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APPOINTING GUARDIANS IN YOUR WILL

INTRODUCTION

The provision for a guardian in a Will is something which should be considered by all parents who have children under the age of 18. A child's guardian is someone who is appointed to take over responsibility for the child in the event of the death of the child's parent or carer. The appointment is not only necessary if the child has property or money but also to provide day-to-day care, as the guardian will have the right to decide on the child's upbringing, health care, religion and education. It is very important to ensure that the right person or persons are chosen to act as guardians and are appointed in accordance with the law. The law on the appointment of guardians changed radically as a result of The Children Act 1989 (the Act).

WHO MAY APPOINT A GUARDIAN?

This is governed by the Act which provides that the appointment of guardians may be made by:

- (a) a parent with parental responsibility for the child, or
- (b) an existing guardian of the child, or
- (c) by a court in family proceedings

The appointment generally becomes effective when the person who makes the appointment dies. At that time the guardian will acquire **parental responsibility** for the child.

WHAT IS PARENTAL RESPONSIBILITY?

The Act defines parental responsibility for a child as:

- **all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to that child and his or her property**



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A person who has parental responsibility has the legal authority to act in relation to a child in such matters as education, medical care, where the child has to live, what surname the child is to have and all other aspects of upbringing and welfare of the child.

WHO HAS PARENTAL RESPONSIBILITY?

If the child is legitimate (or has been legitimated, or is adopted), the parents (or adopting parents) will each have parental responsibility and both may appoint guardians for the child in the event of their respective deaths.

Previously, under the Act where the parents were not married to each other, the mother automatically had parental responsibility but an unmarried father could acquire parental responsibility either by agreement with the mother, or by obtaining an order from the Court. The Court would normally grant an unmarried father parental responsibility, provided he could show his commitment to the child(ren), for example, by having regular contact.

However, from **1st December, 2003** the law has changed. The father of a child who is not married to the mother acquires parental responsibility for that child if he is registered as the father in accordance with the relevant provisions of the Births and Deaths Registration Act 1953. This change in law only applies to births registered on or after 1st December 2003 (irrespective of the date of birth of the child). The law remains unchanged for births registered prior to 1st December, 2003.

Both parents can exercise their parental responsibility independently of the other without first having to obtain the consent of the other parent. In practice the parent with the care of the child will make the day to day decisions in respect of that child.

If you are a father of a child whose birth was registered prior to 1st December, 2003 you may acquire parental responsibility (and therefore be able to appoint a guardian) either through a court order granting you parental responsibility or by entering into a parental responsibility agreement with the child's mother.

The Parental Responsibility Agreement must be prepared in accordance with the law and the agreement must contain certain prescribed information, signed by both parents and witnessed at Court by a JP or court official.

The evidence of the child's identity and birth certificate must also be supplied. The Agreement will only take effect once it has been filed at the Principal Registry of the Family Division in London and the agreement can

only be brought to an end by a court order. A Parental Responsibility Agreement can only be with an unmarried father and not with any other family member.

WHO CAN BE A GUARDIAN?

A parent with parental responsibility for a child or a properly appointed guardian, may appoint one or more individuals to act as guardian or guardians for the child on his or her death. Guardians can only be appointed in relation to a child under the age of 18 years.

WHAT IS A RESIDENCE ORDER?

This is a court order settling the arrangements to be made about the person with whom a child is to live. It also affects the testamentary appointment of guardians. A residence order can be made jointly in favour of both parents, or a parent and another carer of the child. Residence Orders can be made in divorce, judicial separation or nullity proceedings. It can also be made in applications under the Children Act to unmarried parents, grandparents or others who the court allows may apply. Residence Orders can only be granted by the court.

Residence Orders are not automatically granted by the court for instance, on divorce. The court would only make such an order if it considers that doing so would be better for the child than making no order at all. In practice, many family law courts are not making residence orders and other child orders on divorce if the arrangements between the parents for the child are working well.

THE ROLE OF A GUARDIAN

A properly appointed guardian has parental responsibility for the child concerned. He or she has all the decision-making powers over upbringing inherent in the concept of parental responsibility and the right to undertake physical care of the child except where this is withheld by virtue of a residence order in favour of someone else. It is intended that guardians should become parents to the child in the fullest sense since they are in effect complete replacements for deceased parents.

THE APPOINTMENT OF A GUARDIAN

If, on the death of the appointor (even if the parents are separated or divorced), there is:

- a surviving parent with parental responsibility; and
- the deceased did not have a residence order in his or her favour,

the appointment of the guardian *does not take effect until the death of the surviving parent*. Then effective appointments by both parents will take effect simultaneously: this can lead to conflicts between the two separately appointed guardians which the court may have to resolve.

If on the death of a parent with parental responsibility, the child either:

- has no surviving parent with parental responsibility; or,
- immediately before the death of the appointor, a court residence order was in existence in the appointor's favour regarding the child,

then the appointment of the guardian takes immediate effect on the death of the appointor.

A properly appointed guardian of a child may also appoint another individual to take his or her place as guardian on his or her death. However, if there is a surviving parent with parental responsibility and the guardian does not have a residence order in his or her favour then the appointment by the guardian will only take effect on the death of the surviving parent.

HOW IS A GUARDIAN APPOINTED?

The appointment by a parent or guardian will not be effective unless it is made in a written document and dated. It must also be signed by the person appointing the guardian. An appointment made by Will or other testamentary document signed at the appointor's direction must be properly witnessed by two witnesses in accordance with the law.

The court can also appoint a guardian if either:

- a child has no parent with parental responsibility, or
- a residence order has been made in favour of a parent or guardian who has died whilst the order was still in force.

The former applies to orphans, or the children of unmarried fathers without parental responsibility. The latter applies even though the child may have a surviving parent, without a residence order. The court is only likely to appoint a non-parent as sole guardian when the deceased, having a

residence order in his or her favour, did not make a lifetime appointment of guardian and a third party is likely to be better able to care for the child than the surviving parent.

CAN THE APPOINTMENT BE REVOKED OR REFUSED?

During the lifetime of the person who has made the appointment, he or she may revoke the appointment in the following ways:

- by a further appointment of a guardian which is clearly inconsistent with the continuation of the first appointment
- by specifically revoking the appointment in writing
- if the appointment is made other than in a Will or Codicil, by destroying the original written document which provided for the appointment of the guardian, with the intention of revoking the appointment
- by revoking the Will or Codicil which contains the appointment

The Court has power to revoke the appointment at any time.

In addition, the person who is appointed guardian may refuse the appointment by any document in writing signed by him or her made within a reasonable time of his or her first knowledge that the appointment has taken effect.

Upon divorce, any appointment of a former spouse as guardian in a Will would be revoked automatically by law. However, if such a parent has parental responsibility, his or her rights over any children would be unaffected. However, any appointment by Will of a step-parent (without parental responsibility) as guardian is affected by any later divorce. The result is that, unless there is anything in the Will to the contrary the appointment of a step-parent as guardian in such circumstances would be revoked.

ADVANTAGE OF APPOINTING GUARDIANS BY WILL OR CODICIL

Although the appointment of a guardian can be made in any written document, there is an advantage in appointing in a testamentary document such as a Will or Codicil as such documents are likely to be preserved, easily identifiable and be considered by those dealing with the estate of the appointor on death. If a Will or Codicil is revoked at any time and contains a Guardian clause, the appointment of the guardian will also be revoked.



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FOR FURTHER INFORMATION :

On Wills generally please see our **Factsheet 1 – Wills**; on Inheritance Tax Planning please see our **Factsheet 3 – Inheritance Tax**; on Trusts please see our **Factsheet 4 – Trusts including Discretionary Will Trusts**.

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