



Tonga

GUARDIANSHIP ACT 2004

No. 8 of 2004



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Arrangement of Sections

Section

1	Short title.....	5
2	Interpretation.....	5
3	Jurisdiction.....	6
4	Guardianship.....	6
5	Testamentary guardians	6
6	Customary adoption.....	7
7	General Powers of the Court.....	7
8	Wards of Court.....	7
9	Removal of guardian.....	7
10	Custody orders	8
11	Disputes between guardians.....	8
12	Access rights	8
13	Variation or discharge of orders	8
14	Termination of guardianship.....	9
15	Welfare of the child paramount	9
16	Proceedings not open to public	9
17	Costs	9
18	Power of court to appoint counsel	10
19	Regulations	10



GUARDIANSHIP ACT 2004

No. 8 of 2004

AN ACT TO REGULATE GUARDIANSHIP, ACCESS, CUSTODY AND CUSTOMARY ADOPTION

I assent,
TAUFA'AHAU TUPOU IV,
23rd August, 2004

[29th July, 2004]

BE IT ENACTED by the King and the Legislative Assembly of Tonga in the
Legislature of the Kingdom as follows:

1 Short title

This Act may be cited as the Guardianship Act 2004.

2 Interpretation

In this Act, unless the context otherwise requires —

“**child**” means a person under the age of 18 years and includes an unborn child;

“**Court**” means the Supreme Court of Tonga;

“**custody**” means the right to possession and care of a child;

“customary adoption” means the placement of a child according to custom and the transfer of parental rights of custody and control in the upbringing of a child;

“guardianship” means the custody of a child and the right of control, which includes rights, powers and duties in respect of that child and his upbringing, and **“guardian”** has a corresponding meaning.

3 Jurisdiction

- (1) The Court shall have jurisdiction where —
 - (a) any question of guardianship, custody and access in any proceedings before the Court; or
 - (b) the child who is the subject of the application or order is domiciled or resident in Tonga.
- (2) Notwithstanding the provisions of subsection (1) the Court may decline to make an order under this Act if it is not in the interest of the child.

4 Guardianship

- (1) Subject to the provisions of this Act, the father or mother of a child shall be a guardian of the child.
- (2) Subject to the provision of this Act, the mother of a child shall be the sole guardian if she —
 - (a) has never been married to the father; or
 - (b) her marriage to the father of the child was dissolved before the child was conceived.
- (3) Where the mother of the child is, or was at the time of her death, sole guardian by virtue of subsection (2), the father, as entered in the birth register may apply to the Court to be appointed as guardian of the child, and the Court may make such order.
- (4) Subject to the provisions of this Act, the surviving parent shall be the sole guardian of the child on the death of the mother or the father.

5 Testamentary guardians

- (1) A testamentary guardian may be nominated by deed or will by the father or the mother of a child.
- (2) The testamentary guardian shall apply to the Court, and the Court may, appoint him as a guardian.

6 Customary adoption

- (1) The Court may, upon application, make a guardianship order in favour of a person who has had customary adoption of the child.
- (2) A customary adoption may occur notwithstanding that –
 - (a) the agreement was not in writing, but can be inferred from discussions or conduct; and
 - (b) a parent of the child has a continuing relationship with the child.

7 General Powers of the Court

- (1) The Court shall have power to make or revoke a guardianship order.
- (2) The Court may, in respect of a child, appoint a guardian as sole guardian or in addition to any other guardian.
- (3) The Court shall have the power to appoint a *guardian ad litem* in respect of a child in guardianship proceedings.

8 Wards of Court

- (1) The Court may, upon application, order that any child be placed under the guardianship of the court, and appoint any person to be the agent of the Court either generally or for any particular purpose.
- (2) An application under subsection (1) may be made by —
 - (a) a parent, guardian, or relative of the child;
 - (b) the Attorney General;
 - (c) by the child, who may apply without *guardian ad litem* or *amicus curiae*; or
 - (d) any other person, with the leave of the Court.
- (3) The Court shall have the rights and powers in respect of the person and the property of the child.
- (4) A child who has been placed under the guardianship of the Court shall cease to be under such guardianship when the Court so orders or when the child reaches the age of 18 years or sooner marries, whichever first occurs.

9 Removal of guardian

- (1) The Court may on application by the other parent or by a guardian or relative or, with the leave of the Court, by any other person deprive a

parent of the guardianship of his child or remove any guardian appointed by the Court.

- (2) No parent shall be deprived of the guardianship of his child pursuant to subsection (1) unless the Court is satisfied that the parent is for some grave reason unfit to be a guardian of the child or is unwilling to exercise the responsibilities of a guardian.

10 Custody orders

- (1) The Court may make such interim or permanent order with respect to the custody of the child upon application by —
 - (a) the father or mother, relative or a guardian, of the child, or
 - (b) any other person with leave of the Court.
- (2) Any order made under subsection (1) may be made subject to such conditions as the Court thinks fit.

11 Disputes between guardians

- (1) The Court may, upon application of any guardian, make such order in the best interest of the child, where there are two or more between guardians, and they are unable to agree on any matter concerning the exercise of their guardianship.
- (2) The Court may upon application of any custodian make such order as it determines in the best interest of the child where there are two or more custodians, and they are unable to agree on any matter affecting the welfare of that child.

12 Access rights

- (1) The Court may upon application of the parent who does not have custody, make any order relating to access to a child.
- (2) Any order made under subsection (1) may be made subject to such conditions as the Court thinks fit.

13 Variation or discharge of orders

- (1) The Court may vary or discharge any order with respect to the custody, guardianship or access to a child.
- (2) The Court may vary or discharge any order vesting the guardianship of a child in one parent or in any other person or persons. If any such guardianship order is discharged, and no other guardianship order is made,

guardianship shall vest in the person who would be the guardian if the order discharged had not been made.

- (3) An application to vary or discharge any order to which this section applies may be made by any person affected by the order, or by any person on behalf of the child who is the subject of the order.

14 Termination of guardianship

Guardianship of a child shall terminate when the children [sic] attains the age of 18 years or marries under that age according to law.

15 Welfare of the child paramount

- (1) The Court shall regard the welfare of the child as the paramount consideration in any proceedings where any matter relating to the custody, guardianship or access to a child, or the administration of any property belonging to or held in trust for a child.
- (2) The Court shall have regard to the conduct of any parent to the extent only that such conduct is relevant to the welfare of the child.
- (3) In any proceeding under subsection (1), the Court shall ascertain the wishes of the child, if the child is able to express them, take account of them to such extent as the Court thinks fit, having regard to the age and maturity of the child.

16 Proceedings not open to public

- (1) No person shall be present during the hearing of any proceedings under this Act except —
 - (a) officers of the Court;
 - (b) parties to the proceedings, law practitioners, witnesses; and
 - (c) any other person the Court permits.
- (2). Nothing in this section shall limit any power of the Court to hear proceedings in private or to exclude any person from the Court.

17 Costs

In any proceedings under this Act the Court may make such order as to costs as it thinks fit.

18 Power of court to appoint counsel

In any proceedings under this Act, a Court may appoint a law practitioner to —

- (a) assist the Court; or
- (b) represent any child who is the subject of or who is otherwise a party to the proceedings.

19 Regulations

The Attorney General may with the consent of Cabinet, make Regulations for the proper and efficient administration of this Act.

Passed by the Legislative Assembly this 29th day of July, 2004.