

## GUARDIANSHIP AMENDMENT BILL (NO. 2)

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### EXPLANATORY NOTE

THIS Bill is a companion to the Family Proceedings Bill (No. 2) 1979 and the Family Courts Bill 1979. A number of the provisions of this Bill are revised versions of amendments that were originally contained in the First Schedule to the Family Proceedings Bill 1978.

This Bill also makes amendments that are consequential on the proposed establishment of Family Courts.

*Clause 1* relates to the Short Title and commencement. Except as provided in *subclause (3)*, the Act is to come into force on a date to be appointed. *Subclause (3)* provides that *clauses 1, 5, 7, 8, 9, 10, 11, and 12* are to come into force on the day on which the Act receives the Governor-General's assent.

*Clause 2* repeals the definition of the term "District Court".

*Clause 3: Subclause (1)* substitutes a new *section 4* in the principal Act. Under the present section the Supreme Court and Magistrates' Courts have concurrent jurisdiction in respect of proceedings under the principal Act. The new section confers that jurisdiction, subject to certain exceptions, on Family Courts.

While a Family Court Judge will be able to refer proceedings to the High Court, provision is no longer made for the High Court to order that proceedings pending under the principal Act in a Family Court be removed into the High Court.

*Subclause (2)* ensures that where an order for access to a child is made in the High Court, that order may be filed in a District Court. If such a High Court order is not filed in a District Court, Family Courts will be precluded by *section 4 (3)* (as inserted by *subclause (1)* of this clause) from entertaining an application in respect of the child (other than an application for interim custody or an application under *section 19* of the principal Act).

*Clause 4* substitutes new *sections 11 and 12* in the principal Act.

*Section 11* (which relates to custody orders) now includes express reference to the making of interim custody orders. A redundant reference to the Domestic Proceedings Act 1968 is omitted.

*Section 12* (which relates to orders in other proceedings) is altered to reflect the changes being made by the Family Proceedings Bill and the Family Courts Bill.

*Clause 5* substitutes a new *section 16* in the principal Act. The section (which deals with access by relations other than parents) is extended (as was proposed by the Family Proceedings Bill 1978) so that if a right of access that a parent has to a child is not being exercised, the Court may if it thinks fit order that—

- (a) The parents of that parent of the child, or either of them; or
- (b) Any brother or sister of that parent of the child; or
- (c) Any brother or sister of the child,—

shall have access to the child at such times and places as the Court thinks fit.

*Clause 6: Paragraph (a)* amends *section 19* (which relates to the enforcement of custody and access rights). Subsections (1) and (2) of that section make provision for the issue of warrants. The jurisdiction to issue these warrants is at present vested in the Supreme Court and Magistrates' Courts. In future that jurisdiction will be vested in Family Courts and District Courts.

*Paragraph (b)* effects an amendment that is consequential on the jurisdiction conferred on Family Courts by this Bill.

*Clause 7* inserts a new *section 20A* in the principal Act. The new section (which is a revised version of a section contained in the First Schedule to the Family Proceedings Bill 1978) provides that every person commits an offence and is liable on summary conviction to a fine not exceeding \$1,000 who—

- (a) Without reasonable excuse; and
- (b) With intent to prevent an order for access to a child from being complied with—

hinders or prevents access to a child by a person who is entitled under the order to access to the child.

*Subsection (2)* of the new section makes it clear that nothing in the section limits the power of a Court to punish a person for contempt of court.

*Clause 8* inserts a new *subsection (1A)* in *section 23* of the principal Act. The new subsection (which is a revised version of a subsection contained in the First Schedule to the Family Proceedings Bill 1978) provides that for the purposes of *section 23* (which is the section that makes the welfare of the child paramount), and regardless of the age of a child, there shall be no presumption that the placing of a child in the custody of a particular person will, because of the sex of that person, best serve the welfare of the child.

*Clause 9* inserts a new *section 28A* in the principal Act. The new section confers on the Court, in any proceedings before it under the principal Act (not being criminal proceedings), the power to call witnesses.

*Clause 10* inserts a new *section 29* in the principal Act. This section enables the Court to obtain, from the Director-General of Social Welfare or a Social Worker, reports on certain applications. The section is extended so that reports may be obtained on an application for access to a child.

*Subsections (3) (b)* and *(5)* are new. *Subsection (3) (b)* makes express provision for the giving of a copy of the report to any solicitor or counsel appointed to represent a child who is the subject of the proceedings. *Subsection (5)* provides that the report is to be given or shown to the child for whom the solicitor or counsel is acting only if the Court so orders.

Under the existing section the Court may if it thinks fit on the request of any party call the person making the report as a witness. The words "on the request of any party" are omitted so that the Court may, of its own motion, call, as a witness, the person making the report.

*Clause 11* inserts a new *section 29A* in the principal Act. The new section authorises the Court, on any application for guardianship or custody (other than interim custody) or access, to request any person whom it considers qualified to do so to prepare a medical, psychiatric, or psychological report on the child who is the subject of the application.

*Clause 12* substitutes a new *section 30* in the principal Act. Significant modifications are—

- (a) A requirement that, in proceedings under the principal Act which relate to custody of a child or to access to a child, a Court shall, if those proceedings appear likely to proceed to a hearing, appoint a solicitor or counsel to represent any child who is the subject of or is otherwise a party to the proceedings, unless the Court is satisfied that the appointment would serve no useful purpose:
- (b) Express provision for a solicitor or counsel appointed under the section to call and cross-examine witnesses:
- (c) A requirement that the bill of costs rendered by a solicitor or counsel appointed under the section be given to the Registrar of the Court in which the proceedings were heard. The Registrar may tax the bill of costs:
- (d) A variation in the provisions relating to the payment of the fees and expenses of any solicitor or counsel appointed under the section. Those fees and expenses will be paid by the Crown but the Court may order any party to the proceedings to refund to the Crown such amount as the Court specifies of any fees and expenses so paid.

*Clause 13* substitutes a new *section 31* in the principal Act. This section (which relates to appeals) has been modified to conform to the new hierarchy of Courts and to the changes in jurisdiction effected by *clause 3* of this Bill. *Subclause (3)* is new. It provides that in the case of an appeal from a Family Court or a District Court, the Court appealed from may on the ex parte application of the appellant order that security under section 73 (2) of the District Courts Act 1947 shall not be required to be given under that section.

*Clause 14* substitutes a new *subsection (4)* in section 32 of the principal Act. *Paragraph (a)* (which is new) expressly provides for the making of orders regulating the practice and procedure of Family Courts and District Courts in proceedings under the principal Act.

*Clause 15* effects amendments that are consequential on the establishment of Family Courts.

*Clause 16* effects consequential repeals.

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*Hon. Mr McLay*

**GUARDIANSHIP AMENDMENT (NO. 2)**

ANALYSIS

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A BILL INTITULED

**An Act to amend the Guardianship Act 1968**

BE IT ENACTED by the General Assembly of New Zealand in Parliament assembled, and by the authority of the same, as follows:

10 **1. Short Title and commencement**—(1) This Act may be cited as the Guardianship Amendment Act (No. 2) 1979, and shall be read together with and deemed part of the Guardianship Act 1968\* (hereinafter referred to as the principal Act).

(2) Except as provided in subsection (3) of this section, this Act shall come into force on a date to be appointed for the commencement thereof by the Governor-General by Order in Council.

15 (3) This section and sections 5, 7, 8, 9, 10, 11, and 12 of this Act shall come into force on the day on which this Act receives the Governor-General's assent.

\*Reprinted 1973, Vol.2, p.1527  
Amendments: 1977, No.115; 1979, No.52

**2. Interpretation**—Section 2 of the principal Act (as substituted by section 3(1) of the Guardianship Amendment Act 1979 and amended by section 32 (2) of the Courts Amendment Act 1979) is hereby amended by repealing the definition of the term “District Court”.

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**3. Jurisdiction of Courts**—(1) The principal Act is hereby amended by repealing section 4 (as amended by section 2 of the Guardianship Amendment Act 1970), and substituting the following section:

“4. (1) Subject to subsections (2) and (3) of this section and to sections 9, 12, 19, and 20 of this Act, proceedings under this Act shall be heard and determined in a Family Court.

“(2) A Family Court shall not have jurisdiction in respect of criminal proceedings under this Act.

“(3) A Family Court shall not entertain an application in respect of a child (other than an application for interim custody or an application under section 19 of this Act)—

“(a) Where an order of the High Court relating to the custody or guardianship of, or access to, the child (other than an order under section 13 of this Act) is in force, unless the order has been removed into a District Court pursuant to section 26 of this Act; or

“(b) Where the child has been placed under the guardianship of the High Court.

“(4) Notwithstanding anything in subsection (1) of this section, if a Family Court Judge is of the opinion that any proceedings under this Act, or any question in any such proceedings, would be more appropriately or expeditiously dealt with in the High Court, the Family Court Judge may, upon application by any party to the proceedings or without any such application, in the prescribed manner refer the proceedings or the question to the High Court.”

(2) Section 26 (1) of the principal Act is hereby amended by inserting, after the words “custody of a child”, the words “or for access to a child”.

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**4. New sections substituted**—The principal Act is hereby amended by repealing sections 11 and 12, and substituting the following sections:

“11. **Custody orders**—(1) Subject to section 24 of this Act, the Court may from time to time, on application by the father or mother, or a step-parent, or a guardian, of a child or with the leave of the Court by any other person, make such interim or permanent order with respect to the custody of the child as it thinks fit.

“(2) Any order made under subsection (1) of this section may be made subject to such conditions as the Court thinks fit.

5 “12. **Orders in other proceedings**—(1) Subject to section 24 of this Act, in any proceedings under the Family Proceedings Act (No. 2) 1979 for a separation order, for an order declaring a marriage to be void *ab initio*, or for an order dissolving a marriage, a Family Court or the High Court, as  
10 after the principal order, make such interim or permanent order with respect to the custody and upbringing of or access to any child of the marriage as it thinks just.

“(2) In any such case the Court may, if in all the circumstances it thinks appropriate, make a guardianship  
15 order vesting the sole guardianship of the child in one of the parents, or make such other order with respect to the guardianship of the child as it thinks fit.

“(3) An order may be made under subsection (1) or subsection (2) of this section, and any such order may be  
20 varied or discharged, notwithstanding that the Court has refused to make the principal order or to give any other relief sought.

“(4) Unless the Court makes a guardianship order, every  
25 person who was a guardian of the child shall continue to be a guardian of the child.

“(5) For the purpose of this section the term ‘child of the marriage’ has the meaning given to it by section 2 of the Family Proceedings Act (No. 2) 1979.”

5 “5. **Access of other relatives**—The principal Act is hereby amended by repealing section 16, and substituting the following section:

“16. If a parent of a child has died, or if a right of access that a parent has to a child is not being exercised, the Court may if it thinks fit order that—

35 “(a) The parents of that parent of the child, or either of them; or

“(b) Any brother or sister of that parent of the child; or

“(c) Any brother or sister of the child—

shall have access to the child at such times and places as the  
40 Court thinks fit.”

**6. Enforcement of custody and access rights**—Section 19 of the principal Act is hereby amended:

- (a) By omitting from subsection (1) (as substituted by section 3(1) of the Guardianship Amendment Act 1979) the words “the Court”, and substituting the words “a Family Court or a District Court”;
- (b) By omitting from subsection (8) the words “the Court”, and substituting the words “a Family Court”.

**7. Offence of hindering or preventing access**—The principal Act is hereby amended by inserting, after section 20 (as substituted by section 3(1) of the Guardianship Amendment Act 1979), the following section:

“20A. (1) Every person commits an offence and is liable on summary conviction to a fine not exceeding \$1,000 who—

“(a) Without reasonable excuse; and

“(b) With intent to prevent an order for access to a child from being complied with—

hinders or prevents access to a child by a person who is entitled under the order to access to the child.

“(2) Nothing in this section shall limit the power of a Court to punish a person for contempt of court.”

**8. Welfare of child paramount**—(1) Section 23 of the principal Act is hereby amended by inserting, after subsection (1), the following subsection:

“(1A) For the purposes of this section, and regardless of the age of a child, there shall be no presumption that the placing of a child in the custody of a particular person will, because of the sex of that person, best serve the welfare of the child.”

(2) Section 23 (2) of the principal Act is hereby consequentially amended by omitting the words “such proceedings”, and substituting the words “proceedings under subsection (1) of this section”.

**9. Power of Court to call witnesses**—The principal Act is hereby amended by inserting, after section 28, the following section:

“28A. (1) In any proceedings before it under this Act (not being criminal proceedings), a Court may of its own motion call as a witness any person whose evidence may in its opinion be of assistance to the Court.

“(2) The power conferred by subsection (1) of this section shall include power to call as a witness any party to the proceedings or the wife or husband of any party to the proceedings.

“(3) A witness called by the Court under this section shall have the same privilege to refuse to answer any question as the witness would have if the witness had been called by a party to the proceedings.

5 “(4) A witness called by the Court under this section may be examined and re-examined by the Court, or by any solicitor or counsel assisting the Court, and may be cross-examined by or on behalf of any party to the proceedings or  
10 by any solicitor or counsel appointed to represent a child who is the subject of the proceedings.

“(5) The provisions of subsections (1) to (5) of section 20 and sections 38(1) and 39 of the Summary Proceedings Act 1957, so far as they are applicable and with the necessary  
15 modifications, shall apply with respect to every person called as a witness by the Court under this section as if the witness had been called by a party to the proceedings.

“(6) The expenses of any witness called by the Court under this section, in accordance with the prescribed scale of witnesses’ expenses, shall be paid in the first instance out of  
20 the Consolidated Account from money appropriated by Parliament.”

**10. Reports from Director-General**—The principal Act is hereby amended by repealing section 29, and substituting the following section:

25 “29. (1) In any case where the Court so directs in respect of any application for guardianship or custody (other than an application for interim custody) or access, a copy of the application shall be served on the Director-General in such manner as may be prescribed.

30 “(2) The Director-General or a Social Worker shall report on the application, and may appear on the application personally or by solicitor or counsel.

“(3) A copy of the report shall be given by the Registrar of the Court—

35 “(a) To the solicitor or counsel appearing for each party to the proceedings or, if any party is not represented by solicitor or counsel, to that party; and

“(b) To any solicitor or counsel appointed to represent a child who is the subject of the proceedings.

40 “(4) A report given to a solicitor or counsel under subsection (3) (a) of this section shall not be given or shown to the person for whom the solicitor or counsel is acting if the Court so orders.



“(5) A report given to a solicitor or counsel under subsection (3) (b) of this section shall be given or shown to the child for whom the solicitor or counsel is acting only if the Court so orders.

“(6) Any party to the proceedings or any solicitor or counsel appointed to represent a child who is the subject of the proceedings may tender evidence on any matter referred to in any such report. 5

“(7) The Court may if it thinks fit call the person making the report as a witness.” 10

**11. Reports from other persons**—The principal Act is hereby amended by inserting, after section 29, the following section:

“29A. (1) On any application for guardianship or custody (other than interim custody) or access, the Court may request any person whom it considers qualified to do so to prepare a medical, psychiatric, or psychological report on the child who is the subject of the application. 15

“(2) A copy of the report shall be given by the Registrar of the Court— 20

“(a) To the solicitor or counsel appearing for each party to the proceedings or, if any party is not represented by solicitor or counsel, to that party; and

“(b) To any solicitor or counsel appointed to represent a child who is the subject of the proceedings. 25

“(3) A report given to a solicitor or counsel under subsection (2) (a) of this section shall not be given or shown to the person for whom the solicitor or counsel is acting if the Court so orders.

“(4) A report given to a solicitor or counsel under subsection (2) (b) of this section shall be given or shown to the child for whom the solicitor or counsel is acting only if the Court so orders. 30

“(5) Where any person prepares a report pursuant to a request under subsection (1) of this section, the fees and expenses of that person shall be paid by such party or parties to the proceedings as the Court shall order or, if the Court so decides, shall be paid out of money appropriated for the purpose by Parliament. 35

“(6) Any party to the proceedings or any solicitor or counsel appointed to represent a child who is the subject of the proceedings may tender evidence on any matter referred to in any such report. 40

“(7) The Court may if it thinks fit call the person making the report as a witness.” 45

**12. Power of Court to appoint solicitor or counsel—**

The principal Act is hereby amended by repealing section 30, and substituting the following section:

5 “30. (1) In any proceedings under this Act (not being criminal proceedings), a Court may appoint a solicitor or counsel—

“(a) To assist the Court; or

“(b) To represent any child who is the subject of or who is otherwise a party to the proceedings.

10 “(2) Notwithstanding subsection (1) (b) of this section, in any proceedings under this Act which relate to custody of a child or to access to a child, a Court shall, if those proceedings appear likely to proceed to a hearing, appoint a solicitor or  
15 counsel to represent any child who is the subject of or who is otherwise a party to the proceedings, unless the Court is satisfied that the appointment would serve no useful purpose.

“(3) A solicitor or counsel so appointed may call any person as a witness in the proceedings, and may cross-examine witnesses called by any party to the proceedings or  
20 by the Court.

“(4) The fees and expenses of any solicitor or counsel appointed under this section shall be paid out of the Consolidated Account from money appropriated by Parliament for the purpose.

25 “(5) The bill of costs rendered by a solicitor or counsel appointed under subsection (1) or subsection (2) of this section shall be given to the Registrar of the Court in which the proceedings were heard and the Registrar may tax the bill of costs.

30 “(6) Notwithstanding subsection (4) of this section, the Court may if it thinks proper order any party to the proceedings to refund to the Crown such amount as the Court specifies in respect of any fees and expenses paid under that subsection, and the amount ordered to be refunded shall be a  
35 debt due to the Crown by that party and shall be recoverable accordingly in any Court of competent jurisdiction.”

**13. Appeals—**(1) The principal Act is hereby amended by repealing section 31 (as amended by section 3 of the Guardianship Amendment Act 1970), and substituting the  
40 following section:

“31. (1) An appeal shall lie to the High Court from any order or decision of a Family Court or a District Court under this Act, other than an order or decision under section 13 or section 14 of this Act.

“(2) Every appeal under subsection (1) of this section, except an appeal upon a question of law, shall be by way of rehearing of the original proceedings as if the proceedings had been properly commenced in the High Court.

“(3) The Court appealed from may on the ex parte application of the appellant order that security under section 73 (2) of the District Courts Act 1947 shall not be required to be given under that section. 5

“(4) The decision of the High Court upon any appeal under subsection (1) of this section shall be final: 10

“Provided that any party may, with the leave of the Court of Appeal, appeal to the Court of Appeal upon any question of law.

“(5) An appeal shall lie to the Court of Appeal from any order or decision of the High Court under this Act, other than an order or decision under section 13 of this Act: 15

“Provided that if the order or decision was made on appeal from a Family Court or a District Court an appeal shall lie to the Court of Appeal only in accordance with the proviso to subsection (4) of this section. 20

“(6) Except on an appeal upon a question of law, the Court of Appeal may in its discretion rehear the whole or any part of the evidence, or may receive further evidence, if it thinks that the interests of justice so require.

“(7) The decision of the Court of Appeal shall in every case be final.” 25

**14. Rules of Court and regulations**—Section 32 of the principal Act is hereby amended by repealing subsection (4), and substituting the following subsection:

“(4) In addition to the powers conferred by section 122 of the District Courts Act 1947, the Governor-General may from time to time, by Order in Council, make rules— 30

“(a) Regulating the practice and procedure of Family Courts and District Courts in proceedings under this Act; and 35

“(b) Providing for such matters as are contemplated by or necessary for giving full effect to the provisions of this Act and for its due administration.”

**15. Amendments consequential on the establishment of Family Courts**—The principal Act is hereby amended in the manner indicated in the Schedule to this Act. 40

**16. Repeals**—The following enactments are hereby repealed:

(a) Section 36 (2) of the principal Act: 45  
 (b) The Guardianship Amendment Act 1970. 45

## SCHEDULE

Section 15

CONSEQUENTIAL AMENDMENTS OF PRINCIPAL ACT  
 (AS AMENDED BY SECTION 32 (2) OF THE COURTS AMENDMENT  
 ACT 1979)

Section Amended	Amendment
Section 14 ... ..	By omitting the words "District Court Judge" in both places where they appear, and substituting in each case the words "Family Court Judge".
Section 20 (as substituted by section 3 (1) of the Guardianship Amendment Act 1979)	By repealing subsection (1), and substituting the following subsection: "(1) Any High Court Judge or District Court Judge or, if no High Court Judge or District Court Judge is available, any Registrar of the High Court or of a District Court (not being a constable) who has reason to believe that any person is about to take a child out of New Zealand with intent to defeat the claim of any person who has applied for or is about to apply for custody of or access to the child, or to prevent any order of any Court (including an order registered under section 22A of this Act) as to custody of or access to the child from being complied with,— "(a) May issue a warrant directing any constable or Social Worker to take the child (using such reasonable force as may be necessary) and place it in the care of some suitable person pending the order or further order of the Court having jurisdiction in the case; and "(b) May, in addition, order that any tickets or travel documents (including the passport) of the child, or of the person believed to be about to take the child out of New Zealand, or of both, be surrendered to the Court for such period and upon such conditions as the Court thinks fit."