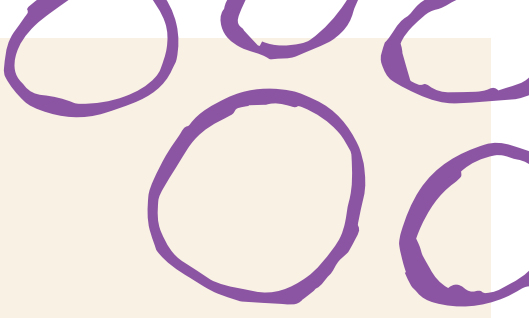


Looking ahead, together





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Notes about this guide

This guide is intended as an outline guide only. We strongly recommend seeking professional advice before writing your Will or deciding on your next steps. This guide is based on English law and practice in force at the date it was prepared. It is important to note that the laws of Northern Ireland and Wales may differ from those of England. If you are based in Scotland, please contact Enable Scotland on 0300 0200 101 or email: trustee@enable.co.uk. You can also visit their website at: www.enable.org.uk.

Introduction by Emma Cadey, Wills and Trusts Manager

As someone who works closely with families and carers, I understand that thinking about guardianship can feel overwhelming—especially when it involves a loved one with a learning disability. You may be facing big decisions, and it's completely natural to have questions or worries about what the future might hold.

This guide is here to help you navigate those decisions with confidence and compassion. Whether you're just starting to explore guardianship or you're already considering who might step into this important role, our aim is to provide clear, practical information in a way that feels supportive and reassuring.

Choosing a Guardian is about much more than legal arrangements; it's about ensuring your loved one is cared for by someone who understands their needs, values, and personality. We know every family's situation is unique, and we hope this guide will help you feel more prepared and empowered, whatever your circumstances.

Our team is available to help signpost you to information you may need when making the important decision with guardianship, please do not hesitate to contact us if you need further guidance.



Emma Cadey



Wills and Trusts Manager, Mencap

Who will care for your child when you are no longer here?

The answer to this depends on your circumstances and the plans that you have put in place. If there is no surviving parent with 'parental responsibility', and no appointment of a Guardian has been made, then surviving family or friends will need to apply to Court to be appointed as Guardian, this can be a lengthy process and may cause a period of upheaval for the child.

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

A Guardian is a person who will effectively 'step into the shoes' of a parent after their death 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 they have 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 them 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 or her 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. All mothers**
- 2. Fathers (or second female parents) who are:**
- 3. married to (or in a civil partnership with) the mother; or**
- 4. named on the birth certificate.**

Adoptive parents (and, following an adoption, the biological parents would no longer have parental responsibility).

Parents who don't meet these criteria can be given parental responsibility through a formal parental responsibility agreement (which must be filed with the Family Court), or by a court order. A court order might also give parental responsibility to someone who is not a parent, or might limit or take away a parent's parental responsibility.

How to appoint a Guardian

The Children Act 1989 allows a parent (or guardian) with parental responsibility to appoint a Guardian. It is best practice to do this as part of your will.

Alternatively, it is possible to appoint a Guardian in a separate document to your Will. The document would need to be a written statement, clearly show an intention to appoint a Guardian, signed by you and by two witnesses (all of whom must be together when they sign the document). The document must also be dated.

If they are separate documents, it is sensible to keep the Will and the appointment of Guardians together in a safe place (and to make sure your executors and your appointed guardians know where that is).



The appointment of a Guardian only takes effect once the person who appointed them has died. There must also be no surviving parents with parental responsibility, unless the person who has died was:

- named in a Child Arrangements Order as the person with whom the child should live, and any surviving parent was not; or
- a Special Guardian – that is, they were given authority by the court to exercise parental responsibility to the exclusion of anyone else.



Choosing the right Guardian

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?

Do they 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?

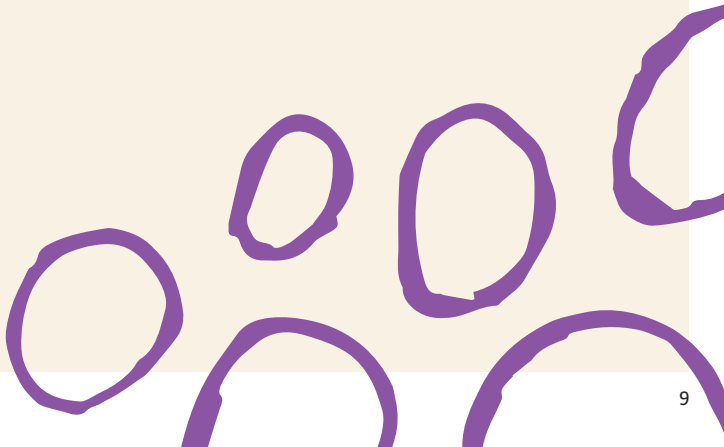
Will your Guardian come to live in your home? If not, do they have suitable accommodation for a child?

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 values which are important to you - perhaps in relation to religion or education?

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 a Guardian may help you decide and can be included in the same document.

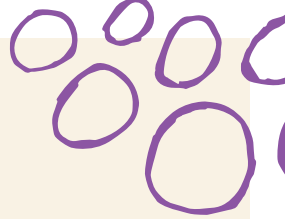


Protecting your child's financial future

On a parent's death, the issues relating to the care of their child are closely linked with 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 the Trust for the child beyond the age of 18?**
- **Will your chosen Guardians also be the Trustees of your child's fund?**
- **Would separate people for each role be better and if so, can the Guardians work well with the Trustees?**
- **Do you wish to make a direct gift to the Guardian for their 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 they reach 18?**
- **Have you written a Letter of Wishes to your Trustees and is this up to date?**





Mencap's Wills and Trusts resources

Mencap's Wills and Trusts service offer free resources to families and carers who are planning for the financial future for a loved one with a learning disability.

We provide:

- Free Wills and Trusts guides
- Free online Planning for the Future webinars
- A list of STEP qualified legal professionals in your area who can help write your Will and set up a Trust
- A dedicated team who can offer guidance and support on Wills and Trusts

By attending one of Mencap's free online you will have the opportunity to:

- Get valuable advice and information about Wills and Trusts
- Hear from a legal professional with experience in Trust and Estate law
- Get answers to your questions
- Hear questions and views from other families in similar situations

“Clear and concise presentation with an empathic approach to disability issues. It is great to feel I can protect my son's assets and support his sibling to manage this process in the future. Thank you.”

A parent who attended a Wills and Trusts webinar

Further information

If you need any further help or guidance, or you would like to attend one of our free online Wills and Trusts webinars:

Call: 020 7696 6925

Email: willsandtrusts@mencap.org.uk



To find out more about Wills and Trusts

Call:

020 7696 6925

Email:

willsandtrusts@mencap.org.uk

Visit:

mencap.org.uk/willsandtrusts