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# Appointing Guardians

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## & Parental Responsibility

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A Public Information Leaflet

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# Appointing Guardians & Parental Responsibility

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## **Appointment of Testamentary Guardians**

The appointment of guardians and the rights they have are governed by the Children Act 1989, s5. A guardian can only be appointed in accordance with that section. A parent with parental responsibility may appoint a guardian by Will or by a document which he dates and signs and which provides that the appointment only takes effect on his death.

The appointee will become the child's guardian if, at the death of the testator:

- A. no parent with parental responsibility survived him; or
- B. there was a residence order in his sole favour relating to the child.

If neither of these conditions is fulfilled, the appointee will not automatically become the child's guardian but, as he has parental responsibility, he will be entitled to apply to the court to be appointed guardian.

Where a testator has children under the age of 18, the appointment of testamentary guardians should always be considered. The expression 'testamentary guardian' merely indicates that the guardian has been appointed by Will.

It is usual (but not essential) that the same persons are appointed guardians of all the testator's minor children. When the guardians are to act only after the death of the surviving parent it is desirable that each parent should appoint the same persons to act as guardian.

It is, of course, important that the testator should obtain the consent of the proposed guardian before making the appointment. The appointed guardian can appoint a successor. It is, however, unnecessary to make express provision in the Will because the Children Act 1989, s5(4) enables a guardian to appoint another individual to take his place in the event of his death.

Whether guardians should be trustees depends on the circumstances of each case. There are arguments for and against. The guardians are best placed to know the needs of the children and have the task of providing for those needs. On the other hand, the guardians may be regarded as the advocates of the children and the trustees as the judges of their conflicting claims. The problem is particularly acute when the residue is held on discretionary trusts for the children and, in that case, a sensible solution may be to appoint one of the guardians and, say two professional trustees.

## **Parental Responsibility**

Without prompting, clients rarely contemplate the appointment of testamentary guardians. But they constantly accept that such an appointment is highly desirable if both parents are to die before their child is eighteen.

Section 2 (1) of the Children Act 1989 provides that where a child's mother and father were married to each other at the time of the child's birth, they both have automatic parental responsibility for that child. (Same applies to children born as a result of AID) If the parents aren't married the father can apply for parental responsibility through the court and be granted a order, agreement with the mother which has to be signed and witnessed in court or via a residence order.

If the father has already acquired a parental rights and duties order under the Family Reform Act 1987, this will automatically be deemed to be an order under the Children Act 1989.

In 2003 the Children Act was reformed. The parents of the child no longer had to be married to both have automatic parental responsibility for the child. Both the father and the mother just have to be named on the child's birth certificate. You can choose to legitimate the child by later getting married.

Guardians, a person with a residence order, adopters and local authorities where a care order or emergency protection order is in force can all acquire parental responsibility.

Section 5 of the Children Act 1989 confirms that the court can appoint guardians for a child. This is only if the child has no parents with parental responsibility or a parents/guardian with a residence order. (The court can also only appoint a guardian if the parents with parental responsibility or the guardian with a residence order dies subsistence of the order).

A parent with parental responsibility or a guardian can appoint other(s) to act as guardian in the even of their death such appointment must be in writing , dated and signed by the maker or, where not signed, signed at his direction and duly witness. S5(5) goes on to provide for the circumstances in which the appointment of the guardian may be revoked or disclaimed.

NOTE:

1. More than one person may have parental responsibility for the same child at the same time
2. Where more than one person has parental responsibility for a child, each person may act independently without the other(s) in discharging that liability. This power is subject to any statute requiring the consent of more than person in any matter affecting the child
3. The fact that a person has parental responsibility for a child does not entitle him to act in a way incompatible with any order made in respect of the child under the 1989 Act
4. Though a person who has parental responsibility may not surrender or transfer any part of it to another, he may arrange for some or all of it to be met by one or more persons acting on his behalf. A person acting on his behalf may already have parental responsibility for the child. An arrangement will not affect any liability the person making it may have as a result of failing to meet any of his parental responsibilities for the child concerned.