

Testamentary Guardianship

Anyone writing a Will who is a parent to children under the age of 18 (minor children) should consider including a clause in their Will to appoint guardians. This will provide them with the peace of mind that people they know and trust will take care of their children after their death and the appointment of guardians won't be left up to the courts. This month's CPD will focus on the law surrounding guardianship and parental responsibility.

WHAT IS A GUARDIAN?

A guardian is a person appointed to look after the interests of a child and who has all of the legal responsibilities of a parent, known as parental responsibility (PR). A guardian may be appointed by the courts during family proceedings or privately by an individual who has PR for the child. The appointment can be made by Will or by a less formal instrument as long as it is in writing and signed by the person making the appointment.

WHY APPOINT A GUARDIAN?

If a person has minor children or is a guardian to minor children they should consider appointing guardians in their Will. This will allow them to choose people they trust and ideally who already have a relationship with the children to look after them in the event that they die while the children are still minors.

Making this decision in lifetime and considering who to appoint as guardians in the Will also gives a testator the opportunity for their chosen guardians to be consulted on the matter to make sure they would be happy to take on the role. A guardian doesn't have to accept the appointment and can decide that they don't wish to act, in which case an application must be made for the court to appoint guardians if there are no substitutes.

When appointing a guardian a testator may also include wishes as to how they would like their children to be brought up. They may want them to continue their music lessons, continue to be brought up in a religious manner, or continue their education at the same school (if appropriate and the guardian lives in the same area). These wishes are not binding on the guardian and are merely a statement of wishes by the parent.

What if no guardian is appointed?

If there are no guardians appointed and a person dies leaving minor children the court must appoint guardians.

The guardians the court appoints will usually be willing family members, however the people the children end up with may not necessarily be the people that the deceased would have appointed if given the choice.

There may be a delay of months between the testator's death and the courts appointing a guardian. During this time the children may be taken into foster care until a decision is reached.

The above also applies if the appointed guardian has predeceased so a testator should consider appointing a substitute guardian.

WHO CAN APPOINT GUARDIANS?

A guardian may only be appointed in accordance with the provisions of the Children Act 1989. More than one person may be appointed as a child's guardian.

A parent with PR for a child may appoint a person to be their minor children's guardians in the event of their death.

A guardian or special guardian may appoint a person to take over from them as guardian or special guardian in the event of their death.

If necessary the courts may appoint a guardian in family proceedings.

HOW ARE GUARDIANS APPOINTED?

By Parents or Guardians

The appointment of a guardian may be made by Will, this is a testamentary guardian. A simple clause such as "If my wife JANE SMITH dies before me I appoint my sister JULIA SMITH to be the guardian of my children who are under 18 years of age" would suffice to appoint a guardian in the event of both parents death.

The appointment does not have to be made by Will and may be made informally as long as the requirements of section 5 of the Children Act 1989 are met. The appointment must be made in writing, dated, and signed by the person making the appointment. If it is not signed by the person making the appointment then it must be signed at the direction of the person making the appointment, in their presence and in the presence of two witnesses who each attest the signature.

If the appointment is made by Will then the signing must comply with all of the requirements of section 9 of the Wills Act 1837.

By the Courts

An application can be made to the Family court by a person willing to be appointed as a guardian. Before an application can be made the proposed guardian must attend a family mediation information and assessment meeting. This is a requirement under section 10 Children of the Children and Families Act 2014.

Even if no one comes forward to apply to be appointed as a guardian the courts may make an order appointing a guardian if it feels it is appropriate to do so. Alternatively they may make a Child Arrangements Order (formally a Residence Order) to decide who the child should live with but without conferring PR on that person.

When deciding who to appoint as a guardian the courts paramount consideration will be the best interests of the child and the decision that will create the least disruption. If there are appropriate relatives nearby

then these will be considered as this will allow the children to stay in the same area and attend the same schools. If the courts must appoint a guardian they would consider the following:

- The child's own wishes and feelings taking into account the child's age and understanding
- The child's relationship with the prospective guardian
- How capable the proposed guardian is of meeting the child's needs
- The recorded wishes of a deceased parent and the wishes of the child's nearest relatives

WHEN DOES THE GUARDIANSHIP APPOINTMENT TAKE EFFECT?

If the testator dies and there is no other person surviving with PR then the guardianship appointment will take effect immediately on the testator's death.

If the testator dies and a Child Arrangements Order (formerly known as a residence or contact order) was in force in which the testator was named as a person with whom the child was to live or the testator was the child's only special guardian then the appointment will take effect immediately on their death even if the surviving parent has PR. In this case the guardian will share PR with the surviving parent.

The appointment will not take effect immediately if the surviving parent with PR was also named in the CAO as a person with whom the child is to live. If there is a dispute about who the child is to live with, either the surviving parent or the guardian can make an application for a CAO. The parent may also apply to have the guardianship terminated. The child's welfare is the courts main concern when dealing with these issues.

A common example of the above situation would be where the testator is divorced, for example Mr. Smith and Mrs. Smith have been divorced for 3 years and there is a CAO in force which states that the children must live with Mrs. Smith. Mrs. Smith dies and has appointed Mr. Jones as guardian. Mr. Jones will become guardian on the death of Mrs. Smith and will share parental responsibility with Mr. Smith. In this circumstance Mr. Smith may apply to the court to terminate Mr. Jones' guardianship.

If the testator dies and the child has a surviving parent with PR and there was no CAO in their favour then the appointment of the guardian will not take effect until the surviving parent with PR has also died.

Residence

Although a guardian acquires PR and may decide where a child lives or provide a home for them there is no automatic entitlement to have the child live with them. If there is a dispute over which guardian the child should live with then an application to the court must be made for a CAO to decide where the child will live.

WHEN DOES GUARDIANSHIP END?

Guardianship ends automatically when the child turns 18 or if the child or sole guardian dies while the child is a minor.

Under section 6 of the Children Act 1989 a guardian may end their guardianship early by disclaiming their appointment. This must be done within a reasonable time of them discovering their appointment has taken effect, must be in writing, and must be signed by the guardian disclaiming.

A guardian may also be removed prematurely by court order. Where an application is made for a removal of a guardian a mediation information and assessment meeting must be held before the court will consider the application.

The application can be made by anyone with PR for the child concerned, or by the child themselves if the court has given them leave. The court may also remove a guardian in family proceedings without an application if it considers it appropriate to do so. Where the court removes a guardian they may appoint a replacement.

WHO SHOULD BE CONSIDERED?

A guardian must be over the age of 18 and mentally capable. Apart from these requirements a testator may appoint anyone they wish and who they think would be suitable to care for their children after their death.

More than one guardian can be appointed, but it's usually best to steer away from appointing a "committee" of guardians as this can lead to conflict when not all guardians agree on a decision or an aspect of the child's upbringing.

A testator should consider the following about their proposed guardian:

- What is their relationship with the child like and are they already close?
- Their location. Do they live nearby? Could the children continue their education at the same school and remain close to other family and friends?
- Are they physically capable of caring for the children? An elderly relative may not be an appropriate guardian for very young children
- Are they financially stable?
- Do they have children of their own?

It is possible to appoint guardians who live abroad but it may not be practical. The guardian would have no automatic right to live in the country because they are appointed as a guardian, nor would the child automatically be able to leave the country to move abroad with the guardian. Visas would have to be applied for and arranged and while this was being organised the child may have to be cared for by a foster family.

To move a child abroad the appropriate consent must be obtained under the Child Abduction Act 1984.

If there are multiple people with PR then permission to take the child abroad for a period of more than one month must be obtained from all of them. Failing this an application must be made to the court to obtain leave to remove the child from the UK. Removing a child from the country without consent or a court order is an offence

There is also the possibility that the courts may feel that removing the child from the UK would not be in their best interests and they would seek to appoint a different guardian in the UK, especially if the child has surviving relatives in the UK.

PARENTAL RESPONSIBILITY

This paper has so far mentioned PR a lot as this is important to establishing who can appoint a guardian and when that guardianship appointment takes effect. But what actually is PR? PR is defined by section 3 of the Children Act 1989 as:

“...all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property and also includes the rights, powers and duties which a guardian of the child’s estate (appointed, before the commencement of section 5, to act generally) would have had in relation to the child and his property.”

PR includes the right and duty to care for the child and provide a home, to determine where the child should live, to ensure that if the child is of compulsory school age they receive appropriate education, to appoint a guardian, to consent to medical treatment or obtain appropriate treatment for the child, to consent to the child's marriage if over 16 and to name the child.

On the death of a parent we must establish whether the surviving parent or anyone else has PR for the child before we can determine whether the guardianship appointment in the deceased’s Will has taken effect.

PR at birth

PR may be acquired automatically on the birth of a child, but this depends on the relationship between the parents. A child’s mother will always automatically acquire PR on the birth of her child. A child’s father will only acquire PR automatically if he is married to the mother when the child is born; this applies whether the child is genetically his or was conceived using assisted reproduction.

For a child conceived after 6 April 2009 PR is also automatically granted to a female civil partner or spouse if they are a parent by virtue of section 42 of the Human Fertilisation and Embryology Act 2008. This would be a female civil partner or spouse to a woman who has conceived using artificial insemination while they have been civil partners and who consented to the treatment.

An unmarried father does not obtain PR automatically.

Acquiring PR

PR can be obtained by an unmarried father after the child’s birth. The main ways of doing this are:

- by marrying the child’s mother after the birth
- entering into a PR agreement with the mother
- jointly registering the birth with the mother (after 1 December 2003)
- obtaining a PR agreement from the court

A step-parent may obtain PR by entering into a PR agreement with the parents with PR or by applying for the court to make an order granting them PR.

THE FINANCIAL ELEMENT

When appointing a guardian under a will, the testator may make a wish to leave the guardian with access to funds to assist them so that taking on the role of guardian isn't too much a financial burden for them. This may mean the guardian will have access to funds so they may make the necessary changes to adapt to taking on the testator's children, i.e. an extension to a house or moving into a larger residence to enable them to undertake their role.

There are advantages and disadvantages of allowing the guardians access to such funds. The advantage of allowing the guardian's access to such funds is where those guardians appointed need to make decisions for the benefit of the child they can do so quickly and easily. However, the disadvantages could mean that the child's legacy is at risk, in that any funds could be misdirected or should the guardian be made bankrupt or die those funds used could be lost.

The best way to ensure that such problems are avoided is to avoid leaving assets to the guardians directly and instead consider leaving assets to the children on trust. During the children's minority the trustees may make funds available to the guardians to use for the children's maintenance, education or other benefit. This would ensure that the children's legacy is protected to some extent, and any funds that are used are used to help the children. The testator may even consider appointing the guardian as a trustee for ease of administration.

CONCLUSION

When dealing with clients with young children is important that they consider guardianship and who they would trust to care for their minor children in the event of their death. It is important to make enquiries into the client's family situation especially where there are step-parents involved, as a client may assume their spouse would take on the care of their children automatically but this may not be the case where the step-parent has not acquired PR.