

# Legal guardianship in Kenya and how to acquire it

The Children Act defines a guardian broadly as any person who in the opinion of the court has charge or control of a child. This relates to any person who at any given time has physical possession of the child and is therefore responsible for the child.



This article however relates to legal guardianship, which is acquired after the death or presumption of death of either one or both parents of the child. Legal guardianship can be acquired either by a deed or will, made by a parent before his/her death or by a court order. In this regard, a (legal) guardian is a person appointed by will or deed by a parent of the child or by an order of the court to assume parental responsibility for the child upon the death of the child's parent. A

guardian can be appointed either alone or in conjunction with the surviving parent of the child or the father of a child born out of wedlock who has acquired parental responsibility for the child.

Unlike custody which allows a person extensive decision-making abilities over the child, guardianship grants the guardian many of the same rights and responsibilities of a parent. However, guardianship can be limited in its scope, but can also include the right to make decisions about the child's upbringing. This is to say that anyone with custody over a child is a guardian, but not all guardians have custody and while both parents and courts can award guardianship, only the court is allowed to grant custody.

A guardian may be appointed in respect of the child or the estate of the child or both, and his guardianship is only to the extent of his appointment. For instance, where a guardian is appointed to the estate of the child, such a guardian has the power and responsibility to administer the estate of the child for the benefit of the child, the duty to take all reasonable steps to safeguard the estate of the child from loss or damage, to produce and avail accounts in respect of the child's estate on every anniversary of his appointment and to produce any account or inventory in respect of the child's estate when required to do so by the court. The court may also appoint a guardian ad litem for a child, who is a party to a suit or subject to adoption proceedings, pending the final determination of the court.

A guardian can be appointed by an agreement, order of the court or through a will of a person and assumes parental responsibility for the child upon the death of the parent. A guardian can be appointed in respect of any child who is resident in Kenya whether or not the child was born in Kenya or is a Kenyan citizen. The guardian need not be a Kenyan citizen or resident in Kenya.



On the death of one parent, the surviving parent automatically assumes parental responsibility thereby becoming the child's legal guardian. The surviving parent can be a guardian either alone or jointly with another person appointed by the deceased parent or a person appointed by the court. In the case of an appointment by deed, the deed has to be dated and signed by the person making the appointment and in the presence of two witnesses. Where the appointment made by a written will, it has to be a valid will under the Law of Succession in Kenya.

### **Making an application for guardianship**

Where a child's parents are no longer living, or cannot be found and the child has no guardian and no other person has parental responsibility over him or where the child is a displaced, any person(s) intending to be a legal guardian to the child has to make an application to court. The application may be accompanied with a Certificate of Urgency if the applicant intends to get any urgent orders such as being allowed to travel with the child outside the country, or to make an important decision regarding the child, before the final determination by the court. The application should be accompanied with the following documents:

- (i) A copy of the child's birth certificate
- (ii) The Applicant's identification

- (iii) The deceased parent's death certificate
- (iv) Proof of ability to take care of the child including proof of earnings
- (v) A consent from the surviving parent if any
- (vi) School reports if the child is a school-going child
- (vii) Any other documents demonstrating fitness of the applicant to act as a guardian

Once the application is filed in court, the court will direct that a children's officer makes a visit to the applicant's home and makes a report, which is presented to court. Once the report is presented to court, the application will be set for hearing. In determining whether to grant or deny an order for guardianship, the court considers factors such as the relationship between the applicant and the child, the willingness and ability of the applicant to assume parental responsibility for the child and most importantly, the best interest of the child.

Once appointed, the guardian assumes all the roles and responsibility of a parent over the child. The appointment of a guardian comes to an end once the child attains the age of eighteen years, unless there are exceptional circumstances to warrant extension by the court.

