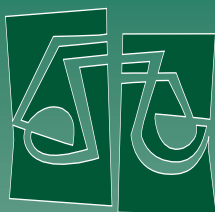
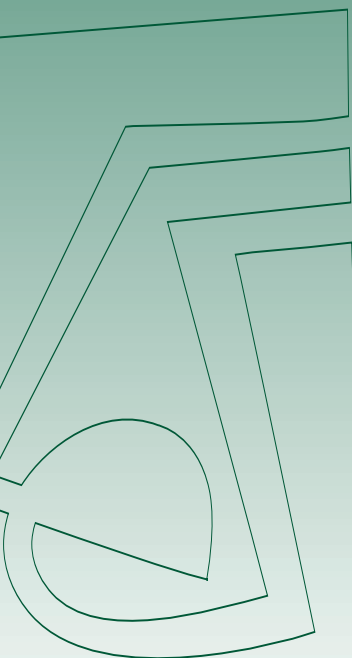


family law and children



flac

promoting access to justice



march 2009

Guardianship

A guardian of a child has the right and responsibility to make all major decisions affecting that child's upbringing, such as: choice of school, medical treatment, adoption, religious matters and decisions about leaving the country.

- Where the parents are **married** both parents are automatically joint guardians of their child.
- Where the parents are **not married**, the mother is the sole guardian of the child. The fact that the father's name is on the register of births does not give him guardianship rights in respect of the child.

For an unmarried father to acquire guardianship rights one of the following needs to occur:

- a** If both parents are in agreement that the father should become the child's joint guardian, then both parents must complete a statutory declaration to this effect in the presence of a Peace Commissioner, a Commissioner of Oaths or a Notary Public. A copy of this declaration is available through the Government Publications Office (ref. Statutory Instrument SI No. 5/1998) or from Treoir, the National Federation of Services for Unmarried Parents and their Children (Tel: 01-670 0120, website: www.treoir.ie) Lo-Call 1890 252 084. In such circumstances, the mother and father become joint guardians of the child.

b When the mother does **not** agree to the father becoming the child's guardian, then the father can apply to the District Court in order to be appointed joint guardian with the mother. This applies whether or not his name is on the Register of Births. Applications for guardianship under the Guardianship of Infants Act 1964 may be made to the parent's local District Court Office. In Dublin, applications can be made to the Family Law Office. The father may institute these proceedings himself by contacting the relevant office.

The fact that the mother does not consent to the father becoming a guardian, does NOT mean that the court will refuse the order. The court makes its decision based on the child's best interests, which are the first and paramount consideration. This means that the child's best interests and needs are given most importance by the judge in weighing up all matters. Therefore if it is in the child's best interests for the father to become a guardian, the father's application may be successful.

- A father who has been appointed joint guardian by the courts OR by a statutory declaration may later be removed, if the court believes this to be in the child's best interests.
- A mother can ONLY give up her guardianship rights by placing the child for adoption.

- Where joint guardians cannot reach an agreement on an issue concerning their child, then an application can be made to the court for a decision, which the court makes in the child's best interests.

If parents marry after the birth of their child:

The father *automatically* becomes the joint guardian with the mother, as long as the child has not been adopted. In this case no particular document is drawn up; the fact that the couple are now married means that the law now sees them as joint guardians.

If the father is a joint guardian and the mother marries someone other than the father:

- The father remains a joint guardian of the child.
- Should the mother and her spouse wish to adopt the child and the natural father has already been made a joint guardian, then the father's consent to the adoption is required.
- Adoption in these circumstances severs all links between the child and his/her father, and the father's family. This includes the father's right to apply for access, custody or guardianship in respect of the child. The child loses the right to maintenance and inheritance from the natural father.

Making a will

All parents who are guardians, and in particular those who are sole guardians, should make a will appointing a person who will act as the child's guardian in the event of the parent's death.

- It is advisable to consult the person you wish to act for you, and to make sure they consent to do so.
- The person appointed by will to act as a child's guardian is known as a testamentary guardian.
- Following the death of the person who made the will, the surviving guardian (if there is one) will then act jointly with the testamentary guardian.
- If the deceased parent has not appointed a guardian, or the appointed guardian refuses to act, the court may appoint a guardian or guardians to act jointly with the surviving guardian (if any).

Custody

Custody is the physical day-to-day care and control of a child. A child usually lives with the person who has custody of that child. While the custodian will usually also be a guardian of the child, it is not necessarily the case that a guardian will always have custody.

Where the parents or guardians of a child do not reside together, they may agree to share custody. In the alternative, they may agree that one or other parent or guardian will have custody. If they cannot agree, the parenting matter can be resolved with the help of a trained mediator from the Family Mediation Service:

Family Mediation Service

Floor 1

St Stephens Green House

Earlsfort Terrace, Dublin 2

Tel: 01-634 4320

Website: www.fsa.ie

As a last resort, a court may decide who will get custody.

The Children Act 1997 made it possible for unmarried parents to apply for joint custody.

- Married parents, or the child's mother if unmarried, are automatically custodians. An unmarried father can apply for custody whether he is a guardian or not.
- Where parents have separated or divorced they can decide on custody arrangements for their children between themselves. If they are unable to reach an agreement they can attempt to work out an agreement through mediation or else they can apply to the court for a decision.
- Mothers who are not married to the fathers of their children have automatic custody of their children. Unmarried parents can also agree to shared custody.

- A One-Parent Family Payment will be granted by the Department of Social and Family Affairs to **one parent only** - whoever is considered the primary carer. It will not be given to both parents or split between them.
- Each parent may be entitled to a One-Parent Family Tax Credit. If a child resides with a parent for any part of the tax year, the parent can claim this credit.
- A child can be in the custody of neither parent, such as where the child is being raised by grandparents or has been placed in the care of the Health Service Executive.
- Once custody is decided then arrangements can be made for access.

Access

Access refers to the right of a parent to meet with and have temporary custody of the child. Where the parents of a child are not living together, it may be possible to reach an informal agreement so that the non-resident parent may have access to his/her child on a regular basis without having to apply to court. This is possible regardless of marital status.

- If parents are having trouble making an arrangement that is satisfactory to both, then mediation may help. This can be beneficial where the parties do not wish to go to court (see above for Family Mediation Service details).
- Where an agreement cannot be reached, an application may be made to the courts for an access order. If the court decides that access by the non-resident parent is best for the child, the court may set the time, place and duration of that access.
- Access may be applied for whether or not the father's name is on the register of births, whether or not he is a joint guardian, and even if an application for joint guardianship has been refused.
- All cases concerning children are considered in light of the child's best interests. Any order will be made with the child's best interests as the deciding factor.

Where a person is applying for guardianship and access, separate applications must be made but both applications will usually be heard at the same hearing.

- It is not possible to force a reluctant parent to have access time with his/her child.
- It is very rare that access is not granted to an unmarried father unless he has serious addiction or violence problems and even in these cases the court may grant access on condition that it is supervised.

Related Persons

Under the Children Act 1997 any person related to the child by blood or adoption, such as grandparents, may apply to the court for leave (permission) to apply for access to a child. This also applies to any person who has acted *in loco parentis* (in place of a parent) to a child.

This could also apply to a partner or spouse of the child's mother or father who, although not a parent, might have formerly resided with the child.

Before a court makes a decision on this it will consider:

- a** The applicant's connection with the child.
- b** The risk, if any, of a successful application disrupting the child's life to the extent that the child would be harmed by it.

- c The wishes of the child's guardian(s). If the relative is granted permission to apply for access by the court, they must then go forward with the process of applying for access. Being granted leave to apply for access does not mean that an applicant has been granted access.

Legal Aid: you may be eligible for legal aid if you are a person of moderate means. To qualify for legal aid in civil cases your disposable income and assets must be below a certain limit, there must be merit to the case and there must be no more satisfactory way of resolving the problem. After approval, the Legal Aid Board provides you with the services of a solicitor and, where necessary, a barrister. You can apply for legal aid for more than one matter at a time. The Board's offices are called Law Centres and are located around the country. For the location of your nearest Law Centre, call 1890 615 200.

All those who are granted legal advice and/or legal aid must pay a fee called a contribution to the Board. The minimum contribution is €10 for legal advice and €50 for legal aid. The law centre staff will advise a person of the actual contribution in each individual case.

As of 1 September 2006 the new disposable income limit of a person applying for legal aid has been increased from €13,000 up to €18,000 per year.

The maximum allowance (this is an expense which the rules allow you to deduct when calculating your disposable income) on

childcare facilities if you are working is €6,000 per child per year. The maximum allowance on accommodation costs (e.g. rent) is now €8,000 per year.

The value of an applicant's home and its normal contents are excluded when assessing the value of his/her capital resources (property), as are the value of the tools of an applicant's trade.

For details of other allowances, contact the Legal Aid Board or your local Law Centre.

Legal information is also available on the following topics in this series:

separation

maintenance

cohabiting

domestic violence

divorce

family law and children

change of name by deed pole

enduring power of attorney

probate

wills and intestacy

the small claims court

working hours

unfair dismissals

maternity leave

FLAC Mission Statement:

FLAC is an independent human rights organisation dedicated to the realisation of equal access to justice for all. It campaigns through advocacy, strategic litigation and authoritative analysis for the eradication of social and economic exclusion.

While every effort has been made to ensure the accuracy of this leaflet, it is provided for general legal information only and is not intended as a substitute for legal advice. FLAC does not accept any legal liability for the contents of this leaflet. Persons with specific legal problems should consult a solicitor.

Funded and supported by

Citizens **Information** Board



Free Legal Advice Centres

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Dublin 1

Lo-Call: 1890 350 250

Tel: 01 874 5690

Email: info@flac.ie

Website: www.flac.ie