

# GUARDIANSHIP, CUSTODY & ACCESS

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## WHAT DOES GUARDIANSHIP MEAN?

Guardianship means the rights and duties of parents in respect of the upbringing of their children. It includes the duty to maintain and properly care for the child and it refers to the decisions which must be made during the child's lifetime which relate to the general lifestyle and development of the child.

Being a Guardian requires a person to partake in the important decisions in a child's life e.g. education, religion, travel, medical treatment, where the child will live and general rearing.

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## CUSTODY VS GUARDIANSHIP

Guardianship is a collection of rights and responsibilities that a guardian has in respect of a child. It includes a right to be party to the decision on who has day to day care of the child – custody or access - but should not be confused with having custody or access to the child.

A married couple has automatic joint actual custody of a child.

Where a child is born out of wedlock, the mother is given automatic and actual sole custody but a father must apply to the local district court for custody or access.

The 2015 Act also allows for others to apply for custody of a child, such as certain relatives (including grandparents and siblings) or qualifying step-parents and cohabiting partners.

Consent from the child's guardians is required before custody can be granted but the court can dispense with the need for such consent if it decides that the consent is being unreasonably withheld.

The court also has the power to give directions regarding the custody of the child and the right of access to the child.

It is possible for a sole guardian to authorise or nominate someone else to be a guardian of the child.

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## WHO CAN BE GUARDIAN?

The natural mother is automatically guardian. If the mother and father are married at the time of the birth of the child- the father is also automatically guardian.

The natural father who is not married to the mother can apply to the Court to be appointed Guardian of the child. However the easiest route to appoint a father as a guardian is if the mother agrees to his appointment, both parties can sign a statutory declaration in front of a Solicitor appointing him guardian

New law, in the form of the Child and Family Relationships Act gives an extension of automatic guardianship to non-marital fathers co-habiting for a specified period with the child's mother. This would mean that the child's father would need to be living with the child's mother for twelve months, including at least three months following the child's birth.

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## DOES THE PARENT WHO DOES NOT HAVE CUSTODY OF THEIR CHILDREN HAVE SPECIFIC LEGAL RIGHTS IN TERMS OF ACCESS TO THEIR CHILDREN?

The parent who does not have custody is entitled to apply for access to their child. The Court will consider an application for access on the basis that the best interests of the child are of paramount importance.

The right of access is ultimately the right of the child. Unlike a custody order, an access order is never final as it is always open to the parents to apply to the court to vary the order on the grounds that it is in the child's best interests and also the child's needs change as they grow older.

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## DO THE COURTS OFTEN REFUSE ACCESS?

It is unusual for the Courts to refuse access to a parent and they are very much in favour of granting access. The Courts are of the opinion that it is essential that the child knows both parents and that the parent seeking access is able to be involved in their lives.

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## WHAT TYPE OF ACCESS DOES THE COURT ORDER?

There is no magic formula, every situation and family is different. The Court will take all the circumstances into account such as the age of the child etc and the relationship which the child has with the parent seeking access.

If the parent seeking access does not have a relationship with the child and if they are not familiar with each other etc it is often more appropriate that the access is built up on a gradual basis and allows both the parent seeking access and the child become accustomed to each other and to allow them develop their relationship gradually.

If however the parties were in a relationship or married and living together – the child would clearly have a relationship with the parent seeking access and there would be no need for them to build up the relationship. The Courts generally requires that access be structured ie certain days/weekends/evenings rather than on an ad hoc basis

The Court can also order supervised access if this is in the child's best interests.

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## CAN THE COURTS TAKE A CHILD'S VIEW IN ACCESS/CUSTODY ISSUES?

Existing legislation, statutory instruments and case law allows for the consideration of children's views and the new the Child and Family Relationships Act echoes this. The child's views can be heard either directly, or through a representative.

In child care proceedings a Guardian ad litem is usually appointed to this role. The Guardian ad Litem provides children involved in family law

proceedings with an independent voice in court. A Guardian Ad Litem is an experienced and qualified person, with expertise in working with children.

The Guardian ad Litem is appointed by the Court and advises on what is in the best interest of the child concerned. The Guardian ad Litem also makes the judge aware of the child's own wishes. The Guardian ad Litem consults with the child, the child's family, and any other organisations who know the child and the family. These consultations are crucial to ensure that the child's best interests are presented independently to the Court.

In many cases the child might be old enough that the judge will decide that he or she will meet with the child for a discussion. This will happen in an informal setting eg the Judges private room and it will be just the Judge and the child will be present.

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## DOES THIS HAPPEN REGULARLY?

It is very common and happens in many cases

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## WHY WOULD A JUDGE DECIDE TO SPEAK WITH A CHILD IN PRIVATE RATHER THAN IN COURT?

The Judge may hear conflicting evidence from the parents. It has long been recognised that trial judges have a discretion as to whether they will interview children who are the subject of custody or access disputes in their chambers or private quarters, since to invite them to give evidence in court in the presence of the parties or their legal representative would involve them in a way that may be unacceptable or inappropriate in the marital disputes of their parents.

Depending on the age of the children concerned, such interviews may be of assistance to the trial judge in ascertaining where their own wishes lie

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## DOES THIS PLACE HUGE RESPONSIBILITY ON A CHILD?

Typically the Judge will explain to the child that it is the judge who is charged with resolving issues between the parents of the child and he/she will reassure the child that in speaking to the judge the child is not taking on the onus of judging the case itself and will assure the child that while the wishes of children may be taken into consideration by the court, their wishes will not be solely (or necessarily at all,) what the Judge bases their decision on.

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## WHAT FACTORS WILL THE COURT TAKE INTO ACCOUNT WHEN REACHING DECISIONS ABOUT THE CHILD?

The Best Interests of the Child is the key!

It has long been the case that the Courts take the best interests of the child in account when dealing with applications on issues that concern them. The new Act also makes this principal the corner stone on any issues affecting children.

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## CAN YOU GIVE US EXAMPLES OF WHAT "BEST INTERESTS" MEANS?

Factors which are usually relevant in considering "best interests" can include:

1. the benefit to the child of having a meaningful relationship with both parents;
2. the views of the child concerned depending on their age and maturity;
3. the physical, psychological and emotional needs of the child;
4. the history of the child's upbringing and care, including the nature of the relationship between the child and each of their parents;
5. the child's religious, spiritual and cultural upbringing and needs;

6. the child's social, intellectual and educational upbringing and needs;
7. the child's age and any special characteristics;
8. any harm which the child suffered or is at risk of suffering.

## FOR MORE INFORMATION

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