

## CHAPTER 7

# Appointing guardians of children

Gillian E. Cockburn and David Hodson

### 7.1 INTRODUCTION

A guardian of a child is someone who is appointed to take over responsibility for a child in the event of the death of the child's parent or other carer. The appointment is not only necessary if a child has property or money but also to provide day-to-day care for the child, as the guardian will have the right to decide on the child's upbringing, health care, religion and education. It is very important to ensure that the right person or persons are appointed as guardians in accordance with the law. It is unrelated to the appointment of guardians who look after children in public law care proceedings.

The law on the appointment of guardians changed radically as a result of the Children Act 1989 ('the 1989 Act') which came into effect from 14 October 1991. It is essential for the will drafter and probate practitioner to understand the main elements of the 1989 Act and in particular the concepts of parental responsibility and residence orders. In some cases it may also be important to liaise with a family law practitioner to find out what court orders have been made concerning a child which may in turn affect the appointment of guardians under the will.

### 7.2 WHO MAY APPOINT A GUARDIAN?

This is governed by s.5 of the 1989 Act, which provides that guardians may be appointed by:

- (a) a parent with parental responsibility for the child (s.5(3)); or
- (b) an existing guardian of the child (s.5(4)); or
- (c) a court order in family proceedings (s.5(1) and (2)).

Except as set out below, the appointment in (a) and (b) becomes effective when the person who makes the appointment dies. At that time the guardian will acquire parental responsibility for the child.

#### 7.2.1 Parental responsibility

The 1989 Act defines parental responsibility for a child as all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to that child and his or her property (s.3(1)).

#### 7.2.2 Who has parental responsibility?

If the child is legitimate (or has been legitimated or is adopted), the parents (or adopting parents) will each have parental responsibility (s.2(1) and (3)) and both may appoint guardians for the child in the event of their respective deaths (s.5(3)).

If:

- the parents of a child were not married to each other at the time of the birth; and
- the child has not been legitimated by the parents' later marriage or adopted, and
- the father's name is not registered on the birth certificate

the mother alone has parental responsibility for that child (s.2(2) and (3)). The father does not have automatic parental responsibility and so will not be able to appoint a guardian of the child on his death. However, the father may acquire parental responsibility (and therefore be able to appoint a guardian) in the following ways:

- through a court order granting him parental responsibility (s.4(1)(c)); or
- by entering into a parental responsibility agreement with the child's mother (s.4(1)(b)); or
- by being appointed, either by the mother or by the court, to assume parental responsibility after the mother's death.
- becoming registered as the child's father primarily on the birth certificate (s4(1)(a)), provided that the child was born after 1 December 2003. If the child was born before that date, the father will not acquire parental responsibility through this method unless the birth was re-registered after that date with the father's name then appearing.

The parental responsibility agreement must be in accordance with the Parental Responsibility Agreement Regulations 1991, SI 1991/1478, reg. 2 as amended. The agreement must contain the names of the child's parents and of the child to whom the agreement is to relate, and must contain the signature of both parents and be witnessed. It must provide for only one child; not more than one. Both parents must have their signature witnessed at court by a JP or court official and provide evidence of their identity (including a photograph and signature). The mother must also provide the child's full birth certificate. The agreement will only take effect once it has been received and recorded at the Principal Registry of the Family Division, (Section A), First Avenue House, 42 – 49 High Holborn, London WC1 6NP. A stamped copy is then given to each parent.

The agreement may be brought to an end only by a court order (s.4(3)). It should be noted that a parental responsibility agreement can only be made with an unmarried father and not with any other family member.

The Adoption and Children Act 2002 introduced a concept of 'special guardians'. They are only appointed by the court, can only apply from a limited category of persons connected with the child, cannot be a natural parent and have to give three months' prior notice of the application to the relevant local authority which then prepares a report. It is a stage short of a full adoption and is a semi permanent order, lasting until the child attains 18. A special guardian has parental responsibility and is entitled to exercise parental responsibility to the exclusion of any other person with parental responsibility apart from other special guardians. They are therefore in a more powerful position than a natural parent with parental responsibility, in that they can override their wishes. In addition, a parent with parental responsibility has to apply for the court's leave to discharge a special guardianship order, and the court may not make that order unless there has been a "significant change in circumstances" (s14D (5)). A special guardian may appoint another individual to be the child's guardian in the event of his or her death. In many ways, the position of the special guardian is the same as the orthodox guardian. Both are substitutes for the parent rather than a substitute parent. Special guardianship is intended to meet the special needs of children who will benefit from a secure placement rather than adoption e.g. due to cultural or other issues with adoption itself. On parental death, an appointment of an orthodox guardian will be invariably be more appropriate than of a special guardian. The Adoption and Children Act 2002 also allows a parent with parental responsibility to give PR to their partner if they are married to them (s 112) or by court order. All other persons with PR must agree. This took effect from 5 December 2005.

### 7.2.3 Who can be a guardian?

Subject to 7.2.4 below, a parent with parental responsibility for a child, or a properly appointed guardian, may appoint another individual to act as guardian for the child on his or her death (s.5(3))

and (4)). Although the 1989 Act refers to an individual in the singular, more than one individual may be appointed in accordance with the Interpretation Act 1978, s.6(c). In addition, the 1989 Act also contemplates the subsequent appointment of further guardians (s.6(1)). However, the term 'individual' would not include a trust corporation, local authority or other non-individual.

#### 7.2.4 Residence orders

A residence order is a court order settling the arrangements to be made about the person with whom a child is to live (s.8(1)). It also affects the testamentary appointment of guardians and so needs to be considered by the will drafter.

Shared (or joint) residence orders are sometimes (and increasingly) made in favour of both parents, or a parent and another carer of the child (s.11(4)). It may not even be the case that the parents and/or carers have the child living with them for approximately equal periods of time.

A residence order may be made in the context of divorce, judicial separation or nullity proceedings. It can be made in freestanding applications under the 1989 Act, for example to unmarried parents, grandparents or others who are given leave of the court to apply (s.10). It is not an automatic replacement of the care and control orders made under the pre-Children Act law; in many respects it is wider and more flexible. Also, unlike parental responsibility which is bestowed by law on all parents except as set out in 7.2.2 above, residence orders can only be granted by a court.

However, residence orders are not automatically granted on or post divorce to, say, the parent who has the child primarily living with him or her. By s.1(5), the court shall not make any order in respect of the arrangements for a child unless it considers that doing so would be better for the child than making no order at all. In practice, most family courts do not make residence orders and other child orders on divorce if the arrangements between the parents for the child are working satisfactorily. Will drafters should therefore enquire of clients whether there is an existing residence order and not presume that there is one simply because a child is living with a particular parent following a divorce or other family law proceedings.

#### 7.3 APPOINTMENT OF A GUARDIAN

If, on the death of the appointor of a guardian (even if the parents are separated or divorced):

- there is a surviving parent with parental responsibility; and
- the deceased did not have a residence order in his or her favour,

the appointment of the guardian does not take effect until the death of the surviving parent with parental responsibility (s.5(8)). Then effective appointments by both parents will take effect simultaneously: this can lead to conflicts between the two separately appointed guardians which the court may have to resolve.

A parent of a child can only appoint a guardian to act jointly with the surviving parent if the deceased parent with parental responsibility had a residence order in his or her favour and in force at the date of his or her death and it was not a joint or shared residence order with the surviving parent (s.5(7)) or he or she was the child's only (or last surviving) special guardian. This situation of an appointed guardian acting jointly with a surviving parent can lead to some bitter and contested children proceedings as the surviving parent often resents the interference and involvement of the guardian appointed by the deceased parent from whom he or she may have been divorced etc. Great care and sensitivity is needed and the matter is invariably better dealt with by specialist children lawyers. The outcome is determined by the paramountcy of the child's welfare.

If:

- on the death of the appointer the child has no surviving parent with parental responsibility; or
- immediately before the death of the appointor, a court residence order was in existence in the appointor's favour regarding the child; or
- he or she was the child's only (or last surviving) special guardian

then the appointment of the guardian takes immediate effect on the death of the appointor (s.5(7)).

A properly appointed guardian of a child may also appoint another individual to take his or her place as the child's guardian on his or her death (s.5(4)). However, if there is a surviving parent with parental responsibility and the guardian does not have a residence order in his or her favour (or was not the last surviving special guardian) then the appointment by the guardian will only take effect on the death of the surviving parent (s.5(8)).

### 7.3.1 How is a guardian appointed?

Under the 1989 Act, the appointment by a parent or guardian will not be effective unless it is made in a written document and dated. It must also be signed by the person appointing the guardian, except in the case of a document signed at the appointor's direction, in his presence and in the presence of two witnesses who each then attest the signature (s.5(5)). An appointment made by will (or other testamentary document) signed at the appointor's direction must be properly witnessed as required under the provisions of the Wills Act 1837, s.9.

The court can also appoint a guardian (on specific application or in general family proceedings) if either:

- a child has no parent with parental responsibility; or
- a residence order has been made in favour of a parent or guardian who has died whilst the order was still in force (s.5(1)).

The former applies to orphans or to children of unmarried fathers without parental responsibility. The latter applies even though the child may have a surviving parent, albeit without a residence order. In practice, the court is only likely to appoint a non-parent as sole guardian when the deceased, having a residence order in his or her favour, did not make a lifetime appointment and a third party is likely to be better able to care for the child than the surviving parent. (The full circumstances in which courts appoint guardians is beyond the scope of this Handbook.)

### 7.3.2 Can the appointment be revoked or refused?

During the lifetime of the person who has made the appointment, he or she may revoke the appointment in the following ways:

- by a further appointment of a guardian unless clearly consistent with the appointment of an additional guardian rather than revoking the first appointment (s.6(1));
- by specifically revoking the appointment in writing, subject to the same conditions for the appointment of guardians as set out in 7.3.1 above (s.6(2));
- if the appointment is made other than in a will or codicil, by destroying the original written document which provided for the appointment of the guardian, with the intention of revoking the appointment (s.6(3)); or
- by revoking the will or codicil which contains the appointment (s.6(4)); or
- if the person appointed is the spouse of the appointor and their marriage is dissolved or annulled in England or Wales, or abroad and recognised here unless a contrary intention appears by the appointment, (s.6(3A)) or is the civil partner of the appointor and the civil partnership is dissolved or annulled as before.

The court has power to revoke the appointment at any time under s.6(7). In addition, the person who is appointed guardian may refuse the appointment by any document in writing signed by him or her made within a reasonable time of his or her first knowledge that the appointment has taken effect (s.6(5)).

The provision concerning spouses came into effect from 1 January 1996 (and civil partners from 5 December 2005). If such a spouse or civil partner has parental responsibility, his or her right over any children would be unaffected. The result is that, unless there is anything in the will to the contrary, the appointment of a step-parent as guardian in such circumstances would be revoked unless the step-parent had parental responsibility.

### 7.3.3 Pre-Children Act 1989 orders

As noted at 7.2 above, s.5(3) of the 1989 Act provides that a parent with parental responsibility may appoint a guardian. What is the position then, in respect of court orders made under pre Children Act enactments? There are complex transitional provisions contained in Sched. 14, para. 4 to the 1989 Act. In practice, the Children Act 1989 has now been in force for 16 years and there are few minor children with pre-Children Act orders which have not been replaced by post Children Act orders.

### 7.3.4 Effect of the 1989 Act on appointment of guardians by will or codicil

An appointment of a guardian may still be made in a will or codicil as these documents are written instruments under s.5(5). Although an appointment may be made in any written document, there is an advantage in appointing in a testamentary document as such documents are likely, by their nature, to be preserved, easily identifiable and be considered by those dealing with the estate of the appointor on death. However, as substitute or additional guardians may also be appointed in other written documents, the probate practitioner cannot assume that the guardians appointed in the will are the only guardians and enquiries should be made as to any other appointments which might take effect either instead of, or in addition to, the appointment in the testamentary document.

Even if a guardian is appointed in the will or codicil, the appointment may be revoked in any written document in accordance with ss.5 and 6 of the 1989 Act. Thus a will may be valid, apart from the appointment of guardians which may have been revoked in a later non-testamentary document. The converse situation could never arise, i.e., a revoked will but a valid appointment of guardians due to the provisions of s.6(4), so that if a will or codicil is revoked, the appointment of a guardian contained in the testamentary document will also be revoked.

It is advisable, when dealing with an estate involving minors, to check whether there are any other written documents which may have revoked an appointment of guardians in a will or codicil. However, it is possible to have an invalid will (e.g. if the formalities for signing and witnessing the will have not been complied with) containing a valid appointment of guardians. The appointment will be valid provided that the invalid will qualifies under ss 5 and 6 as a document in writing, is signed by the appointor, and is dated.

It has been common in the past for both parents to appoint a guardian or guardians to take effect on the death of the second parent. In general, it is no longer necessary that such a specific condition should be included within a will because under the terms of the 1989 Act, where both parents have parental responsibility (and there is no residence order in force), the appointment will not take effect until the second death. Some parents may however feel happier knowing that the provision is in place were they to be the first to die.

At any one time more than one person may have the right to appoint a guardian for a child but the appointment of guardians on death will not, in general, take effect until the child's last surviving guardian or parent with parental responsibility dies. The situation may then arise of two or more

separately appointed guardians acting. This should be taken into account by the probate practitioner.

As noted from 7.3 above, the position will be further complicated if there are any residence orders in force with respect to the child. Will drafters and probate practitioners should also take this into account. If clients are at all unclear as to the existence of residence orders, the prudent will drafter should make enquiries of a specialist family law practitioner to ascertain the correct position.

If the will drafter is acting for the mother of a non-marital minor child, enquiries should be made as to either if the father is registered on the birth certificate (and if so, the date) or the existence of any parental responsibility agreement, as the father of the child may then be able to appoint testamentary guardians. As the significance of parental responsibility is of such importance for the appointment of guardians, and the requirements for parental responsibility agreements are strict, it may be prudent for the will drafter or probate practitioner, in appropriate cases, to check the existence of a valid agreement at the Principal Registry. Enquiries should be directed to the Searches Department. A fee of £25 is payable for every 10 years searched. Cheques should be made payable to HMCS.

There is no provision in the 1989 Act for successive appointments by the original appointor (i.e., 'I appoint Jane Smith as guardian of my minor children and when she dies then I appoint her husband William Smith as guardian'). However, there seems to be no prohibition on substitutional appointments taking effect if the first choice as guardian does not survive the appointor (i.e. 'I appoint Jane Smith as guardian of my minor children but if she has pre-deceased me then I appoint her husband William Smith as guardian').

There are often a number of clauses included in wills giving executors, trustees and appointed guardians certain rights and powers in relation to financial provision for minor beneficiaries under the will. If the will refers to provision for the child being made to the child's guardian, care should be taken by executors and trustees as well as those administering estates to ensure that the named guardian is properly and effectively appointed.

Gillian Cockburn is specialist tax, trust and probate lawyer practising from Cockburns, Guildford, Surrey. She can be contacted on 01483 452848.

David Hodson is a specialist family law solicitor, mediator and Deputy District Judge at the Principal Registry of the Family Division, London. He is also an Australian solicitor and mediator. He can be contacted via [www.davidhodson.com](http://www.davidhodson.com)

They are grateful to Punam Denley of Reading for her help in this updated chapter.