

Mencap's guide to guardianship

Notes about this guide

This guide is intended as an outline guide only. It is not intended to be exhaustive and reliance should not be placed on it without seeking more detailed advice from a professional advisor or solicitor in light of your own circumstances. This guide is based on English law and practice in force at the date it was prepared.

The wills and trusts team can provide you with the following guides:

- **Leaving money in trust** - a guide to leaving money to someone with a learning disability. This is a starting point for parents, families and carers to think about their options
- **Mencap's guide to making wills** - a factsheet about making your will, answering common questions and giving tips
- **Mencap's guide to being a trustee** - information about the duties and responsibilities of being a trustee
- **Mencap's guide to writing your letter of wishes** - information about writing a letter of wishes as guidance for your trustees
- **Mencap's guide to Lasting Powers of Attorney and the Court of Protection** - information about making a power of attorney and/or a deputy application to the Court of Protection (not applicable in Northern Ireland).
- **Mencap's guide to the Mental Capacity Act** - an introductory guide to the Mental Capacity Act 2005
- **Mencap Trust Company** - information about the Mencap Trust Company (a trust company which administers discretionary trust funds for people with a learning disability)
- **A list of specialist legal professionals in your area** - an essential part of drawing up a will or trust is finding a legal professional who has the knowledge and experience to help you provide for a person with a learning disability. We can give you a list of legal professionals in your area who are specialists in preparing wills and trusts
- **Giving times magazine** - the latest edition of the wills and trusts team's annual magazine, with tips, advice and stories
- **An easy-to-read guide to wills** - information for people with a learning disability about writing their will
- **A gift for the future** - information about leaving a gift in your will to Mencap

To order any of the booklets or guides, please contact the wills and trusts team:

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Visit: www.mencap.org.uk/willsandtrusts

Guide to guardianship

To choose a personal guardian, someone to raise your child in the unlikely event that you cannot, is not an easy thing to consider. However, with a simple arrangement of a guardian in your will, you can feel sure that your child will be well cared for in the extremely unlikely event of your death **before they are 18 years old**.

What happens to a child on the death of a parent?

The answer to this depends on your particular circumstances and the plans that you have put in place. If there is no surviving parent with 'parental responsibility' (see below), and no appointment of a guardian has been made, then the child becomes the responsibility of the Court. Until such time as the Court appoints a guardian, the child may be taken into care.

In contrast, if a guardian has been appointed, then responsibility for the child's care passes on the second parent's death to that guardian. The guardian is likely to be a person known to the child or perhaps someone such as a step-parent who has been living with the child.

Appointing a guardian

Perhaps the most important step you can take in making plans for your child is to appoint a guardian. A guardian is a person who will effectively 'step into the shoes' of a deceased parent and assume responsibility for the child. A legal guardian is responsible for the wellbeing and safety of the child under their guardianship. This includes making sure they are fed, clothed, sent to school and are looked after in the same way they would be if their parent or parents were around to do so.

Appointing a guardian, rather than leaving the decision to a Court, has several important advantages:

- you can choose the person whom you would wish to care for your child, rather than leaving the decision to a judge;
- if you feel that it is appropriate, you can discuss your choice with your child so that he or she has the security of knowing who will take care of them in the event of your death;
- you can discuss your wishes for your child's upbringing with your chosen guardian and leave him or her a detailed letter of your wishes;
- you can discuss your choice with your family and pre-empt any dispute about who should care for your child after your death.

Who can appoint a guardian?

A guardian can be appointed by any parent with 'parental responsibility' or by a Court. Once a guardian 'steps into the shoes of the parents', they obtain 'parental responsibility'.

The legal concept of parental responsibility is defined in the Children Act 1989 (England and Wales)* as being:

“All the rights, duties, powers, responsibilities and authority which by law a parent has in relation to a child and his property.”

* In Northern Ireland the legal concept of parental responsibility is defined in The Children Order 1995.

A person with parental responsibility has the right to make important decisions such as a child's education, place of residence and medical treatment amongst other issues.

Who has parental responsibility?

The following parents automatically have parental responsibility:

1. Parents who are married when their child is born;
2. Unmarried mothers;
3. Unmarried fathers who are named on the birth certificate where the birth was registered on or after 1 December 2003;
4. Anyone who has a residence order in their favour.

Fathers who were not married to the mother at the time of the child's birth and whose birth was registered before 1 December 2003 do not automatically have parental responsibility, even if they subsequently marry the mother. These fathers can receive parental responsibility by agreeing and signing with the mother a formal document known as a Parental Responsibility Agreement. If the mother does not agree to grant parental responsibility then the father can apply to the Court to request a Parental Responsibility Order.

How to appoint a guardian - legal matters

The Children Act 1989 introduced a simple method for appointing guardians. It is sufficient that an appointment be made in writing, dated, signed by the person appointing the guardian and clearly showing the intention to appoint a guardian.

A more common method of appointing a guardian is to include the appointment in a will. Making the appointment in a will has the added benefit that related financial arrangements (such as setting up a trust for your child) can be included in the same document.

Choosing the right guardian - practical matters

Each parent will have their own beliefs and priorities regarding the care of a child and it is these considerations which are at the heart of choosing a guardian.

When deciding who should take care of your child in the event of your death, it may be helpful to bear in mind the following points:

- Is your prospective guardian old enough (you must choose someone over 18 years old)?
- Do you trust your guardian to raise your child as you would have wished?

- Will your guardian's lifestyle be able to accommodate your child? If not, are they prepared to make changes?
- Does your guardian have children the same age? Does he or she have experience of parenting?
- Is your chosen guardian fit enough to cope with the demands of a child over a number of years, particularly a young child?
- Is your guardian known to your child? Do they get on well together? Does your guardian have a genuine concern for your child's welfare?
- Does your guardian get on well with other members of your child's family?
- Does your guardian live locally? Will your child have to move school?
- Will your guardian come to live in your home? If not, do they have suitable accommodation for a child?
- Is there likely to be a dispute over your choice of guardian? If so, is your guardian prepared to deal with it? Is there another choice you could make to avoid such a dispute?
- If you (or you and your partner) are choosing more than one guardian, will they be able to work well together? Is it clear with whom your child will live?
- Does your guardian share those values which are important to you - perhaps in relation to religion or education?
- Have you discussed the proposed appointment with the guardian and established that he or she would be willing to accept the appointment if the time comes?

If you are finding it difficult to decide on who to choose as a guardian, take some time to talk with the person you are considering, as their feelings about acting as guardian may help you decide.

Other matters to consider

On a parents' death, the issues relating to the care of their child also relate to the financial arrangements that are to be made for that child. If you are considering setting up, or have set up, a trust for your child, either in your lifetime or in your will, you should ensure that the following issues are considered:

- How will your child's upbringing be paid for?
- Is money to be held in trust for the child beyond the age of 18?
- Will your chosen guardians also be the trustees of your child's fund? If not, can the guardians work well with the trustees?
- Do you wish to make a direct gift to the guardian for his or her own benefit?
- If you own a property, is it to be sold after your death? If not, how is its maintenance to be paid for?
- What can the trustees spend your child's money on before he/she reaches 18?
- Have you written a letter of wishes to your trustees and is this up to date?