

Appointment of Guardians

The appointment of guardians and the rights they have are governed by the Children Act 1989, s5. A guardian can only be appointed accordance with that section. A parent with parental responsibilities 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 their death.

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

- No parent with parental responsibility survived them: or
- There was a residence order in their 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 they have parental responsibility, they will be entitled to apply to the court to be the 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 their 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 have regards 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 trust 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 invariably accept that such an appointment is highly desirable if both are to die while they have a child under 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 shall each have parental responsibility for the child. This applied also to children born as a result of AID.

Where the child's parents were not married to each other at the time of the child's birth, only the mother has parental responsibility (s2. (2)) but the father may acquire it either by a court order or agreement with the mother under s4, or a residence order s8:s12 (1). If the father had already acquired parental rights and duties order under s4 (1), Family Reform Act 1987, this will automatically be deemed to be an order under s4 of the Children's Act 1989 (sched 14, para 4).

Parental responsibility may also be acquired by a guardian, a person with a residence order, adopters and local authorities where a care order or emergency protection order is in force.

Section 5, Children's Act 1989 provides that a court may appoint a guardian if the child has no parent with a parental responsibility or a parent or guardian with a residence order has died during the subsistence of the order. A parent with parental responsibility or a guardian may appoint another (or others (se (10))) to act as guardian in the event of their death. Such appointment must be in writing, dated and signed by the maker or, where not so signed, signed at their direction and duly witnessed: s5(5). The section 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 one 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, they may arrange for some or all of it to be met by one or more persons acting on their behalf. A person acting on their 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.