

# GUARDIANSHIP OF CHILDREN

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## Table of Contents

	<i>Page</i>
<i>Principal</i>	
<b>Guardianship of Children Act 1975</b>	
Table of Provisions .....	445
Table of Amendments .....	447
Guardianship of Children Act 1975 .....	449



# Guardianship of Children Act 1975

## TABLE OF PROVISIONS

*Section*

*Title*

### **PART 1 — PRELIMINARY**

1	Short title and commencement
2	Interpretation
3	Definition of ‘custody’ and ‘guardianship’
4	Concurrent jurisdiction of the Supreme Court and the Family Court
5	Personal jurisdiction

### **PART 2 — GUARDIANSHIP OF CHILDREN**

6	Guardians
7	Declaration of guardianship
8	Testamentary guardians
9	Court-appointed guardians
10	Wards of court
11	Removal of a guardian
12	Custody orders
13	Orders in other proceedings
14	Disputes between guardians
15	Review of guardian’s decision or refusal to give consent
16	Access rights
17	Access of other relatives on death of parent
18	Variation or discharge of orders
19	Effect of custody agreements
20	Enforcement of custody and access rights
21	Preventing removal of child from the Republic
22	Termination of guardianship
23	Custody of children over 16

### **PART 3 — MISCELLANEOUS PROVISIONS**

24	Domicile of married child
25	Welfare of child paramount
26	Consents to operations
27	Filing of Supreme Court orders in the Family Court
28	Costs
29	Evidence
30	The court may call for a report
31	Legal practitioner may be appointed
32	Appeal to lie to the Supreme Court from orders of the Family Court

<i>Section</i>	<i>Title</i>
33	Provisions of common law and equity displaced
34	Other statutes not affected
35	Regulations
36	Application of this Act

# Guardianship of Children Act 1975

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## TABLE OF AMENDMENTS

The Guardianship of Children Act 1975 No 6 was certified on 12 September 1975 and commenced on 3 October 1977 (GN No 394/1977; Gaz 66/1977).

<b>Amending Legislation</b>	<b>Certified</b>	<b>Date of Commencement</b>
Interpretation (Consequential Amendments) Act 2011 No 18	3 November 2011	3 November 2011
Revised Written Laws Act 2021 No 7	1 June 2021	1 June 2021



An Act to define and regulate the authority of parents as guardians of their children, their power to appoint guardians and the powers of the courts in relation to the custody and guardianship of children.

Enacted by the Parliament of Nauru as follows:

## PART 1 — PRELIMINARY

### 1 Short title and commencement

This Act may be cited as the *Guardianship of Children Act 1975* and came into effect on 3 October 1977.

### 2 Interpretation

In this Act:

*‘child’* means a person under the age of 18 years;

*‘near relative’* means a step-parent, grandparent, aunt, uncle, brother or sister; and includes a brother or sister of the half-blood as well as the full-blood;

*‘Supreme Court’* means the court established under the *Constitution* and the *Supreme Court Act 2018*;

*‘the Chairperson’* means the Resident Magistrate as Chairperson of the Family Court;

*‘the Family Court’* means the Family Court established by the *Family Court Act 1973*; and

*‘upbringing’* includes education and religion.

### 3 Definition of ‘custody’ and ‘guardianship’

For the purposes of this Act:

*‘custody’* means the right to possession and care of a child; and

*‘guardianship’* means the custody of a child, except in the case of a testamentary guardian and subject to any custody order made by the court, and the right of control over the upbringing of a child, and includes all rights, powers and duties in respect of the person and upbringing of a child that were at the commencement of this Act vested by any written law or rule of law in the sole guardian of a child; and ‘guardian’ has a corresponding meaning.

### 4 Concurrent jurisdiction of the Supreme Court and the Family Court

(1) The Supreme Court and the Family Court shall each have jurisdiction in respect of proceedings under this Act:

Provided that the Family Court shall have no jurisdiction to entertain any application, other than an application for interim custody, in respect of a child:

(a) where proceedings relating to or affecting the child are pending in the Supreme Court;

- (b) where an order of the Supreme Court relating to the custody or guardianship of, or access to, the child, other than an order under Section 14, is in force unless the order has been removed into the Family Court pursuant to Section 27; or
  - (c) who has been placed under the guardianship of the Supreme Court.
- (2) Notwithstanding anything in subsection (1), if the Family Court 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 Supreme Court, it 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 that court.
  - (3) The Supreme Court, upon application by any party to proceedings pending under this Act in the Family Court, may, if it thinks fit, order that the proceedings be removed into the Supreme Court.
  - (4) Where the proceedings have been so removed they shall be continued in the Supreme Court as if they had been properly and duly commenced in that court.

## **5 Personal jurisdiction**

- (1) The Supreme Court and the Family Court shall have jurisdiction under this Act in any of the following cases:
  - (a) where any question of custody, guardianship, or access arises as an ancillary matter in any proceedings in which the court has jurisdiction;
  - (b) where the child who is the subject of the application or order is present in the Republic when the application is made; or
  - (c) where the child, or any person against whom an order is sought, or the applicant, is domiciled or resident in the Republic when the application is made.
- (2) Notwithstanding the provisions of subsection (1), the court may decline to make an order under this Act if neither the person against whom it is sought nor the child is resident in the Republic and the court is of the opinion that no useful purpose would be served by making an order or that in the circumstances the making of an order would be undesirable.



## PART 2 — GUARDIANSHIP OF CHILDREN

### 6 Guardians

- (1) Subject to the provisions of this Act, the father and the mother of a child shall each be a guardian of the child.
- (2) Subject to the provisions of this Act, the mother of a child shall be the sole guardian of the child if she is not married to the father of the child, and either:
  - (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 a child is, or was at the time of her death, the sole guardian under subsection (2), the father of the child may apply to the Supreme Court or the Family Court to be appointed as guardian of the child, either in addition to or instead of the mother or any guardian appointed by her, and the court may in its discretion make such order on the application as it thinks proper.
- (4) On the death of the father or the mother, the surviving parent, if he or she was then a guardian of the child, shall, subject to the provisions of this Act, be the sole guardian of the child.

### 7 Declaration of guardianship

Any man or woman who alleges that he or she is a guardian of a child by virtue of the provisions of Section 6, other than by virtue of an order under Section 6(3), may apply to the Supreme Court or the Family Court for an order declaring that he or she is a guardian of the child and, if it is proved to the satisfaction of the court that the allegation is true and that the man or woman has not been deprived of his or her guardianship, the court may make the order.

### 8 Testamentary guardians

- (1) The father or the mother of a child, including an unborn child, may by deed or will appoint any person to be a guardian of the child after his or her death, and that person is in this Act referred to as a testamentary guardian.
- (2) Where the person appointing a guardian pursuant to subsection (1) is himself or herself a guardian of the child at his or her death, the testamentary guardian shall thereupon, if he or she is of full age and capacity, be either sole guardian or a guardian in addition to any other guardian, as the case may be.
- (3) Where the person appointing a guardian pursuant to subsection (1) is not himself or herself a guardian at his or her death, the testamentary guardian may apply to the Supreme Court or the Family Court, and the court may if it thinks fit appoint him or her as a guardian accordingly.
- (4) Notwithstanding any written law or rule of law, a person under the age of 18 may appoint a guardian by deed or will pursuant to subsection (1).

[subs (4) am Act 18 of 2011 s 3 and Sch[12], opn 3 Nov 2011]

## 9 Court-appointed guardians

- (1) Subject to the provisions of this Section, the Supreme Court or the Family Court may at any time on application made for the purpose or on the making of an order under Section 11, appoint a guardian of a child either as sole guardian or in addition to any other guardian, and either generally or for any particular purpose, and either until the child attains the age of 18 years or sooner marries or for any shorter period.
- (2) Subject to any power vested in any higher court, the Supreme Court shall have exclusive jurisdiction to appoint and remove a *guardian ad litem* in respect of any proceedings before it or any higher court, and may appoint or remove a *guardian ad litem* in respect of any proceedings before any other court.

## 10 Wards of court

- (1) The Supreme Court may upon application order that any unmarried child be placed under the guardianship of the court, and may 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:
  - (a) by a parent, guardian or near relative of the child;
  - (b) by the child, who may apply without *guardian ad litem* or next friend;  
or
  - (c) with the leave of the court, by any other person.
- (3) Between the making of the application and its disposal, and thereafter if an order is made, the court shall have the same rights and powers in respect of the person and property of the child as the Lord Chancellor of England possessed in England on the 31st day of January 1968, in relation to wards of court:

Provided that the court shall not direct any child of or over the age of 16 years to live with any person unless the circumstances are exceptional.
- (4) A child who has been placed under the guardianship of the Supreme 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.

## 11 Removal of a guardian

- (1) The Supreme Court or the Family Court may at any time on application by the other parent or by a guardian or near relative or with the leave of the court, by any other person deprive a parent of the guardianship of his or her child or remove from his or her office any testamentary guardian or any guardian appointed by the court.
- (2) No parent shall be deprived of the guardianship of his or her 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.

## 12 Custody orders

- (1) Subject to Section 23 and to Section 5(4) of the *Maintenance Act 1959*, the Supreme Court or the Family Court may from time to time, on application

by the father, mother, step-parent or guardian of a child or with the leave of the court by any other person, make such order with respect to the custody of the child as it thinks fit.

- (2) Any order made under subsection (1) may be made subject to such conditions as the court thinks fit.

### **13 Orders in other proceedings**

- (1) Subject to Section 23, in any proceedings in the Family Court for divorce, judicial separation, annulment of a voidable marriage or declaration of nullity of marriage the court may from time to time, before or by or after the principal decree or order, make such order, whether an interim order or a permanent order, as it thinks just with respect to the custody and upbringing of any child of the marriage.
- (2) In any such case the court may, if in all the circumstances it thinks it appropriate, make a guardianship order vesting the sole guardianship of the child in one of the parents or make such order with respect to the guardianship of the child as it thinks fit.
- (3) An order may be made under subsection (1) or (2), and any such order may be varied or discharged, notwithstanding that the court has refused to make a decree 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.

### **14 Disputes between guardians**

- (1) Where more than one person is a guardian of a child and they are unable to agree on any matter concerning the exercise of their guardianship, any of them may apply to the Supreme Court or the Family Court for its direction, and the court may make such order relating to the matter as it thinks proper.
- (2) Where more than one person has custody of a child and they are unable to agree on any matter affecting the welfare of the child, any of them may apply to the Supreme Court or the Family Court for its direction and the court may make such order relating to the matter as it thinks proper.
- (3) Where pursuant to an order of the Supreme Court more than one person is a guardian or has custody of a child, the Supreme Court shall have exclusive jurisdiction to settle disputes unless the order has been removed into the Family Court pursuant to Section 27.

### **15 Review of guardian's decision or refusal to give consent**

- (1) A child of or over the age of 16 years who is affected by a decision or by a refusal of consent by a parent or guardian in an important matter may, unless the child is under the guardianship of the Supreme Court, apply to the Family Court which may, if it thinks it reasonable in all the circumstances to do so, review the decision or refusal and make such order in respect thereto as it thinks fit.
- (2) Any consent given by the Family Court pursuant to this Section shall have the same effect as if it had been given by the parent or guardian.

## 16 Access rights

- (1) On making any order with respect to the custody of a child a court may make such order as it thinks fit with respect to access to the child by a parent who does not have custody of it under the order.
- (2) A parent who does not have custody of his or her child may apply to the court which made the order as to custody for an order granting him or her access to the child, and the court may make such order with respect thereto as it thinks fit.

## 17 Access of other relatives on death of parent

Where a parent of a child has died, a court may, if it thinks fit, order that the parents of the deceased parent, or either of them, or any brother or sister of the deceased parent, or any brother or sister of the child, shall have access to the child at such times and places as the court thinks fit.

## 18 Variation or discharge of orders

- (1) A court may from time to time vary or discharge any order made by it with respect to the custody or upbringing of a child or with respect to access to a child.
- (2) A court may from time to time vary or discharge any order made by it 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, if any, 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.
- (4) This Section shall apply to every order of the kinds mentioned in subsections (1) and (2) whether made before or after the commencement of this Act but shall not apply to any interim order or adoption order made under the *Adoption of Children Act 1965*.

## 19 Effect of custody agreements

An agreement between the father and mother of a child with respect to the custody or upbringing of or access to the child shall be valid, even if one or both of the parties to the agreement is under the age of 18, but shall not be enforced if the court is of opinion that its enforcement would not be in the best interest or welfare of the child.

[s 19 am Act 18 of 2011 s 3 and Sch[13], opn 3 Nov 2011]

## 20 Enforcement of custody and access rights

- (1) Where any person is entitled to the custody of a child, whether pursuant to this Act or to the order of a court, the Chairperson or a Judge may at any time, on the application of the person so entitled to custody, issue a warrant authorising any police officer or any other person named in the warrant to take possession of the child and to deliver him or her to the person entitled to custody:

Provided that where more than one person is entitled to the custody of a

child no warrant issued under this subsection shall authorise the removal of the child from the possession of one of those persons and the delivery of him or her to another of them.

- (2) The Chairperson or a Judge may at any time, on the application of the person entitled to access to a child pursuant to an order of any court, issue a warrant authorising any police officer or any other person named in the warrant to take possession of the child and deliver him or her to the person entitled to access in accordance with the order.
- (3) The powers conferred on the Chairperson and Judge by subsections (1) and (2), if the court thinks fit, be exercised on the making of the order.
- (4) For the purpose of executing any warrant issued under subsection (1) or (2), any police officer, or any other person named in the warrant, may enter and search any building, aircraft, ship, vehicle, premises or place, with or without assistance and by force, if necessary.
- (5) A police officer or other person executing any such warrant shall have it with him or her and shall produce it if required to do so.
- (6) Nothing in subsections (1), (2) and (3) shall limit or affect any other power to enforce a right of custody or access exercisable by any court.
- (7) Where a court declines to enforce a right of custody or access, it may of its own motion vary or discharge any existing order of custody or access accordingly.
- (8) Subject to the proviso to Section 10(3), in considering an application under subsection (1) or (2), or any other application to enforce a right of custody or access, the court, Chairperson or Judge shall not grant the application contrary to the wishes of the child if the child is of or over the age of 16 years unless the court, Chairperson or Judge is satisfied that his or her moral welfare so requires.

## **21 Preventing removal of child from the Republic**

- (1) A Judge, Resident Magistrate or member of the Family Court who has reason to believe that any person is about to take a child out of the Republic 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 as to custody of or access to the child from being complied with, may issue a warrant directing any police officer 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.
- (2) A person who without the leave of the Supreme Court or the Family Court takes or attempts to take any child out of the Republic knowing that proceedings are pending in that court, or are about to be commenced under this Act, in respect of the child or that an order of that court conferring custody of or access to the child on any other person is in force or with intent to prevent any order of that court as to custody of or access to the child from being complied with is guilty of an offence and shall be liable to a fine not exceeding \$500 and to imprisonment for 3 months.
- (3) No proceedings for contempt of court shall be taken against any person in respect of any act to which this Section applies.

**22 Termination of guardianship**

- (1) Guardianship of a child shall terminate when the child attains the age of 18 years or marries under that age.
- (2) Nothing in subsection (1) shall limit or affect the appointment of a *guardian ad litem* or the powers of any court in respect of any such guardian.

**23 Custody of children over 16**

- (1) An order with respect to the custody of a child of or over the age of 16 years shall not be made unless there are special circumstances.
- (2) An order in respect of a child under the age of 16 years in so far as it relates to custody shall expire when the child attains that age unless the court in special circumstances otherwise orders at the time of making the order or subsequently.
- (3) Nothing in this Section shall limit or affect the power of the Supreme Court or the Family Court to make orders in respect of the upbringing of a child or to appoint or remove guardians.
- (4) Nothing in this Section shall apply in respect of children who are under the guardianship of the Supreme Court.

## PART 3 — MISCELLANEOUS PROVISIONS

### 24 Domicile of married child

The domicile of a child who is or has been married shall be determined as if the child were an adult.

[s 24 am Act 18 of 2011 s 3 and Sch[14], opn 3 Nov 2011]

### 25 Welfare of child paramount

- (1) In any proceedings where any matter relating to the custody or guardianship of or access to a child, the administration of any property belonging to or held in trust for a child, or the application of the income of such property, is in question, the court shall regard the welfare of the child as the first and paramount consideration.
- (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 such proceedings as are referred to in subsection (1), the court shall ascertain the wishes of the child, if the child is able to express them, and shall, subject to Section 20(8), take account of them to such extent as the court thinks fit, having regard to the age and maturity of the child.

### 26 Consents to operations

- (1) The consent of a child of or over the age of 16 years to any donation of blood by him or her or to any medical, surgical or dental procedure, including a blood transfusion, to be carried out on him or her for his or her benefit by a person professionally qualified to carry it out, shall have the same effect as if he or she were of full age.
- (2) The consent of or refusal to consent by a child to any donation of blood or to any medical, surgical or dental procedure, including a blood transfusion, whether to be carried out on him or her or on any other person, shall if the child is or has been married have the same effect as if he or she were of full age.
- (3) Where the consent of any other person to any medical, surgical or dental procedure, including a blood transfusion, to be carried out on a child is necessary or sufficient, consent may be given:
  - (a) by a guardian of the child;
  - (b) if there is no guardian in the Republic or no such guardian can be found with reasonable diligence or is capable of giving consent, by a person in the Republic who has been acting in the place of a parent; or
  - (c) if there is no person in the Republic who has been so acting, or if no such person can be found with reasonable diligence or is capable of giving consent, by a magistrate or a member of the Family Court.
- (4) Where a child has been lawfully placed for the purpose of adoption in the home of any person, that person shall be deemed to be a guardian of the child for the purposes of subsection (3).
- (5) Nothing in this Section shall limit or affect any written law or rule of law whereby in any circumstances:

- (a) no consent or no express consent is necessary;
- (b) the consent of the child in addition to that of any other person is necessary; or
- (c) subject to subsection (2), the consent of any other person instead of the consent of the child is sufficient.

## **27 Filing of Supreme Court orders in the Family Court**

- (1) A party to any proceedings in the Supreme Court in which an order for the guardianship or custody of a child has been made, whether that order was made before or after the commencement of this Act, may make application to the Registrar of Courts to have a copy of the order filed in the Family Court and shall forward with the application a copy of the order and of any order varying or otherwise affecting it and the fees prescribed for sealing copies of orders.
- (2) The Registrar of Courts shall transmit to the Deputy Registrar of the Family Court a copy under the seal of the Supreme Court of the order and of every order varying or otherwise affecting it, and shall also note on the original order a memorial to the effect that the copy has been so transmitted.
- (3) The Deputy Registrar of the Family Court shall file the copy of any order transmitted to him or her under subsection (2).
- (4) A copy under the seal of the court of every order of the Supreme Court varying or otherwise affecting any such order shall be forwarded by the Registrar of Courts to the Deputy Registrar of the Family Court.
- (5) Every order of the Supreme Court so filed in the Family Court may be enforced by the Family Court as though it were an order of that court.

## **28 Costs**

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

## **29 Evidence**

In all proceedings under this Act, whether by way of hearing in the first instance or by way of appeal, the court may receive any evidence that it thinks fit, whether it is otherwise admissible in a court or not.

## **30 The court may call for a report**

- (1) Where a court thinks fit in respect of any application made to it for guardianship, custody or access it may direct that a report on the application be made to it by a welfare officer or any other public officer.
- (2) The welfare officer or other public officer required to do so by a direction given under this Section shall report on the application and may attend on the hearing of any application.
- (3) A copy of the report shall be given by the Registrar of Courts, or Deputy Registrar, to the legal practitioner appearing for each party to the proceedings or, if any party is not represented by a legal practitioner, to that party:  
Provided that the court may, if it thinks fit, order that a report given to a legal practitioner be not given or shown to the person for whom he or she is acting.



- (4) A party to the proceedings may tender evidence on any matter referred to in any such report which is given or shown to him or her or to his or her legal practitioner.
- (5) The court may, if it thinks fit, on the request of any party call the person making the report as a witness.

### **31 Legal practitioner may be appointed**

The court may appoint a legal practitioner to assist it or to represent any child who is the subject of, or who is otherwise a party to, proceedings under this Part and, where any legal practitioner is so appointed, his or her fees and expenses shall be paid by such other party or parties to those proceedings as the court shall order or, if the court so decides, shall be a charge upon the Treasury Fund.

### **32 Appeal to lie to the Supreme Court from orders of the Family Court**

- (1) An appeal shall lie to the Supreme Court from any order or decision of the Family Court in proceedings under this Act.
- (2) The appeal shall be by petition and shall lie as of right if the petition is lodged at the registry of the Supreme Court within 14 days of the order being made or the decision given by the Family Court.
- (3) Where a petition is not lodged within 14 days of the order being made or the decision given, leave to appeal may be granted by a Judge upon application by summons.
- (4) Except as may be otherwise expressly provided by any written law, the provisions of Section 18 of the *Family Court Act 1973* shall apply *mutatis mutandis* to the hearing of appeals under this Section.
- (5) Subject to subsection (4), the provisions of Part 11 of the *Supreme Court Act 2018* relating to appeals from the District Court to the Supreme Court shall apply *mutatis mutandis* to appeals from the Family Court under this Section.

### **33 Provisions of common law and equity displaced**

- (1) Except as otherwise expressly provided in this Act, the provisions of this Act shall have effect in place of the rules of the common law and of equity relating to the guardianship and custody of children.
- (2) Subject to Section 10, no person shall be appointed as or shall have any powers as guardian of the property of any child:  
Provided that nothing in this Act shall limit or affect any power of the Supreme Court in relation to any property held upon trust or to the administration of the property.
- (3) In matters not provided for by this Act, the Supreme Court shall have all such powers in respect of the persons of children as the Lord Chancellor of England had in England on the 31st day of January 1968.

### **34 Other statutes not affected**

Except as expressly provided in this Act, nothing in this Act shall limit or affect the provisions of the *Maintenance Act 1959* or of the *Matrimonial Causes Act 1973*.

**35 Regulations**

- (1) The Cabinet may make regulations for the better carrying into effect of the provisions, objects and intentions of this Act and for the due administration of this Act.
- (2) The Cabinet may make regulations providing for the enforcement in the Republic of orders with respect to the custody and upbringing of, and access to, children made in such other countries as may be prescribed, and relating to the enforcement in other countries of orders made in the Republic with respect to the custody and upbringing of, and access to, children.

**36 Application of this Act**

This Act shall apply to persons living at the date of the commencement of this Act and to persons born thereafter.