

Guardianship of Children

Whose parents are not married to each other



What is Guardianship

Guardianship is the collection of rights and duties that a parent (or non-parent) may have in respect of a child. A guardian has a duty to maintain and properly care for the child and has the right to make decisions in the major areas of the child's life e.g. religion, school, adoption, consent to medical treatment, passports, including decisions about taking the child out of the country, where the child lives and other matters affecting the welfare of the child. A person can apply for guardianship up until a child reaches 18 years of age.

Guardianship should not be confused with custody, which is the day-to-day care of the child. See information section on Access and Custody on Treoir's website, www.treoir.ie

For a parent:

Where a parent has guardianship s/he has the full collection of rights and duties in respect of her/his child. All parents have a duty to financially maintain their children, whether or not they are guardians.

For non-parents:

The court will decide what guardianship rights it will grant a non-parent. These rights could include all or some of the guardianship rights granted to a parent.

Who Is Automatically A Child's Guardian?

When a child is born to parents who have not married each other, only the mother is automatically the sole guardian of her child.

How does an Unmarried Father get Guardianship Rights?

1. By agreement with the mother

A father and mother can complete and sign the statutory declaration for joint guardianship (**S.I. No 210 2020**) in the presence of a Peace Commissioner, a Commissioner for Oaths, or a Solicitor. This form declares that:

- the parents have not married each other
- they are the parents of the child
- they agree to the appointment of the father as a guardian
- they have entered into arrangements regarding the custody of (and access to) the child.

The **S.I. No 210 2020** form can be downloaded from Treoir's website or ordered from Treoir on 01-670 0120. When this form is signed and witnessed it needs to be kept in a safe place as it is the only evidence that the father is a guardian. There is no central register for these Statutory Declarations.

2. By satisfying the cohabitation period

A father who lives with the child's mother for at least twelve consecutive months, including not less than three months after the child's birth, will automatically be the guardian of his child. The three months period does not have to take place directly after the child is born. It can be fulfilled any time before the child turns 18 provided that it is part of the twelve consecutive months during which the parents have lived together. The cohabitation period can only be calculated going forward from the commencement date of the Children and Family Relationships Act 2015. This means that guardianship will only be acquired automatically where the parents live together for at least twelve months after the 18th of January 2016. While not mandatory, fathers in this situation can and should seek a formal declaration from the court that the 'living together' test has been satisfied and that the father is a guardian of the child.

A declaration that a person is (or is not) a guardian may be applied for through the courts if there is uncertainty, or disagreement, as to whether or not the father has been cohabiting with the mother for the required length of time. The application can be made by a guardian of the child or by the person wishing to seek a declaration that he is or

is not a guardian of the child. The court shall make a declaration where it is proved on the balance of probabilities that the person named is or is not a guardian of the child.

3. Going to court

The father can apply to the local District Court to become a joint guardian of his child, whether or not his name is on his child's birth certificate. While the mother's views are taken into account by the court, the fact that she may or may not consent does not mean that the court will refuse an order for guardianship. The decision of the court will be made with the best interests of the child as the most important consideration. If the father is not happy with a decision made by the court he has 14 days to appeal. The terms of the order will come into force while waiting for the appeal unless a court directs otherwise.

4. Marriage following the birth

If the parents of a child marry each other following the birth of their child, then the father automatically becomes a joint guardian.

NOTE: If a parent (who is a guardian) marries someone other than the parent of the child, his/her spouse will not have an automatic legal relationship to the child. However, the spouse can apply for (limited) guardianship rights if he/she has shared the responsibility of the day-to-day care of the child for at least two years (see 'Who else can become a guardian?').

The only way the spouse can have full legal rights in relation to the child is through adoption. This is called 'step-parent adoption'. Step-parents can apply to adopt their spouses or partner's child without the partner, who is already the biological parent, also applying to adopt to child. If the child is adopted by the step-parent, the other biological parent will lose all legal rights in relation to the child.

See www.treoir.ie for more information on step-parent adoption

Who Else Can Become A Guardian?

Since commencement of the Children and Family Relationships Act 2015, on the 18th January 2016, a person other than a parent can apply to the court to be appointed a guardian of a child.

An application can be made by:

- a person who is married to or is in a civil partnership with, or has been for over 3 years a cohabitant of, a parent of the child and has shared the responsibility of the day-to-day care of the child for at least 2 years.
- a person who has provided for the day-to-day care of the child for a continuous period of twelve months or more and where the child has no parent or guardian who is willing or able to exercise guardianship rights and responsibilities in respect of the child. TUSLA, the Child and Family Agency, will be notified of such an application.

NOTE: The appointment of additional guardians does not affect the guardianship rights of existing guardians. Guardianship rights for non-parents may be limited to making decisions on day-to-day matters in respect of the child. The court will make its decision in the best interests of the child and may have regard to the views of the child where possible given the child's age and understanding. Each parent or guardian of the child will be notified of an application to appoint a person other than a parent as a guardian of a child. The consent of all guardians will be required. However, the court may make an order dispensing with the consent of a guardian if it is satisfied that the consent is unreasonably withheld and that it is in the best interests of the child to make such an order. A court appointed guardian continues to be a guardian of a child up until the child reaches 18 years of age, unless the court orders otherwise.

Temporary Guardianship

***A qualifying guardian** may nominate a person (nomination form is available to download at www.treoir.ie) to act as a guardian if he/she is unable, through serious illness or injury, to exercise his/her guardianship rights. The nomination must be made in writing and can specify the rights and responsibilities that the nominated person can exercise. The nominated person must then apply to the court for guardianship rights when and if necessary. Each guardian, parent and TUSLA will be informed of such an application. The decision of the court will be made in the best interests of the child and the court may take the views of the child into account where possible given the child's age and understanding.

***A qualifying guardian, in relation to a child, means a person who is a guardian of that child and who:**

- is the parent of the child and has custody of him/her, or
- is not the parent of the child but has custody of him/her to the exclusion of any living parent of the child

What If A Person Obtained Guardianship Rights, Or Equivalent, In Another State?

Guardianship rights and/or similar rights e.g. parental responsibility obtained in other jurisdictions* are recognised in this state. The courts in Ireland may have the right to remove, vary or enforce these rights depending on the habitual residence of the child and the specific circumstances. *This applies where the other State has signed up to the Hague Convention 1996 or is in accordance with the provisions of the Council Regulation **(EC) No. 2201/2003** (regarding parental responsibility).

If Guardians Don't Agree

Where guardians cannot reach agreement on important issues concerning the child they can consider mediation and/or collaborative law (see below) and/or apply to the court for direction. The court in making a decision takes into account the views of all guardians. The decision of the court will be made in the best interests of the child. The court must have regard to the views of the child where possible given the child's age and understanding.

Mediation

If you are having difficulty in agreeing parenting issues you might think about mediation. Mediation is where a third party, the mediator, helps parents/guardians/family members reach agreement. Mediation encourages all parties to co-operate with each other in working out arrangements concerning their children. Any written agreement can be made a **Rule of Court** (see below).

NOTE: a free mediation service is currently available through local district courts located in Dublin (Dolphin House), Naas, Nenagh, Ennis, Clonmel, Limerick City, Cork City, Carlow and Tralee. Check with your local district court for availability.

The Family Mediation Service: 01-874 7446, www.legalaid.ie
Mediators' Institute of Ireland: 01-609 9190, www.themii.ie

Collaborative Law

Collaborative law is where parents/guardians/family members work with specially trained lawyers, receive legal advice and guidance, and together with the lawyers, discuss and attempt to resolve issues through face-to-face meetings. Decisions are made by the parties involved. A written agreement can be made a Rule of Court (see below).

Association of Collaborative Practitioners: www.acp.ie
Legal Aid Board: 066 947 1000, www.legalaid.ie

What is a Rule of Court?

If an agreement is entered into and made in writing (including written agreements made during mediation), an application can then be made to the court for an order to make that agreement a Rule of Court. The court may make an order if it is satisfied that the agreement is fair and reasonable and adequately protects the interests of the child. The agreement then has the same standing as a court order. A written agreement that is not made a Rule of Court is **NOT** legally binding.

Removal of Guardianship Rights

A mother's guardianship rights can only be removed if she gives her child up for adoption. Other guardians can have guardianship rights removed by the court if the court is satisfied that this is in the best interests of the child.

Guardians & Wills — Testamentary Guardianship

All parents who are guardians and other guardians who have the custody (day-to-day care) of a child should make a Will appointing a guardian to act on their behalf in the event of their death, before the child is 18. This is especially important if a parent/guardian is a sole guardian. This is called testamentary guardianship. If a parent dies without appointing

a guardian in a Will it is possible for someone with an interest in the child to apply to the court to be appointed a guardian of the child.

Appeals

If you are not happy with a decision made by the court you have 14 days in which to appeal. The terms of the order will come in to force while waiting for the appeal unless a court directs otherwise.

1. Before making an application for Guardianship, court form No. 58.49 'Statement of Arrangements for Child' must be completed and submitted to your local District Court. See 'Guardianship' at www.treoir.ie to download this form.
2. Where guardianship and/or access/custody are being applied for, separate applications must be made to the court for each one, though all applications can be heard at the same hearing.
3. Family law court hearings are not open to the general public.
4. Parents can represent themselves in court.
5. Some parents may qualify for legal aid. Contact the Legal Aid Board: 066 947 1000, www.legalaidboard.ie

Comprehensive information on Access & Custody, Maintenance, Shared Parenting and more can be found online at www.treoir.ie.

If you would like to talk through your individual situation, call Treoir on our confidential helpline at: 01 670 0120



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February 2025

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