

Title	Special Guardianship Advice – Emergency Care Arrangements and Testamentary Guardianship
Purpose/scope	This Coram BAAF practice note provides guidance for assessing social workers of Prospective or current Special Guardians on making practical family arrangements in case of health emergency or accident. In addition the purpose and process of drafting a Testamentary Guardianship for arrangements of who will care for a child in the event of the death of both Special Guardians is explained
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PRACTICE NOTE 74

Supporting Special Guardians to make Family Arrangements in the Event of a Health Emergency or Accident: Information for Social Workers

The context

Currently, there is a lack of information about the process for special guardians to appoint a person to be responsible for the children in their care, to make a clear family arrangement in the event of illness, incapacity or death. This Practice Note clarifies the process. The following information can be used to help inform planning, decision-making and as part of wider communications with carers and children. Suggestions are provided about making family arrangements and about what may be helpful to record about the child, their relationships and practical matters.

This Practice Note is written for social workers to help them in their work with families. It covers an area that should be explored sensitively with a proposed special guardian during an assessment or when preparing a report for court. Arrangements that have been made some time ago may also need revisiting. Family relations change, as do the needs of children.

A crisis is a difficult time to make child-centred plans. Conflict within the extended family that led to the special guardian being appointed is not uncommon, and health emergencies can cause tensions to re-emerge. Practitioners should consider how they might actively and

sensitively engage with special guardians about these issues before a crisis arises.

Making practical family arrangements in case of a health emergency or accident

A special guardian holds and exercises parental responsibility to the "exclusion" of all other persons who hold parental responsibility. This means that the special guardian makes all the day-to-day decisions and the longer term decisions about the child, as any parent would expect to do. It also means that the special guardian can delegate parental responsibility, and can therefore make an advance arrangement about who in the family or the child's network will be the nominated person to care for the child on a temporary basis should the special guardian become ill and their capacity to care for the child become severely limited. This may include being clear about whether the expectation is that a nominated person would look after the child in their present home. To avoid confusion, a written record of proposed arrangements should be made, kept with the family papers and shared with the nominated person/s (for more details on keeping a written record, see the paragraph below headed 'Appointing a testamentary guardian to take parental responsibility for a child').

To assist a nominated person in assuming the care of a child, it may be useful to keep a record or file about the following points, which could be accessed or passed to them in this event:

- Who are the important people in the child's life? What is the nature of these relationships? What and where are their contact details? Are there any important issues to be aware of?
- Are there any court orders about contact? Where is a copy of the order kept? What are the routine arrangements for contact and have they altered over time? Where is a note about that kept?
- What are the contact details of the child's GP? Does the child have any particular health needs, including prescribed medication? Where is the record of that? What is the routine for the child taking the medication?
- What are the child's likes and dislikes? (about food, bedtime routines, washing and teeth brushing, etc)
- Is there life story material and where is it kept? Does the child know where this is, and do they have easy access to it?
- What are the child's best loved objects or interests? (sport, dancing, video games, music, books, photographs, toys, comfort objects, etc)
- What are the family routines? (favourite TV programmes, places, activities, etc)
- Are there any specific fears or worries that the child has that should be known?

This list is not exhaustive, nor is it something to go through as a questionnaire. Where at all possible,

children should be involved and consulted in an age-appropriate way about what matters to them in their lives. Raising these issues may trigger anxieties and questions that are difficult to answer for all those involved. Practitioners are encouraged to engage in reflective discussions with colleagues and supervisors to consider the dynamics. CoramBAAF publishes a range of books on communicating with children, which can be found in our website bookshop.

Appointing a guardian who will have parental responsibility for a child after the death of a special guardian

Conversations about this should ideally take place in the context of a supportive and meaningful relationship. Thinking about and making plans for a child in case of the death of a special guardian may be uncomfortable and stressful, but it is very important for the child to have an agreed arrangement and plan secured. This is particularly so if the special guardian is the sole carer. If there are two special guardians appointed, on the death of one, the remaining person becomes the sole person with exclusive parental responsibility for the child.

The legal provisions for appointing a named person who will have the rights and responsibilities to make decisions about the child are set out in sections 5 and 6 of the Children Act 1989.

Section 5(4) states:

...a special guardian of a child may appoint another individual to be the child's guardian in the event of (their) death.

A "section 5" guardian does not have parental responsibility that they can exercise to the "exclusion" of others holding parental responsibility — usually the child's parents. This means that the section 5 guardian will share parental responsibility with the child's parents. If there is more than one special guardian, the arrangement only comes into effect when all named special guardians have died. A section 5 guardian is sometimes referred to as a "testamentary guardian", but it is not necessary for the formal arrangement to be linked to the special guardian's will. For the remainder of this briefing, we use the term testamentary guardian to mean a section 5 guardian.'

Appointing a testamentary guardian to take parental responsibility for a child

Appointing a testamentary guardian does not require the use of a particular form of words, but there does need to be

a written document. A statement should be included, such as: 'As set out in section 5 of the Children Act 1989, I appoint [X] to be the guardian of my child [Y]'. This straightforward sentence achieves the special guardian's intention. The document must be dated and signed by the special guardian. It may be important to also ask the person being appointed as the testamentary guardian to countersign the document and to have each signature witnessed, but this is not formally required. What is important is that the intentions of the special guardian are clear and unambiguous.

It is helpful to ensure that contact details of the person nominated as the testamentary guardian are included, with a record kept that the person has been consulted and agrees. It is preferable that the testamentary guardian has a connection with the child. In the case of young people, they too may wish to be involved in giving their views about who should be appointed. The document does not need to be registered, but the special guardian needs to ensure it is kept with the family papers and also that the person appointed is given a copy of the appointment.

When does the appointment come into effect?

The appointment does not take effect until the special guardian (or if the special guardianship order is made to more than one person, all special guardians) has died.

What are the duties and powers of the testamentary guardian?

The testamentary guardian may not necessarily be the person with whom the child will live after the special guardian's death. Parental responsibility for the child is shared with the parents. If there is a dispute about, for example, with whom the child should now live or have contact, or some other aspect of the child's upbringing, the testamentary guardian and anyone else with parental responsibility will need to ask the court to resolve matters, by making a section 8 child arrangements order defining with whom the child will live and who will have contact. If the dispute is about the exercise of parental responsibility, the court could make a specified issues or prohibited steps order. Alternatively, the court could make a special guardianship order giving "exclusive" parental responsibility to the guardian or another approved person in the child's network.

The testamentary guardian does not have the right to the same level of support that the special guardian may have been receiving. The local authority's duties under

1 The term "testamentary guardian" is no longer used, as the innovative provision in section 5 of the Children Act 1989 removed the requirement to make such an appointment as part of a will, making this arrangement more straightforward. However, we use the term in this Practice Note as it remains a helpful practice concept to assist special guardians to consider nominating one or more persons to care for the child in the event of their own illness, incapacity or death.

the special guardianship regulations will no longer apply following the death of the special guardian. The testamentary guardian could ask the local authority for the child to be assessed under section 17 of the Children Act 1989 as a "child in need", although there is no enforceable right to require this. The testamentary guardian should be supported and advised about any benefit entitlements in relation to caring for the child.

What entitlements may the child have on the death of the special guardian?

The child will not have any automatic right to inheritance from the special guardian's estate. The special guardian can make a specific bequest in their will for the child. The child may also have the right to be supported out of the special guardian's estate as a dependent under the Inheritance (Provision for Family and Dependents) Act 1975. Under this Act, it is possible to claim financial support that has not been allocated in a will. An application can be made to the court to alter the distribution of the estate of a deceased person to any spouse, former spouse, child, child of the family, or dependant of that person, in cases where the deceased person's will or the rules of intestacy fail to make "reasonable financial provision". It is important to note that a child will not have any *automatic* right to inheritance.

² <https://www.legislation.gov.uk/ukpga/1989/41/section/6>

³ <https://www.legislation.gov.uk/ukpga/1989/41/section/1>

Can the testamentary guardian appointment made by the special guardian be brought to an end?

Section 6 of the Children Act 1989 gives the court the power to end a testamentary guardian appointment.² Any person with parental responsibility can apply to court to terminate the appointment. The court, when making a decision about ending the appointment, will place the child's welfare paramount.³ The child, with the court's permission, can apply to ask for the appointment to be revoked, and the court itself has the power to end the appointment, when dealing with any family proceedings (which could include care proceedings), even though no application has been made asking for this.

Summary

The above information clarifies the process for special guardians in relation to appointing a person (a testamentary guardian) to be responsible for the child/ren in their care, to make a clear family arrangement in the event of a health emergency, an illness or death. It can be used to help inform permanence planning, decision-making and as part of wider communications with carers and children. Social workers have a role to play in modelling good communication, and that includes addressing difficult issues sensitively.

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