

# Testamentary Guardianship

## What is a Testamentary Guardian?

A guardian is a person who is appointed to look after the interests of a child in certain circumstances like the death of the child's parents or special guardians. When they become a guardian, they gain all the legal rights and responsibilities of a parent, this is known as parental responsibility.

This is similar to considering and naming guardians in your will for your own children. In the event that anything should happen to you, if you hold a Special Guardianship Order, this will mean that the Testamentary Guardian identified will be able to take on the care of the child/ren.

The Testamentary Guardian will still need to be assessed as suitable to care for the children. The SGO will not automatically pass to them and relevant applications will need to be made to the Court to transfer the SGO to them.

A person can be appointed as a guardian either by a Will, or in writing if 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 so wish.

## 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 another willing family member. 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 if 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.

## **When does testamentary guardianship take effect if appointment made by a special guardian?**

The testamentary guardian appointment takes effect when the special guardian dies and there is no other surviving special guardian. This applies even if there is a parent with parental responsibility still living.

If there is another special guardian still living, the testamentary guardian appointment will not take effect because they have the responsibility to care for the child.

## **What should be considered when appointing a testamentary guardian?**

- Does the potential guardian agree to taking on the role?
- A guardian must be over the age of 18 and be able to look after a child.
- More than one guardian can be appointed, although it is 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?
- 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 ended 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 ended even though no application has been made.

## Legal advice

The information contained in this fact sheet is intended for guidance only. Whilst every effort is made to ensure the information is correct, it should not be used as a replacement for legal advice.

Appointment of a testamentary guardian can be a complex area of law. Therefore. We recommend that you seek independent legal advice before considering any action. You can seek free independent legal advice from one of the following sources:

- Family Rights Group 0808 801 0366 [www.frg.org.uk](http://www.frg.org.uk) - Provide free confidential advice over the telephone.
- Child Law Advice at Coram Children's Legal Centre 0300 330 5480 - <https://childlawadvice.org.uk/clas/contact-child-law-advice/> - Provide free confidential advice over the telephone.

**Please Note:** There will usually be a charge by the above sources if you require them to take on any additional work or representation. Please make sure you discuss any potential fees before you agree to any further work being carried out on your behalf.