



## family law and children

This leaflet covers family law as it affects the rights of children. In particular, it explains guardianship, access and custody.

**Guardianship** means having an input in the decision-making and overall welfare of a child, whilst **Custody** means having responsibility for the day-to-day care of the child. **Access** meanwhile relates to the right of a child and a parent (or other relative or a person who has acted in a parental role) who do not live together to spend time together. This leaflet also explains about the importance of **mediation**.

### Mediation

Family Mediation is a process in which an impartial third person (the mediator) assists those involved in family breakdown to reach their own agreed and informed decisions regarding the family home, parenting and finances. Mediation is particularly useful where the parties have agreed to separate or divorce or where they have any issues relating to maintenance, custody, access or guardianship.

The courts favour mediation and judges will adjourn cases in some instances and suggest mediation before proceeding with the case in court.

The mediator should be accredited and professionally trained – his/her job is to manage negotiations in an impartial way. Generally speaking mediation takes place over 3 to 6 sessions. The parties should obtain their

own separate legal advice throughout the mediation process.

When agreement is reached, the mediator will draw up a written document usually referred to as a memorandum of understanding that sets out what the parties have agreed. The parties will each be advised by the mediator to get independent legal advice and the mediated agreement can then form the basis of a legally binding document.

**Note:** A mediated agreement is not legally binding until it is formalised by a Deed of Separation or Court Order.

The **Family Mediation Service** is a state-run, non-means tested and free service forming part of the Legal Aid Board. There can be a waiting time of a number of weeks/months. Each party must contact the mediation service separately to book themselves in. There are currently 17 offices located around Ireland, some part-time and some full-time. For more information, check the website at [www.legalaidboard.ie](http://www.legalaidboard.ie)

Apart from the Family Mediation Service, you can avail of mediation on a private basis where you pay by the hour. Private mediators can be sourced through the Mediators' Institute of Ireland at [www.themii.ie](http://www.themii.ie). It is important to establish the family mediator's credentials and experience before proceeding.

**Community Law and Mediation**

Tel: 01 847 7804

Web: <http://www.communitylawandmediation.ie/>  
(serving Dublin 5/17 and in Limerick) *and*Ballymun Community Law Centre (BCLC) –  
(based in Dublin 9/11)Tel: 01 862 5805 Web: [www.bclc.ie](http://www.bclc.ie)

Both independent law centres provide a free family mediation service.

**Collaborative law****What is collaborative law?**

Collaborative law is an alternative way of resolving family law matters including separation, divorce, custody, access, guardianship and maintenance. It encourages people to try and resolve their disputes in a non-confrontational manner, with the help of specially trained collaborative lawyers, and avoid going to court.

**How does it work?**

Both parties work with their collaborative lawyers to try and resolve the issues through face to face meetings. If the process breaks down, neither of the lawyers can act for their clients in any contested court proceedings. If the process is successful the parties will have an agreement.

The Legal Aid Board can provide lawyers trained in collaborative law for those eligible

for legal aid. In the event that the process breaks down, the Legal Aid Board will arrange for alternative legal representation to represent the parties in court.

Further information about collaborative law can be obtained from the Legal Aid Board [www.legalaidboard.ie](http://www.legalaidboard.ie) and the Association of Collaborative Practitioners – [www.acp.ie](http://www.acp.ie)

**What is guardianship?**

Guardianship represents the rights and duties a parent has in relation to their child. It concerns everything to do with a child's social, religious, moral, intellectual and physical welfare. Guardianship differs from custody, which is the right to physical care and control of a child.

A guardian has the right and responsibility to make all major decisions affecting that child's upbringing. This includes making decisions regarding the child's religious, spiritual, cultural and linguistic upbringing. It also includes the right to make decisions about where the child is to live, decisions regarding medical treatment and decisions about leaving the country.

Guardianship also imposes duties, such as the duty to protect a child and the duty to maintain (that is, financially support) a child.

**Who is automatically a guardian?**

Where the parents of a child are **married**, they are both automatically joint guardians of their

child. If parents get married after the child is born, the father automatically becomes a guardian on marriage and no documents are required to affect this. If parents separate or divorce, they retain their guardianship rights.

Where the parents are **not married**, the mother has automatic guardianship and she is the sole guardian of the child. The father does not have guardianship rights, even if his name is on the child's birth certificate.

However, as and from 18 January 2016, an unmarried father can automatically be a legally recognised guardian of his child if he has lived with the mother of the child for a minimum of 12 consecutive months. At least three of these months must be after the birth of the child. 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.

**How can an unmarried father become a joint guardian?**

- a) If both parents are in agreement that the father should become the child's joint guardian, they must complete a statutory declaration in the presence of a Peace Commissioner or a Commissioner of Oaths, which can be done in a solicitor's office. The declaration will contain the parents'

Section 49 of Children & Family Relationships Act 2015 amending Section 6 of Guardianship of infants Act 1964

names, the fact that they are unmarried, the fact that they agree that the father should be appointed as joint guardian and confirmation that they have entered into arrangements regarding custody and access to the child. You can download an example declaration text at

<http://bit.ly/statdeclar>

- b) If the mother does not agree to the father becoming the child's joint guardian, the father can apply to the local District Court in order to be appointed joint guardian with the mother. An unmarried father can do this even if his name does not appear on the Birth Certificate.

Regardless of whether the mother does or does not consent to the father becoming a joint guardian, the court will make its own decision, based on the child's best interests, which are always the first and paramount consideration in any proceedings involving children. This means that the judge gives priority to the child's welfare, the child's best interests and the individual needs of the child in weighing up all matters. Therefore if it is in the child's best interests for the father to become a guardian, his application may be successful.

A father who has been appointed joint guardian by the courts or by a statutory declaration may later be removed as guardian if the court believes this to be in the child's best interests. This will have to be done by court order.

A mother will always remain a guardian of her child and can only give up her guardianship rights by placing the child up for adoption.

#### Who else can apply for guardianship?

- Under the 2015 Act, a person who is not a parent may apply for guardianship, if at the date of application, he or she has provided for the day-to-day care of the child for a continuous period of more than 12 months and the child has no parent or guardian willing or able to exercise the rights and responsibilities of guardianship for him or her.
- A civil partner, step parent or any persons who have cohabited with a parent for 3 years or more may apply to the court to become a guardian where he or she has also co-parented the child for more than 2 years.
- It is now possible for a temporary guardian to be appointed by the court if the guardian is suffering from a serious illness or injury that would prevent him or her from being able to exercise responsibilities as guardian.

Section 49 of Children & Family Relationships Act 2015 amending Section 6 of Guardianship of Infants Act 1964

#### What happens where joint guardians cannot reach agreement on an issue concerning their child?

In these circumstances, one or both can apply to the District Court for a decision. The court will make its decision based on the child's best

interests. For example, where there is a disagreement about a medical treatment or applying for a passport, one guardian can apply to the court for an Order to remove the need for the consent of the other guardian.

Section 11 of Guardianship of Infants Act 1964

#### What is meant by 'the best interests of the child'?

When dealing with applications for guardianship, custody or access of a child, the court must take the best interests of the child as its paramount consideration.

The 'best interests' principle was inserted into the Irish Constitution by the 31<sup>st</sup> Referendum in November 2012. It is given effect in legislation by Section 45 of the 2015 Act which inserts a new Section 3 into the Guardianship of Infants Act 1964.

#### How does the court determine the best interests of the child?

The court must take into account any factors or circumstances which it considers relevant to the child and his or her family. In court proceedings for guardianship, access and custody, the court must find out the views of the child and give them due weight in proceedings, taking into account the age and maturity of the child.

#### What factors might a court take into account in ascertaining the best interests of the child?

- The benefit to the child of having a meaningful relationship with each of his

or her parents and with the other relatives and persons who are involved in the child's upbringing and, except where such contact is not in the child's best interests, of having sufficient contact with them to maintain such relationships;

Section 63 of Children & Family Relationships Act 2015 inserts new Section 31 into Guardianship of Infants Act 1964

- The views of the child concerned that are possible to ascertain;
- The physical, psychological and emotional needs of the child, taking into account the child's age, stage of development and the likely effect on him or her of any change in circumstance;
- The history of the child's upbringing;
- The child's religious, spiritual, cultural and linguistic upbringing and needs;
- The child's age and any special circumstances;
- Any harm which the child has suffered or is likely to suffer and the protection of the child's physical and psychological well-being;
- Any proposals made for the child's custody, care, development and upbringing and for access to and contact with the child;
- The willingness and ability of each of the child's parents to facilitate and encourage a close and continuing relationship between the child and the other parent, and to maintain and foster relationships between the child and his or her relatives;

- The capacity of each person involved to:
  - care for and meet the needs of the child,
  - communicate and co-operate on issues relating to the child, and
  - exercise relevant powers, responsibilities and entitlements.

#### How will the views of the child be ascertained?

The court must facilitate the child in freely expressing his or her views and must ensure that those views are free from undue influence. However this does not necessarily require the child to be present or appear in court. The court can make an order appointing an expert to prepare a report regarding any matter affecting the child's welfare and/ or to determine and convey to the court the views of the child. The expert may be called as a witness by either party or by the court.

Section 63 of Children & Family Relationships Act 2015 inserts new Section 32 into Guardianship of Infants Act 1964

In some circumstances, a person may be seeking both guardianship and access in respect of a child or children. In other situations, this person may be the child's guardian but may not have access to that child. This must be done using separate application forms, but may be heard by the court at the same time. Please see the section on 'Access' below for more details.

#### What happens if the father is a joint guardian but the mother marries someone else?

The father remains a joint guardian of the child and remains responsible for the

maintenance of the child unless the child is adopted by the mother's husband. If the mother and her spouse wish to adopt the child (so that her spouse becomes the child's guardian) and the natural father has already been made a joint guardian, the natural father's consent to the adoption is required.

Adoption in these circumstances will sever all legal links between the child and his/her natural 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 will also lose the right to maintenance and inheritance in respect of his or her natural father.

#### How should I provide for guardianship of my children if I should die?

Parents and guardians should make a **will** appointing a person or persons to act as the child's guardian(s) in the event of their deaths. This is particularly important in the case of a parent who is the sole guardian. You should consult the person you wish to act as your child's guardian to make sure he or she is willing to take on this role.

- A person appointed in a will to act as a child's guardian is known as a **testamentary guardian**. Following the death of the parent who made the will, the testamentary guardian will act jointly with any surviving guardian (e.g. the natural father). The surviving parent has a right to object to the testamentary

guardian and seek to have him or her removed as guardian but must apply to the Court and supply grounds for the objection.

- 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 means having responsibility for the physical day-to-day care and supervision of a child. A child usually lives with the person who has custody of him or her. 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.

Guardianship  
of Infants Act,  
1964

Where the parents or joint guardians of a child do not reside together, they may agree to share custody. Alternatively, they may agree that one or other parent or guardian will have full custody. If they cannot agree, the parenting matter may be resolved with the help of a trained mediator.

As a last resort, a court may decide who will get custody. The court will only enforce a custody agreement if it is in the child's best interests. Where a custody dispute arises between parents, the court can make any order it thinks fit and necessary in relation to the child's welfare. Furthermore, orders in relation to the

custody of a child are never final, because a child's needs and interests evolve over time and a court can vary or discharge (cancel) any orders it has already made.

## Who can have custody of a child?

From 18 January 2016, the following people may apply for custody of a child:

- a relative of the child,
- a parent's spouse,
- a parent's civil partner, or
- a parent's cohabitant of at least 3 years with whom the child resides and where the couple has shared parenting of the child for a minimum of 2 years.

Section 57 of  
Children &  
Family  
Relationships  
Act 2015  
amending  
Section 11 of  
Guardianship  
of Infants Act  
1964

A person with whom the child resides will also have the right to apply for custody if he or she has provided for the day-to-day care of the child for at least 1 year and where there is no parent or guardian willing or able to exercise the powers and responsibilities of guardianship.

Unmarried parents can apply for joint custody. Married parents, or the child's mother if she is 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, through mediation or by applying to the court, as outlined above.

## Are any social welfare payments available?

Full information relating to One-Parent Family Payment, Single Person Child Carer credit, Guardian's Payments and other social welfare payments can be found on the websites of Citizens Information, the Department of Social Protection and Revenue.

## Access

Access refers to the right of a child to meet and spend time with the non-custodial or non-resident parent or other relative or person who has acted in loco parentis (in the place of the parent). Where the parents of a child are not living together, whether married or not, 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.

- If parents are unable to reach an agreement on access, they may avail of mediation. This is beneficial where parties do not wish to go to court.
- If parents cannot agree on access, either can apply to the court for an Access Order. If the court decides that access by the non-resident parent is in the best interests of the child, the court will determine access



and set the time, place and duration of that access.

- The child's best interests will be the deciding factor for the court in making any order.
- An unmarried father may apply for access even if his name is not on the Birth Certificate. Furthermore, he does not have to be a joint guardian of the child and he can apply for access even if an application for joint guardianship has already been refused by the court. The court will base its decision on the welfare of the child.
- If a person is applying for both guardianship and access, separate applications must be made for each but both applications will usually be heard at the same time.
- If a parent does not take access time with his/her child, as set out in the court order, there is little that can be done – the court will not force the parent to take access.
- It is very rare that access is not granted to a parent unless he/she has serious addiction or violence problems and even in these cases the court may grant access on condition that it is supervised.

### Can anyone other than a parent or guardian apply for access to a child?

From 18 January 2016, a wider range of people may apply for access. In particular, grandparents and other relatives can apply for

access, as can a person with whom the child lives or formerly lived. The person may apply directly to his or her local District Court for access. The court is obliged to act in the best interests of the child throughout this process.

The court in deciding whether to grant access will consider:

- the applicant's connection with the child;
- the risk, if any, of the application disrupting the child's life to the extent that the child would be harmed by it;
- the wishes of the child;
- the wishes of the child's guardians; and
- whether it is necessary to make an order for access.

### What happens if there is a denial of custody or access where an order has been made?

Where one party unreasonably denies access or custody rights to the other party (and where an access or custody order has been made) the court has been given new powers of enforcement to cover these situations. The court can order that compensatory time with the child be given to the party that has been denied the

Section 55 of Children & Family Relationships Act 2015 amending Section 11 of Guardianship of Infants Act 1964

Section 60 of Children & Family Relationships Act 2015 amending Guardianship of Infants Act 1964

access or custody. The court can also reimburse expenses or order attendance at parenting programmes, family counselling or mediation.

### What happens if one parent wants to leave the jurisdiction?

It has become more common that, following relationship breakdown or for a variety of other reasons, parents wish to relocate out of Ireland with their children. If the parents of the child are joint guardians or joint custodians, or if there is an access order in place in respect of the child, neither parent can relocate with the child to another jurisdiction without the consent of the other parent.

If a parent does remove a child from the jurisdiction without this consent, or does so in defiance of a court order such as an access order, that parent may be in contempt of court or may even be guilty of a criminal offence. Further, the other parent may be entitled to seek the immediate return of the child to the jurisdiction of its habitual residence pursuant to a number of international legal agreements.

However a parent seeking to leave the jurisdiction may apply to the court for a **Relocation Order**. This would allow him or her to leave the jurisdiction without the express consent of the other joint guardian / custodian / access party. Relocation orders are not granted lightly – the court will have to be

satisfied to a very high degree that such a Relocation Order is in the best interests of the child.

**Note:** If the mother is sole guardian & custodian of the child and there is no access order in place, she can leave the jurisdiction without the consent of the father. However if proceedings relating to guardianship, custody and/or access have been initiated and are currently ongoing, the mother may not leave the jurisdiction until the outcome of these proceedings have been determined.

### The *in camera* rule

All cases in the Family Law Courts in Ireland are heard *in camera* (in private). Therefore, members of the general public are not permitted to enter the court. The *in camera* rule has changed recently to allow the media to have limited access to family law hearings and to have limited rights to report on the proceedings on condition of anonymity.

## Important contacts

### Treoir

Treoir provides information on a range of issues where parents are not married to each other.

14 Gandon House,  
Lower Mayor Street,  
IFSC, Dublin 1

LoCall 1890 252 084

Tel 01-6700 120

Email: [info@treoir.ie](mailto:info@treoir.ie)

Web: [www.treoir.ie](http://www.treoir.ie)

### The Courts Services

15-24 Phoenix Street North,  
Smithfield,  
Dublin 7

Tel: 01-888 6000

Web: [www.courts.ie](http://www.courts.ie)

### The Children's Ombudsman

If you think a child in your care has been treated unfairly by a state agency or service you can make a complaint to the Ombudsman for Children's Office.

Millennium House,  
52-56 Great Strand Street,  
Dublin 1

Tel 1800 20 20 40

Email: [oco@oco.ie](mailto:oco@oco.ie)

Web: [www.oco.ie](http://www.oco.ie)

## 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 other satisfactory way of resolving the problem.

You apply for civil legal aid to the Legal Aid Board – it is based in Cahirciveen, Co Kerry and its website is [www.legalaidboard.ie](http://www.legalaidboard.ie) or you can telephone at 066-947 1000 or LoCall: 1890-615 200

After approval, the Legal Aid Board provides you with the services of a solicitor and, if 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.

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 €30 for legal advice and €130 for legal aid. Law centre staff will advise what a person's actual contribution will be as each person is assessed on an individual basis.

Before you qualify for legal aid, you must first satisfy a means test. Your disposable income must be less than €18,000 and your disposable capital cannot be more than €100,000.

If you are in receipt of allowances, they will be taken into account and they are deductible

when calculating disposable income. The maximum allowance on childcare facilities if you are working is €6,000 per child per year and the maximum allowance on accommodation costs (e.g. rent) is €8,000 per year. The Public Service Pension Related Levy and the Universal Social Charge are now also considered and are deductible for the purposes of assessment.

The value of an applicant's home and its normal contents are excluded when assessing the value of his/her capital resources (property). If your capital resources exceed €4,000, you must complete a Statement of Capital.

For further details on financial eligibility requirements or for details of other allowances, contact your local Law Centre. A full list is available at [www.legalaidboard.ie](http://www.legalaidboard.ie).

FLAC has prepared a guide to the state legal aid system which you can download at [bit.ly/CLaflacsheet](http://bit.ly/CLaflacsheet).

### Need more information?

Legal information leaflets are also available from FLAC on a variety of other areas of law. They are free to download as PDFs from the FLAC website or in print from your local FLAC centre or Citizens Information Centre.

## FLAC Mission Statement

FLAC (Free Legal Advice Centres) is a human rights organisation which exists to promote equal access to justice for all.

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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. The information it contains is correct as of date of publication. FLAC does not accept any legal liability for the contents of this leaflet. People with specific legal problems should consult a solicitor.

FLAC is very grateful to solicitors Diego Gallagher, Keith Walsh and Maureen Gourley for their help with updating this leaflet.

FLAC offers free, confidential basic legal information via its lo-call telephone information line at 1890 350 250 or 01 874 5690 from a mobile number. One-on-one legal advice is available through a network of voluntary advice clinics countrywide - <http://www.flac.ie/help>



promoting access to justice

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