

# Guardianship



# GUARDIANS – WHAT ARE THEY AND WHAT DO THEY DO?

## WHAT IS A GUARDIAN?

A guardian of a child is someone the law has given all the duties, rights, responsibilities and powers that a parent has in bringing up that child.

Although most parents will be guardians of their children, others can be guardians of those children as well. A child can have more than one guardian, and they may include parents and any number of others. In some cases the Family or High Court may become the guardian of a child.

## GUARDIANSHIP RESPONSIBILITIES

A guardian's responsibilities to a child include –

- providing **day-to-day care** for the child. This means making sure that the everyday things in the child's life are OK – a safe and secure home, loving care and attention, proper arrangements for school, for example. But this does not apply to a guardian appointed by a parent in their will.
- contributing to the child's **development as a person**. In different ways, and at different stages of a child's life, guardians help children build a life for themselves, so that they can learn about the world and their culture, make friends, achieve goals, cope with setbacks, and all the other things that growing up involves.
- helping make the **big decisions** in a child's life. These include important things like –
  - where they live
  - where they go to school
  - major medical treatment
  - what their culture, language and religion will be
  - any changes to their name.

## PARENTS AS GUARDIANS

### BOTH PARENTS ARE USUALLY GUARDIANS

Usually, a child's mother and father are joint guardians of the child. They are often referred to as the child's **natural guardians**.

However, while a child's **mother** is automatically a guardian, the child's **father** is a guardian only if –

- he was married to or in a civil union with the child's mother at any time from when the child was conceived until it was born
- the child was conceived **before** 1 July 2005 and he was living with the child's mother when the child was born
- the child was conceived **on or after** 1 July 2005 and he was living with the child's mother at any time between conception and the birth, or
- he was recorded as the father of the child on the birth certificate on or after 1 July 2005.

The father can also apply to be appointed a guardian by the Family Court. The Court will do this unless it is against the child's best interests.



## HOW CAN A FATHER BE RECOGNISED AS A GUARDIAN?

A father who is a guardian of a child can ask the Family Court to officially recognise this by making a declaration of guardianship in his favour. He might want to do this if, for example, he and the mother have split up and she doesn't want him to be involved in bringing up the child.

## WHAT HAPPENS WHEN PARENTS SEPARATE?

Parents don't stop being guardians just because they separate, or start living with new partners. The Care of Children Act 2004 recognises that breaking up with a spouse or a partner doesn't mean breaking up with the children. Both parents continue to be guardians of the children as before. Children need both parents to continue being a big part of their lives.

## WHAT IF CHILDREN ARE LIVING WITH ONLY ONE PARENT?

Even when only one parent has day-to-day care of a child, the other parent is still a guardian and continues to have the other responsibilities of guardianship – namely, guiding their child's upbringing and development, and being involved in big decisions.

## HOW DO PEOPLE OTHER THAN PARENTS BECOME GUARDIANS?

People other than a child's parents can become guardians of a child in the following ways –

- a parent can name a person in their will to be a guardian if that parent dies. This person is known as a **testamentary guardian**.
- if a parent has a **new partner** who has helped care for the child for a year or more, the parent may be able to appoint the new partner as a guardian of the child. This will depend on whether any of the restrictions set out in the Care of Children Act apply in their case.

- the Family Court can appoint someone to be a guardian of a child. These people are known as **Court-appointed guardians**.
- the Family Court or the High Court can make themselves guardians of a child. This is known as **guardianship of the Court**. The Court usually appoints Child, Youth and Family to act on its behalf in these cases.

These different types of guardianship are explained below:

## TESTAMENTARY GUARDIANS

A parent who is a guardian of a child can appoint someone to become a guardian of the child when that parent dies. The parent can do this either in their will or in a special type of legal document called a deed. A testamentary guardian must be at least 20 when the parent dies.

If the other parent or another guardian isn't happy about the person who became a guardian in this way, they can ask the Family Court to remove that person as a guardian or to appoint someone else in their place.

## WHAT DOES A TESTAMENTARY GUARDIAN DO?

A testamentary guardian's role is similar to other guardians of the child except that they do not have a role in the day-to-day care of the child. Just like other guardians, testamentary guardians have an important role in contributing to the child's **development as a person** and helping make the **big decisions** in a child's life.

Even though testamentary guardians don't have a role in a child's day-to-day care, they can ask the Family Court to make a **parenting order** in their favour so they have, or share in, the day-to-day care of the child. For more information, see the pamphlet **Parenting Orders**.

## NEW PARTNERS WHO ARE APPOINTED AS GUARDIANS

If a parent has a new partner who is sharing day-to-day care of the child and has done so for at least a year, the parent may be able to appoint the new partner as a guardian of the child. This will depend on whether any of the **restrictions** set out in the Care of Children Act apply in their case.

If the other parent of the child is alive, then both parents must make the appointment. There is a special form for the appointment.

A Family Court Registrar must check that the appointment form is in order. They must be satisfied that the proper information has been provided, that the paper-work has been done correctly, and that none of the restrictions that may prevent an appointment apply. For example, the new partner can't be appointed a guardian if they have ever been involved in any dispute in the Family Court about children, or have ever been convicted of an offence involving harm to children.

The parent and the new partner may be married, in a civil union or in a de facto relationship.

For more information, see the pamphlet **Parents Appointing New Partners as Guardians**.

## GUARDIANS WHO ARE APPOINTED BY THE COURT

A person can also become a guardian by being appointed by the Family Court. This might be a family member, for example, such as a grandparent.

The Court can appoint a guardian after being asked by someone to do so, or it can do so at the same time as it decides to remove a guardian. Anyone can apply to the Court asking it to appoint a guardian. The new guardian can be the person applying, or someone else.

The Court can appoint a guardian in addition to other guardians or as the child's only, or "sole", guardian.

## WHY WOULD THE COURT APPOINT A GUARDIAN?

There are various circumstances in which the Court might appoint a guardian – if both parents have died without appointing a testamentary guardian, for example, or if a person who is not a guardian is in fact acting as a guardian for a child. The Court can also appoint someone as a child's guardian for a particular purpose or for a limited time – if neither parent is going to be able to look after the child for a time, for example.

The child's welfare and best interests are the most important factors when the Court is deciding whether to appoint a guardian.

## GUARDIANSHIP OF THE COURT

In some cases the High Court or Family Court will appoint itself to be a child's legal guardian. The Court usually appoints Child, Youth and Family to play the role of guardian as the Court's **agent**.

Only certain people can apply to the Court asking it to appoint itself guardian of a child. These include the parents and guardians of the child, a partner of a parent (whether they are married, in a civil union or in a de facto relationship) if they've been sharing day-to-day care of the child, other family members, Child, Youth and Family, and even the child. Anyone who is not entitled to apply can do so with the Court's permission.



# THE CHILD'S VIEW OF GUARDIANSHIP

## PARENTS' RESPONSIBILITIES, CHILDREN'S RIGHTS

The Care of Children Act recognises that guardianship is as much about parents' **responsibilities** towards their children as it is about control over them. The Act also recognises that children have important **rights** too.

The law recognises that as children grow into young adults, they are more and more able to make decisions for themselves. The role of the guardian changes to fit in with this growth in the child's personal responsibility. In the end, a guardian is an advisor and trusted friend.

## LISTENING TO THE CHILDREN

Like everyone else, children have the right to say what they think about things that affect them.

The Act recognises this right. If separated parents disagree about where a child should go to school, for example, and the Family Court is asked to settle the dispute, the child must be given a reasonable chance to say what they think. The Court must then take their views into account when it makes a decision.

## WHAT CAN A CHILD DO IF THEY DON'T LIKE A GUARDIAN'S DECISION?

If a child who is 16 or older is unhappy about an important decision made about them by their guardian or guardians, the child can ask the Family Court to decide the issue.

For example, if a guardian has refused to let a child get married, enter into a civil union, or live with someone as a couple, the child can ask the Family Court to give its permission. The Court's decision would overrule that of the guardian.

## WHEN CAN A CHILD LEGALLY CONSENT TO MEDICAL PROCEDURES?

Once they are 16, children can decide for themselves whether they want to consent to any medical treatment, operation, dental procedure or blood transfusion. This right to **give consent** also includes the right to **refuse consent**.

## ABORTION

A female **of any age** can legally consent to or refuse to have an abortion.

## DISPUTES BETWEEN GUARDIANS

### WHAT HAPPENS WHEN GUARDIANS DON'T AGREE?

Sometimes guardians can't agree on an issue about a child's upbringing. If so, they can ask the Family Court to arrange free **counselling** to help them sort out the dispute.

If counselling doesn't work, either guardian can apply to the Family Court and ask it to sort out the disagreement.



## HOW WILL THE COURT DECIDE WHAT TO DO?

The child's welfare and best interests are always the most important factor when the Court is deciding what should happen. The child must be given a reasonable chance to say what they think, and the Court must then take their views into account when it makes a decision.

## WHEN GUARDIANSHIP STOPS

### WHEN DOES GUARDIANSHIP OF A CHILD END?

Guardianship of a child ends when –

- they turn 18, or
- they get married, enter into a civil union, or start a de facto relationship (if the child is 16 or 17 they must get written permission from their guardian).

Guardianship can also end because of a decision by the Family Court –

- the Court can remove a person as guardian, whether it's a parent, a testamentary guardian or a Court-appointed guardian
- if the Court has appointed someone as a guardian for only a limited time or a particular purpose, they stop being a guardian when the time is up or the purpose has been achieved.

### WHEN CAN PARENTS BE REMOVED AS GUARDIANS?

The Family Court can take away a parent's guardianship of their child **only** if –

- they are not willing to be a guardian, or
- there is a very serious reason why they're not fit to be one.

Removing them must also be what's best for the child.

## WHO CAN ASK THE COURT TO REMOVE A GUARDIAN?

Only certain people are entitled to apply to the Family Court to ask it to remove a guardian of a child. They are –

- a parent or guardian of the child
- a partner of a parent of the child (whether they are married, in a civil union or in a de facto relationship), if they have been sharing day-to-day care of the child
- a grandparent or aunt or uncle of the child, and
- a brother or sister of the child, including half-brothers and half-sisters.

Anyone who is not entitled to apply can do so with the Court's permission.

## NEED MORE INFORMATION OR ADVICE?

For more information or advice about guardianship, look on the Family Court website ([www.justice.govt.nz/family](http://www.justice.govt.nz/family)), or contact a family lawyer ([www.familylaw.org.nz](http://www.familylaw.org.nz)), a community law centre, or the nearest Family Court office.

## LEGAL AID

Anyone who needs a lawyer but can't afford one may be able to get **legal aid**. This is where the Government pays some or all of the lawyer's bills (sometimes you may have to pay some or all of it back).

You can get information on legal aid by –

- contacting the local Legal Services Agency office (see the blue Government pages at the front of the phonebook)
- visiting the Legal Services Agency website at [www.lsa.govt.nz](http://www.lsa.govt.nz), or
- seeing a lawyer and discussing legal aid with them.

Legal aid is available for all Family Court cases, except dissolution of marriage (divorce).



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