excludes an illegitimate infant where he is adopted under the Adoption Act, 1952; this ensures that the rights given in the Bill to the natural parents of an illegitimate infant shall not survive after the infant has been legally adopted. "Welfare" is defined as comprising the religious and moral, intellectual, physical and social welfare of the infant; this wording follows that in Article 42.1^o of the Constitution.

5. *Section 3* sets out the principle that in any proceedings affecting an infant or his property the court, in coming to a decision, shall regard the welfare of the infant as the first and paramount consideration. This is the existing rule of law.

6. *Section 4* is the repeals section.

7. *Part II* of the Bill (*sections 5 to 12*) confers jurisdiction on the High Court and Circuit Court in guardianship matters and provides for the rights of parents to guardianship of their infant children, the powers of parents to appoint testamentary guardians, the powers and duties of guardians and the powers of the courts to appoint and remove guardians and give directions on any question affecting the welfare of infants.

8. *Section 5* provides for the jurisdiction of the High Court and Circuit Court in regard to the guardianship matters dealt with in this Part. The jurisdiction so conferred will be in addition to any other jurisdiction of the Courts in regard to infants.

9. *Section 6* deals with the rights of parents to guardianship of their infant children.

Subsection (1) reflects the principle referred to in paragraph 1 above that both parents of an infant have equal rights to guardianship. The subsection provides that the father and the mother of an infant are guardians of the infant jointly. While this is a new statutory provision it is the logical outcome of the statement in the Supreme Court judgment in the *Tilson Case* [1951] I.R. 1 that, pursuant to Article 42 of the Constitution, parents have a "joint power and duty" in respect of their children's upbringing.

Subsections (2) and (3) provide that a surviving parent remains guardian either alone or jointly with any guardian appointed by the deceased parent or by the court. This re-enacts the existing law (except that at present a guardian appointed by the mother cannot act jointly with the surviving father).

Subsection (4) provides that the mother of an illegitimate infant shall be guardian of the infant; at present such an infant has, strictly speaking, no guardian, although the mother *prima facie* has custody.

10. *Section 7* deals with the powers of parents to appoint testamentary guardians.

Subsections (1), (2) and (3) provide that both the father and mother of an infant may by deed or will appoint a person or persons to be guardian or guardians of the infant after his or her death and that such person(s) shall act jointly with the surviving parent. Under existing law the mother may only appoint a guardian to act after her own and the father's death, or she may provisionally nominate a fit person to act as joint guardian on her own death provided the court confirms the appointment on being satisfied that the father is unfit to be sole guardian.

Subsections (4), (5) and (6) provide for cases where joint guardians cannot agree and where the court is asked to decide who should act as guardian or guardians of the infant. Generally, the subsections re-enact the existing law.

Subsection (7) is a new provision enabling parents who are themselves under 21 years to appoint guardians by will. At present, by reason of section 7 of the Wills Act, 1837, persons under 21 years cannot make a valid will.

Subsection (8) is a new statutory provision providing that an appointment of a guardian by deed may be revoked by a subsequent deed or by will. This is declaratory of the existing law.

11. *Section 8* provides for the appointment and removal of guardians by the court.

Subsections (1), (2) and (3) enable the court to appoint guardians where the infant has otherwise no guardian or where one parent has died without leaving a testamentary guardian; in the latter case the guardian appointed by the court will continue to act after the death of the second parent. These are new provisions.

Subsection (4) empowers the court to remove from office testamentary or court-appointed guardians and re-enacts the existing law.

Subsection (5) empowers the court to appoint guardians in place of those so removed or in place of a court-appointed guardian who dies. This is declaratory of the existing law.

12. *Section 9* is generally a re-enactment of the existing law. It provides that appointed guardians (this excludes parents) are to act jointly, that on the death of any of them the survivor or survivors shall continue to act and that testamentary guardians appointed by both parents shall act jointly after the death of the two parents.

13. *Section 10* sets out the powers and duties of a guardian as under existing law.

Subsection (1) provides that every guardian is guardian of the person and of the estate of the infant, unless he is an appointed guardian and the terms of his appointment provide otherwise.

Subsection (2) provides that, as guardian of the person of the infant, a guardian shall be entitled to the custody of the infant and, as guardian of the estate, shall be entitled to possession and control of the infant's property.

Subsection (3) is a saver for any powers that parents, guardians or trustees of an infant may otherwise have over his property.

14. *Section 11* deals with applications to the court by guardians of an infant for directions on any question affecting the welfare of the infant (*subsection (1)*). The court may make orders as to custody, right of access of parents and maintenance (*subsection (2)*). A guardian here includes the mother of an illegitimate infant, and to this extent the provision is new.

Subsection (3) enables the court to make the necessary orders even where the parents reside together. At present, a mother cannot seek custody of her children without first leaving the family home. An order under this subsection will not be binding while the parents reside together and will cease to have effect altogether if the parents live together for 3 months after it is made.

Subsection (4) is new and deals with the rights of the natural father of an illegitimate infant. The right of guardians to apply to the court for custody etc. is extended to him. It is to be noted, however, that he is not made the infant's legal guardian. Moreover, while he may get custody of the infant, he is, in effect, precluded from obtaining a court maintenance order against the mother.

15. *Section 12* enables the court to vary or discharge any order previously made under this Part. This is new to the law.

IV—PART III OF THE BILL

16. *Part III (sections 13 to 18)* deals mainly with the powers of the High Court in proceedings for the enforcement of the right of custody of an infant. All the provisions in this Part re-enact the existing law. (See the Custody of Infants Act, 1873, and the Custody of Children Act, 1891).

17. *Section 13* is the definitions section for this Part. The "court" means the High Court; the proceedings envisaged in the succeeding sections are all proper to the High Court under existing law. "Parent" in this Part is more comprehensive than in *Part II*, where it means father or mother; here it includes any person who is at law liable to maintain an infant or entitled to his custody. "Person" includes a school or institution.

18. *Section 14* provides that the court, on the application of any person entitled to the custody of an infant, may decline to make an order for the production of the infant where the applicant's conduct has been such that the court should refuse him custody of the infant.

19. *Section 15* specifies that, where the court orders that an infant be given up to the parent and where that infant is being brought up at the expense of another person, or is (or was) receiving assistance from a health authority, the parent may be ordered to pay the whole or part of the expense.

20. *Section 16* provides that, where a parent has abandoned or deserted an infant or has, in the opinion of the court, been unmindful of his parental duties, the onus of proving himself a fit person to have custody of the infant shall be on that parent.

21. *Section 17* deals with the powers of the court as to an infant's religious education.

Subsection (1) provides for the case where, under *section 15*, the parent is denied the exercise of his right to custody and the infant is given by the court to another person. In such a case, the court may order that the infant be brought up in the parent's religion.

Subsection (2) is a saver for the inherent power of the court to consult the wishes of the infant and for the right of the infant to exercise his free choice. It is the present practice of the courts to consult the wishes of infants (but not infants of tender years) in suitable cases where either custody or religious upbringing is in dispute.

22. *Section 18* deals with custody where parents are separated.

Subsection (1) empowers the court to declare a person whose misconduct has led to a decree of divorce *a mensa et thoro* to be unfit to have the custody of the children.

Subsection (2) provides that a provision in a separation agreement is not invalid by reason only of its providing that one parent surrenders to the other his right of custody or control of the infant. Prior to the Custody of Infants Act, 1873 (from which the present provision is derived) any agreement by which a father divested himself of the custody of his children was at common law considered to be void.

V—SCHEDULE TO THE BILL

23. The *Schedule* lists the enactments to be repealed by *section 4*.

Roinn Dlí agus Cirt
Samhain, 1963