



Testamentary Guardianship

What is a Guardian?

A guardian is a person who is appointed to look after the interests of a child. When they become a guardian they have all of the legal responsibilities of a parent this is known as parental responsibility. A guardian may be appointed by the court or privately by a person who already has parental responsibility. This includes kinship carers who have either a Child Arrangements Order or Special Guardianship Order. A person can be appointed as a guardian either by a Will or in writing, as long as the document is signed by the person making the appointment.

Why Appoint a Guardian?

It is important to appoint a guardian to look after the child you are caring for should you die. It means that you can make sure your child will be looked after by someone you trust, or someone that already has a relationship with the child. You should always make sure that the person you wish to appoint is happy to take on the role of guardian, as they have the right to refuse to take on guardianship if they do not wish to act.

What if no Guardian is appointed?

If no guardian is appointed, then the decision about who becomes a legal guardian to the child will be left up to the courts. A court will usually appoint other willing family members. However, the child may not end up with the person that you would have appointed given the choice.

In addition to this, it is likely there will be a delay between death and the court appointing a guardian. During this time the child may be placed in foster care until a decision is reached as there will be no one to exercise parental responsibility.

How Guardians are appointed?

A guardian can be appointed in a Will - this is called Testamentary Guardianship. If a guardian is appointed in a Will then the signing must comply with all the requirements of Section 9 of the Wills Act 1837:

- The Will must be in writing
- The Will must be signed by the testator (the legal guardian)
- The above must be witnessed by two witnesses who attest to the testator's signature.

You do not have to make an appointment in a Will. It can also be made informally as long as it is in writing, dated and signed by the testator (the legal guardian). If the testator is unable to sign the document then it must be signed at the direction of the testator, in their presence and the presence of two witnesses who attest the signature.

Applying to the court

An application can be made to the Family court by a person willing to be appointed as a guardian. However, before an application can be made the proposed guardian must attend a family mediation information and assessment meeting (MIAM).

When the family court is making a decision on matters that will affect a child, the court is required to look at the welfare of the child as the most important consideration. The welfare checklist has seven statutory criteria that the courts must consider under the Children Act 1989 when reaching its decision:

- The ascertainable wishes and feelings of the child concerned.
- The child's physical, emotional and educational needs.

- The likely effect on the child if circumstances changed as a result of the court's decision.
- The child's age, sex, backgrounds and any other characteristics which will be relevant to the court's decision.
- Any harm the child has suffered or maybe at risk of suffering.
- Capability of the child's parents (or any other person the courts find relevant) at meeting the child's needs.
- The powers available to the court in the given proceedings.

When does Testamentary Guardianship take effect?

The Testamentary Guardianship will take effect on the death of the testator (legal guardian) if there is no other surviving person with parental responsibility.

Parental responsibility will not automatically transfer to the guardian if there is a surviving parent with parental responsibility for the child and there is no Child Arrangement Order or Special Guardianship Order which names the proposed guardian.

What should be considered when appointing a Testamentary Guardian?

- A guardian must be over the age of 18 and be mentally capable.
- More than one guardian can be appointed, although it's usually best to keep at a minimum to avoid future conflict about the child's upbringing.
- Do the prospective guardian and child already have a close relationship?
- Does the prospective guardian live nearby? Can the child continue their education and remain close to family and friends?
- Is the prospective guardian physically fit and capable of taking on the care of a child?
- Is the prospective guardian financially stable?
- Does the prospective guardian have children of their own? How will this impact on them?

When does Guardianship end?

Guardianship ends automatically when the child reaches the age of 18 or if the child or sole guardian dies while the child is a minor, or by order of the court.

Can the appointment of a Testamentary Guardian be discharged?

Any appointment of a guardian can be brought to an end at any time by order of the court:

- on the application of any person who has parental responsibility for the child;
- on the application of the child concerned, with leave of the court; or
- in any family proceedings, if the court considers that it should be brought to an end even though no application has been made.

Grandparents Plus advice service provides:

Independent advice and information on a wide range of other issues including employment, housing, education, disability parenting and legal options.

Open Mon – Fri 9.30am – 3.30pm. Translation service available.
Call 0300 123 7015 or emailadvice@grandparentsplus.org.uk
www.grandparentsplus.org.uk

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