

[AS REPORTED FROM THE STATUTES REVISION COMMITTEE]
House of Representatives, 8 August 1980.

Words struck out are shown in italics within bold round brackets, or with black rule at beginning and after last line; words inserted are shown in roman underlined with a double rule, or with double rule before first line and after last line.

[AS REPORTED FROM THE COMMITTEE OF THE WHOLE HOUSE]
House of Representatives, 3 December 1980.

Words struck out are shown in italics within double bold round brackets, or with double black rule at beginning and last line; words inserted are shown in roman underlined with a triple rule, or with triple rule before first line and after last line

Hon. Mr McLay

GUARDIANSHIP AMENDMENT (NO. 2)

ANALYSIS

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A BILL INTITULED

An Act to amend the Guardianship Act 1968

5 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) 1980, and shall be read together with and deemed part of the Guardianship Act 1968* (hereinafter referred to as the principal Act).

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

No. 145—3

Price 45c

(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)~~ the 1st day of October 1981.

(3) This section and sections 4B, 5, 6A, 7, 8, 8A, 8B, 9, 10, 11, 5
and 12 of this Act shall come into force on the day on which this Act receives the Governor-General's assent.

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)~~ section 18 10
(2) of the District Courts Amendment Act 1979) is hereby amended by repealing the definition of the term “District Court”.

3. Jurisdiction of Courts—~~(1)~~ The principal Act is hereby amended by repealing section 4 (as amended by section 2 15
of the Guardianship Amendment Act 1970), and substituting the following section:

“4. (1) Subject to subsections (2) (and (3)) to (4) 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 20
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)— 25

“(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)~~ under section 26 of 30
this Act; or

“(b) Where the child ~~(has been placed)~~ is 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 35
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; and the High Court 40
shall have the same power to adjudicate on the proceedings or question as the Family Court had.”

New

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

Struck Out

- 5 (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”.

New

- 10 **3A. Wards of Court**—Section 9 of the principal Act (as amended by section 12 of the Judicature Amendment Act 1979) is hereby amended by adding the following subsection:

15 “**(5)** In relation to the custody of, or access to, any child who is under the guardianship of the High Court or who is the subject of an application under this section, the High Court shall have all the powers of a Family Court and any order of the High Court which relates to the custody of or access to any such ~~((person))~~ child may be enforced under this Act as if it were an order of a Family Court.”

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

Struck Out

25 “**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.

New

30 “**11. Custody orders**—(1) Subject to section 24 of this Act, the Court may from time to time,—

“(a) On application by the father or mother, or a step-parent, or a guardian, of a child; or

35 “(b) With the leave of the Court, on application by any other person,—

make such interim or permanent order with respect to the custody of the child as it thinks fit.

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

“12. **Orders in other proceedings**—(1) Subject to section 24 of this Act, in any proceedings under the Family Proceedings Act (No. 2) (1979) 1980 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 the case may require,)*, in any proceedings under section 9 of this Act, the High Court, may from time to time, before or by or 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 **fit**.”

“(2) In any such case the Court may, if in all the circumstances it thinks appropriate, make a guardianship 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 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 person who was a guardian of the child shall continue to be a guardian of the child.”

New

“(4A) Any order made under subsection (1) of this section may be made subject to such conditions as the Court thinks fit.”

“(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) 1980.”

New

4A. Review of guardian’s decision or refusal to give consent—Section 14 of the principal Act (as amended by section 18 (2) of the District Courts Amendment Act 1979) is hereby amended by omitting the words “District Court Judge” in both places where they appear, and substituting in each case the words “Family Court Judge”.

4B. Access rights—Section 15 of the principal Act (as amended by section 2 of the Guardianship Amendment Act 1973) is hereby amended by inserting, after subsection (2), the following subsection:

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

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

“16. (1) 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,)* has been refused access to the child by a Court, or if a parent who has access to a child is not making any attempt to exercise access to the child, 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.

New

“(2) Any order made under subsection (1) of this section may be made subject to such conditions as the 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”:

New

(aa) By omitting from subsection (2) (as substituted by section 3 (1) of the Guardianship Amendment Act 1979) the word “including”, and substituting the words “being an order made under section 15 or section 16 of this Act or”:

(b) By omitting from subsection (8) the words “the Court”, and substituting the words “a Family Court”.

New

6A. Preventing removal of children from New Zealand—Section 20 of the principal Act (as substituted by section 3 (1) of the Guardianship Amendment Act 1979 and amended by section 18 (2) of the District Courts Amendment Act 1979) is hereby amended by repealing subsection (1), and substituting the following subsection:

New

“(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.”

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”.

5

New

8A. Removal of High Court orders to District Court—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”.

10 **8B. New sections substituted—**The principal Act is hereby amended by repealing section 27, and substituting the following sections:

“27. **Proceedings not open to public—**(1) No person shall be present during the hearing of any proceedings (other than
15 criminal proceedings) under this Act except —

“(a) Officers of the Court:

“(b) Parties to the proceedings and their barristers and solicitors:

“(c) Witnesses:

20 “(d) Any other person whom the Judge permits to be present.

“(2) Any witness shall leave the courtroom if asked to do so by the Judge.

25 “(3) Nothing in this section shall limit any other power of the Court to hear proceedings in private or to exclude any person from the Court.

“27A. **Restriction of publication of reports of proceedings—**(1) No person shall publish any report of proceedings under this Act (other than criminal proceedings) except with the
30 leave of the Court which heard the proceedings.

“(2) Every person who contravenes subsection (1) of this section commits an offence against this Act and is liable on summary conviction—

35 “(a) In the case of an individual, to imprisonment for a term not exceeding 3 months, or to a fine not exceeding \$500:

“(b) In the case of a body corporate, to a fine not exceeding \$2,500.

“(3) Nothing in this section shall limit—

40 “(a) The provisions of any other enactment relating to the prohibition or regulation of the publication of reports or particulars relating to judicial proceedings; or

45 “(b) The power of any Court to punish any contempt of Court.

New

“(4) Nothing in this section shall apply to the publication of any report in any publication that—

“(a) Is of a bona fide professional or technical nature; and

“(b) Is intended for circulation among members of the legal or medical professions, officers of the Public Service, psychologists, advisers in the sphere of marriage counselling, or social welfare workers.

“27B. Costs—In any proceedings under this Act the Court may make such order as to costs as it thinks fit.”

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))** husband or wife 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.

“(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)** barrister or solicitor assisting the Court, and may be cross-examined by or on behalf of any party to the proceedings or by any **(solicitor or counsel)** barrister or solicitor 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))** Sections 20, 38, and 39 of the Summary Proceedings Act 1957, so far as they are applicable and with the necessary 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 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:

5 “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.

10 “(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) a barrister or solicitor.

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

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

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

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

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

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

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

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

40 “29A. (1) On any application for guardianship or custody (other than interim custody) or access, the Court may, if it is satisfied that it is necessary for the proper disposition of the

application, 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.

New

“(1A) In deciding whether or not to request a report under subsection (1) of this section, the Court shall, if the wishes of the parties are known to the Court or can be speedily ascertained, have regard to those wishes. 5

“(2) A copy of the report shall be given by the Registrar of the Court— 10

“(a) To the (*solicitor or counsel*) barrister or solicitor appearing for each party to the proceedings or, if any party is not represented by (*solicitor or counsel*) a barrister or solicitor, to that party; and
 “(b) To any (*solicitor or counsel*) barrister or solicitor 15
 appointed to represent a child who is the subject of the proceedings.

“(3) A report given to a (*solicitor or counsel*) barrister or solicitor under subsection (2) (a) of this section shall not be given or shown to the person for whom the (*solicitor or 20*
counsel) barrister or solicitor is acting if the Court so orders.

“(4) A report given to a (*solicitor or counsel*) barrister or solicitor under subsection (2) (b) of this section shall be given or shown to the child for whom the (*solicitor or counsel*) 25
barrister or solicitor is acting only if the Court so orders.

“(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 30*
purpose by Parliament) by Parliament for the purpose.

“(6) Any party to the proceedings or any (*solicitor or counsel*) barrister or solicitor appointed to represent a child who is the subject of the proceedings may tender evidence on any matter referred to in any such report. 35

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

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) barrister or solicitor**—
- “ (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 counsel) barrister or solicitor** to represent any child who is
- 15 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) barrister or solicitor** so appointed may call any person as a witness in the proceedings, and may cross-examine witnesses called by any party to the
- 20 proceedings or by the Court.
- “ (4) The fees and expenses of any **(solicitor or counsel) barrister or solicitor** 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) barrister or solicitor** 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
- 30 Registrar may tax the bill of costs.

New

- 35 “(5A) If the barrister or solicitor is dissatisfied with the decision of the Registrar as to the amount of the bill, he may within 14 days after the date of the decision apply to a Family Court Judge to review the decision; and the Judge may thereupon make such order varying or confirming the decision as he considers fair and reasonable.

- 40 “(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 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 following section: 5

Struck Out

“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. 10

New

“31. (1) Where in any proceedings under this Act (other than criminal proceedings or proceedings under section 13 or section 14 of this Act) a Family Court or District Court has made or has refused to make an order, or has otherwise finally determined or dismissed the proceedings, a party to the proceedings may, within 28 days after the making of the order or decision or within such further time as the Court may allow in accordance with section 73 (1) of the District Courts Act 1947, appeal to the High Court in accordance with the provisions of Part V of that Act (except section 71) and those provisions shall apply accordingly with the necessary modifications. 15 20 25

“(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. 30

“(4) The decision of the High Court upon any appeal under subsection (1) of this section shall be final: 35

“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: 40

“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.

5 “(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.

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

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

15 “(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—

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

20 “(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.”

Struck Out

25 **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.

16. Repeals—The following enactments are hereby repealed:

- 30 (a) Section 36 (2) of the principal Act;
 (b) The Guardianship Amendment Act 1970.

*Struck Out***Section 15****SCHEDULE**

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."