

GUARDIANSHIP AFTER DEATH OF PARENT OR GUARDIAN

1. Key concepts	2
2. Overview of rules on guardianship after death of parent	2
3. Who is the sole guardian of a child?	3
4. Naming a guardian in a will	4
5. Appointment of a guardian	4
5.1 Applying to become a child's guardian	6
5.2 Appointment of a legal guardian as a "tutor"	10
6. Complaints about guardians or tutors	13
7. Separating guardianship and custody	14

NOTE

In this publication, "Ministry" and "Minister" refer to the Ministry and Minister responsible for child protection, and "Guide" means this *Guide to the Child Care and Protection Act* (which is published in separate chapters).

EDITION
2019

The Child Care and Protection Act provides a simple procedure for appointing a guardian for a child when the child’s parent or guardian has died. There is also a simple complaints procedure to use if someone believes that a guardian is not acting in the child’s best interests – such as using the child’s inheritance for the guardian’s own benefit. These provisions in the Act are almost identical to provisions in the Children’s Status Act 6 of 2006 which it replaced.

1. Key concepts

Guardianship: Guardianship is the capacity to make important legal decisions for a child. However, the term “guardianship” can have both a narrow and a wide meaning. The term “guardianship” includes custody if there is no other legal custodian for the child.

A person who has guardianship of a child is called the guardian. A guardian has the power to do legal acts on behalf of a child – such as signing contracts, bringing court cases and administering property.

In some cases, a legal guardian must also be appointed as a tutor in order to have the power to administer the child’s property. See section 5.2 of this chapter.

Custody: Custody is responsibility for the day-to-day care of a child, including the power to make decisions relating to that care.

A person who has custody of a child is called the custodian. A custodian has legal responsibility for the daily care of a child.

2. Overview of rules on guardianship after death of parent

If the parents of a child are married, they are joint custodians and equal guardians of their children. This means that if one parent dies, the surviving parent will automatically become the child’s sole guardian. If married parents divorce, it is possible that one of them will be made sole guardian by the divorce order.

If the parents of a child were never married, one parent will normally be the sole custodian and guardian, unless there is a court order which provides otherwise.

Anyone who is the sole guardian of a child can name any person in a written will to be the child’s guardian after his or her death.

Remember that guardianship will include custody unless a separate custodian is named. If the will names a guardian and not a custodian, then the guardian will automatically be the child's custodian as well. The guardian may delegate the responsibility of daily care for the child to someone else, but will remain the responsible person to carry out legal acts on behalf of a child – such as signing contracts, bringing court cases and administering property.

If a child's sole guardian dies and no guardian is named in a will, any person can apply to become the child's guardian.

- ⑨ The applicant does not have to be related to the child.
- ⑨ If there are competing applications, preference will normally be given to close family members or to the child's primary caretaker.
- ⑨ The guardian appointed by the court will also be the child's custodian – unless the court makes a separate order about custody.

Any person with an interest in the child's well-being can make a complaint to the children's court if the appointed guardian is failing to act in the child's best interests.

These rules apply to all children, regardless of whether they were born before or after the law came into force and regardless of whether they were born inside or outside marriage.

3. Who is the sole guardian of a child?

Married parents: If the parents of a child are married, the parents are joint custodians and equal guardians of any child of the marriage. This means that if one parent dies, the other parent will automatically become the child's sole custodian and guardian.

This could also happen in other contexts. For example, suppose that an aunt and uncle of a child had a court order giving them joint custody and equal guardianship of their niece. If the aunt died, the uncle would become the sole custodian and guardian.

◆ Married Persons Equality Act 1 of 1996, section 14

◆ common law on marriage

◆ Child Care and Protection Act, sections 100(1), 101(3) and 113(1)

Unmarried parents: If the parents of a child are unmarried or divorced, one parent will often be the child's sole custodian and guardian.

Unmarried parents can make a written agreement about which of them will be the child's custodian and guardian. They can also ask the children's court to decide on this question. If they do not make an agreement or apply to the children's court, then the common-law position will apply as the default, meaning that the child's mother will be the sole custodian and guardian. The children's court can also name two or more persons to act as guardians for a single child – such as two parents, or a parent and some other person.

◆ Child Care and Protection Act, sections 99-101, 100(1), 101(3), 112(4) and 113(1)

◆ common law on children born outside marriage

Other legal guardians: There may also be a situation where a child has a sole guardian who is not the child's parent. This could be an extended family member or someone unrelated to the child. A legal guardian can be appointed for a child by a court order, or by being named in a valid written will.

◇ Child Care and Protection Act, sections 100(1), 101(3) and 113(2)

4. Naming a guardian in a will

Anyone who is the sole guardian of a child can make a will naming someone else as a guardian for a child after his or her death.

If one married parent died, the other parent would become the sole guardian of a child of the marriage. Married parents often make wills naming someone as the child's guardian in case they both die at the same time (in a car accident or a plane crash, for example), or to cover the situation where one of the married parents has already died when the will comes into play.

Naming a guardian in a will is a good idea because it makes sure that the child will be cared for and prevents disputes about guardianship.

People who make wills usually name only a guardian, without mentioning a custodian. In this case, the guardian will automatically be the child's custodian as well. The guardian could delegate custody to someone else, who would act as the child's primary caretaker.

◇ Child Care and Protection Act, sections 112(1), 113(2)

For example, Louise was a single mother who had sole guardianship of her children before she died. In her will, Louise named her sister Caroline as the guardian of her children. Caroline is a lawyer and does not have time to look after the children on a day-to-day basis. Caroline asked her mother (the grandmother of the children) to look after the children for her. Caroline is the guardian and custodian of the children, but the grandmother is the primary caretaker. If Caroline and the grandmother preferred, the grandmother could approach the children's court and apply to be formally named as the children's legal custodian while Caroline remained the children's guardian. Alternatively, Caroline and her mother might decide to conclude a kinship care agreement.

5. Appointment of a guardian

What if there is no will naming a guardian for the child? In the past, if a will did not name a guardian for a child after the sole guardian of the child died, only the High Court could appoint a guardian. Because this was an inaccessible and expensive procedure, many children were left without any legal guardians at all. The Child Care and Protection Act provides a simple procedure for the appointment of a guardian after the death of a child's parent or guardian, in the children's court. Children's courts are more accessible than the High Court, which should encourage families to make use of the procedure provided.

The High Court is the "upper guardian" of all children and retains the power to appoint a guardian for a child in any circumstances where this is necessary.

Applying to be the guardian of a child whose parent or guardian has died

STEPS BY THE APPLICANT

- 1 Family consultation:** The applicant must consult the child's close family members to see if they are in agreement with the application.
- 2 Certification from Master of High Court:** The applicant must complete Form 10A and get a certification from the Master that there is no valid will containing a provision on guardianship.
- 3 Submit application to the court:** The applicant must submit Form 10A and Form 6 to the clerk of the children's court.

STEPS BY THE CHILDREN'S COURT

- 4 Notification:** The clerk of the children's court will notify interested persons of the application, so that they can make input if they wish.
- 5 Summons to applicant and other persons:** The children's commissioner *must* summon the applicant or applicants for questioning. The children's commissioner *may* summon other relevant persons for questioning.
- 6 Social worker report:** The children's commissioner *must* order a social worker report and set a deadline for the delivery of this report.
- 7 Child participation:** The children's commissioner must consider the child's views, if the child is sufficiently mature.

DECISION

The application is granted

Certificate of guardianship

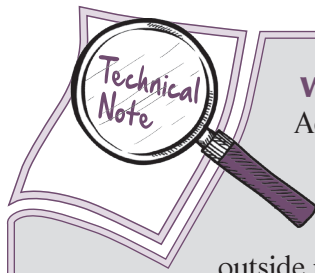
The application is refused

Written reasons

Review: Anyone who is unhappy with the court's decision can ask the High Court to review it.

Any person who has a genuine interest in the well-being of a child may make a complaint to the clerk of the children's court about a guardian or tutor who is not acting in the best interests of the child.

5.1 Applying to become a child's guardian



When does this procedure apply? The wording of section 113(4) of the Act is confusing. It says that this procedure applies “if there is no provision in a written will naming a guardian for *a child born outside marriage* or if there is for any other reason no competent guardian for *a child*”.

Read together, this means that the procedure applies to: (a) a child born outside marriage where there is no provision in a written will naming a person as a guardian; or (b) any child who for any reason does not have a competent guardian. In other words, it applies to any child who has no guardian after the death of a parent or guardian – as in the case of the Children's Status Act 6 of 2006 which was replaced by the Child Care and Protection Act.

- ◆ Child Care and Protection Act, section 113(4)
- ◆ Child Care and Protection Regulations, regulation 34(1)

Who can apply? Any person who has a genuine interest in a child can apply to be the guardian. The applicant does not have to be related to the child.

The applicant could be a parent of a child. For example, suppose that the mother of a child born outside marriage is the sole custodian and guardian of the child. She dies without naming anyone else as custodian or guardian in a written will. The child's father would not become the child's custodian or guardian automatically in such a case. He would have to apply to the children's court (or to the High Court) for custody and/or guardianship responsibilities and rights. The father might have to prove paternity in such a case.

- ◆ Child Care and Protection Act, section 113(5)

Application: A person who seeks a court order on guardianship must make an application to the clerk of the children's court on **Form 10A**, submitted together with **Form 6**. Both of these forms are appended to the Child Care and Protection Regulations.

If there is more than one application for legal guardianship of a particular child, the court will consider them together.

- ◆ Child Care and Protection Act, section 113(6)
- ◆ Child Care and Protection Regulations, regulation 34(1)

Consultation: The applicant must consult the child's close family members to see if they are in agreement with the application. The applicant must give the court a statement which gives the names and contact details of the family members who were consulted, and confirms that they do not dispute the application.

What if the family members are *not* in agreement? Another family member could make a competing application, or give reasons why the court should refuse the application. The court would decide what to do on the basis of the child's best interests.

- ◆ Child Care and Protection Act, section 113(7)(a)
- ◆ Child Care and Protection Regulations, regulation 34(1)(b)(i)

Certification that there is no will naming a guardian: The applicant must provide certification from the Master of the High Court that there is no record of a valid will made by the child's deceased guardian OR that there is a valid will but it contains no provision on guardianship. There is a place for this certification on **Form 10A**.

The person applying for guardianship must get the certification from the Master of the High Court before submitting the form to the clerk of the children's court. This certification can be requested in person at the Master's Offices in Windhoek or Oshakati. The request can also be made by post, fax or email. The Master's Office recommends the use of registered post if the applicant is not able to come to the office in person.

◆ Child Care and Protection Act, section 113(7)(b)

◆ Child Care and Protection Regulations, regulation 34(1)(b)(ii)(bb)

Notification: The clerk of the court must notify the following people of the application on **Form 7**, which is appended to the Child Care and Protection Regulations, enclosing a copy of the application:

- ⑨ the child's **parent** (if there is a surviving parent)
- ⑨ the person with **custody** of the child
- ⑨ the child's **care-giver** (if applicable)
- ⑨ **any other person identified by the court or the relevant social worker** as having an interest in the application.

These persons will be invited to make representations on the application if they wish.

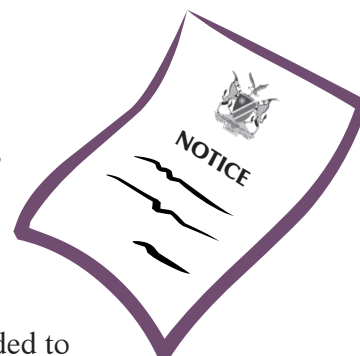
◆ Child Care and Protection Act, section 113(7)(c)

◆ Child Care and Protection Regulations, regulation 34(2)

Notices under the Child Care and Protection Regulations

Notices from the court must be served by a member of the police, a messenger of the magistrate's court or a person authorised by the children's commissioner in the following manner:

- (1) The notice can be served **personally** on the person.
- (2) The notice can be given to the person's **legal practitioner**, if the legal practitioner's name and address have been provided to the court for purposes of proceedings under the Act.
- (3) The notice can be left at the person's **place of residence or business**, with anyone who appears to be at least 16 years of age and residing at the residence or working at the business.
- (4) The notice can be left at the person's **place of employment**, to anyone who appears to be at least 16 years of age, and employed at the same place or in charge there.
- (5) In the case of a **legal person (such as an organisation)**, the notice can be left at its **registered office or main place of business**, with a director or a responsible employee.



If the person to be served in any way **prevents the notice from reaching him or her**, it is sufficient service to **attach a copy of the notice to the outer door or security gate** of the relevant place.

If a notice cannot be served in any of these ways, the member of the police, messenger of the magistrate's court or other person authorised by the children's commissioner must attempt notification in one or more of the following ways:

- (1) The person can be notified by **telephone**.
- (2) The person can be notified by **fax**.
- (3) The person can be notified by **e-mail**.
- (4) The person can be notified by **courier** or **registered post**.
- (5) The person attempting notification can visit the last known residential address or place of business or employment of the person in question, to **attempt to discover the current contact details** of the person, and then try to use that contact information to serve the notice.

If all efforts to serve the notice fail, the person who attempted notification must give the children's **court proof of the attempts made**.

Proceedings in a children's court may begin or continue in the **absence of a person who was notified, or attempted to be notified**, to attend the proceedings or to make representations – IF the children's court considers it to be in the **interests of justice** and in the **best interests of the child**.

The court must **postpone** the matter due to the **absence of a person who was notified to attend** in any one of these circumstances:

- ⑨ The person who is not present at children's court proceedings is **likely to make a valuable contribution** regarding the best interests of the child in question.
- ⑨ The court is of the opinion that the presence of the person is **necessary** for the purposes of the court proceeding.
- ⑨ The person who is absent is the relevant child's **parent, guardian, custodian, care-giver or a person identified by the court or the relevant social worker as having an interest in the matter** (see section 56(3) of the Act).
- ⑨ The person who is absent is the **investigating social worker** (see section 56(3) of the Act).

In such a case, the court can postpone the matter and arrange for the issue of a **subpoena** to the absent person on **Form 4**, which is appended to the **Regulations relating to Children's Court Proceedings**.

A person who fails to appear before the children's court without a reasonable cause after being issued with a notice or a subpoena commits a crime punishable by a fine of up to N\$5 000 or to imprisonment for up to one year or both. A person is not subject to a penalty for non-attendance if the children's court decided to proceed in that person's absence.

◇ Child Care and Protection Regulations, regulation 120

Information-gathering by children's commissioner: The clerk of the children's court will refer the application to the children's commissioner.

- (1) The children's commissioner *must* summon the applicant or applicants for questioning.
- (2) The children's commissioner *may* summon other relevant persons for questioning.
- (3) The children's commissioner *must* order a social worker report and set a deadline for the delivery of this report.

◇ Child Care and Protection Act, section 113(8)

Social worker report: The social worker must submit a report on the guardianship application to the children's court on **Form 10B**, which is appended to the Child Care and Protection Regulations.

◇ Child Care and Protection Regulations, regulation 34(3)

Child participation: The child's view must be given due consideration, if the child is of sufficient age and maturity to express a view. Every child has the right to choose **not** to participate, but the child in question must be given sufficient information and advice about the matter to enable him or her to make a decision on participation which is in his or her best interests.

The children's commissioner may require the applicant to bring the child before the commissioner in person, if the commissioner considers that this would be in the best interests of the child. Alternatively, the child might participate in the social worker investigation and provide his or her views in that way.

◇ Child Care and Protection Act, section 4(1)

◇ Child Care and Protection Regulations, regulation 34(4)

Decision by children's commissioner: The children's commissioner will consider the application, the social worker report and other supporting documentation, the child's viewpoint and any other representations made. The children's commissioner may:

- ⑨ **approve** the application and direct the clerk of the children's court to issue a certificate of guardianship to the applicant
- OR
- ⑨ **refuse** the application and give the applicant written reasons for the refusal.

Channelling draft social worker reports via Ministry

All social worker reports must be channelled through a staff member designated by the Minister before being submitted to the children's court. This rule is intended to provide quality control and to harmonise the work of State and private social workers. The Ministry official may return the report to the social worker with directions for improvement if necessary. If so, the social worker must re-submit the revised report to the channelling officer for final approval before it is submitted to the court.

- ◇ Child Care and Protection Act, section 33(7)-(8)
- ◇ Child Care and Protection Regulations, regulation 8
- ◇ See Chapter 5 of this *Guide* for more details on the channelling procedure.

Preferences in appointment of guardian

Preference for appointment as a legal guardian must be given to **close family members** of the child, or to a person who has **custody** or is the **primary caretaker** of the child — but the key factor is the **best interests of the child**.

If a **person has been named as guardian in a testamentary disposition other than a written will (such as an oral will made under customary law)**, the children's commissioner must give preference to that person as guardian if he or she is satisfied that the testamentary disposition is valid and that the person in question is suitable to be appointed as the child's guardian.

- ◇ Child Care and Protection Act, section 113(11)

If the application concerns the appointment of a guardian for a child in a child-headed household, the children's commissioner must refer the matter to the Minister for possible recognition of the household as a child-headed household in terms of the Act.

◆ Child Care and Protection Act, section 113(9)

Certificate of guardianship: If the application is approved, the clerk of the children's court will issue a certificate of guardianship on **Form 10C**, which is appended to the Child Care and Protection Regulations. The clerk must give the original certificate to the person who has been appointed as guardian, in person or by courier or registered post. The clerk must keep a copy of the certificate on file at the children's court and send a copy to the Master of the High Court for reference in connection with the administration of estates.

The certificate of guardianship can be used as proof of guardianship when the guardian wishes to conduct transactions on behalf of the child.



An aunt applies to be the guardian of her niece after the death of the child's parents. The social worker investigation finds that the aunt goes out gambling every night. Because of this evidence, the children's commissioner may decide that she is not a good role model for the children, and not well-suited to safeguard the child's assets.

◆ Child Care and Protection Act, section 113(9)(a) and (10)
 ◆ Child Care and Protection Regulations, regulation 34(5)-(6)

Review: The appointment of a guardian is an administrative act by the children's commissioner. (It results in the issue of a certificate rather than a court order.) Anyone unhappy with the decision could ask the High Court to review it.

In a review, the High Court would examine the record of the proceeding in the children's court to be sure that the children's court followed the correct procedure and made a reasonable decision based on the information before it.

◆ Child Care and Protection Act, section 113(9)

5.2 Appointment of a legal guardian as a "tutor"

A legal guardian appointed by the children's court after the death of a child's parent or guardian who is NOT a natural guardian of the child may not administer any property belonging to the child or make decisions about the child's person unless he or she has been issued with **letters of tutorship** by the Master of the High Court in terms of the Administration of Estates Act.

In such cases, the legal guardian must apply to the Master of the High Court to be appointed as tutor. The Master must give preference to the legal guardian as tutor, but may appoint another suitable person as tutor if he or she considers it to be in the best interests of the child concerned.

If the child has property, the Master can require a tutor who is appointed to administer the child's property to provide **security** to the Master in an amount which the Master will determine. However, if the property does not exceed a certain value which is set from time to time, the security requirement can be **waived**.

The **letters of tutorship** which are provided by the Master of the High Court may contain other conditions pertaining to the rights and duties of a tutor.

Note that, since 2005, the administration of some estates is handled by magistrates' courts instead of by the Master of the High Court, depending on the value of the estate.

- ◆ Child Care and Protection Act, sections 113(3), 114
- ◆ Administration of Estates Act 66 of 1965, sections 4A, 72(1), 77

Who is a “natural guardian”?

A parent is the “natural guardian” of a child when that parent's guardianship duties are imposed by law in a way which gives the parent no choice about whether to accept the responsibilities of guardianship. In contrast, in a situation where a person becomes a “legal guardian” as a result of an agreement between the parents authorised by the Act, a court order or a nomination in a will, the person in question can *choose* whether they wish to accept the office of guardian. Because of this distinction, there are certain differences between the duties of a natural guardian and a legal guardian who is NOT a natural guardian.

Both parents are natural guardians of a child born inside marriage, but the biological father of a child born outside marriage is *not* a natural guardian — although he may acquire guardianship rights in respect of the child in several ways.

A person other than a parent may be appointed as the “legal guardian” of a child, but such a person is not the child's “natural guardian”.

The “child's person”

This legal term refers to the child himself or herself, as opposed to the child's property.

The role of a tutor in respect of the child's inheritance

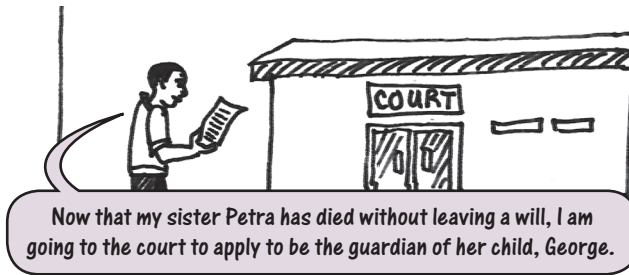
Once a guardian is appointed for a child and issued with letters of tutorship, that guardian will have the responsibility of controlling the child's property.

The assets inherited by a child under age 21 will go into the State Guardian's Fund for the child to access as needed. (As of 2019, amendments to the Administration of Estates Act were under discussion which might make exceptions for some situations involving written wills.) If the assets are held in the State Guardian's Fund, the guardian appointed for the child will receive payments for the child's expenses from time to time.

All of the inheritance must benefit the child. The child's inheritance must not be used to enrich the guardian.

PROCESS FOR APPOINTMENT AS A GUARDIAN

- 1 The applicant goes to the children's court and fills in an application form.



- 2 The applicant consults the child's close family members to see if they are in agreement with the application and provides the court with a statement which gives the names and contact details of the family members who were consulted and confirms that they do not dispute the application. A family member who is not in agreement could make a competing application, or provide reasons why the court should refuse the application.



- 3 The clerk of the children's court must contact certain key persons: the surviving parent or parents, the child's care-giver (if the child is in the care of someone other than a parent), anyone other than a parent with custody of the child and any other person identified by the court or the social worker concerned with the case as having an interest in the application.



- 4 The children's commissioner will ask a social worker to make an investigation.



- 5 The child must also be consulted, if he or she is old enough.



- 6 The children's commissioner will ask the applicant to come in for questioning.



- 7 The children's commissioner may ask other relevant persons to come in for questioning.



The Children's Commissioner might also want to interview Luke's sister and Joseph, George's father.

- 8 After considering all the relevant information, the children's commissioner will either (a) approve the application for guardianship and issue a guardianship certificate or (b) refuse the application and give written reasons for this decision.



This example illustrates the process described in the diagram on page 5.

6. Complaints about guardians or tutors

Some people may become the guardian of a child in order to get control of the child's money or property, without having the child's best interests at heart. The Act provides a complaints mechanism to deal with such situations.

Who can make a complaint?: Any person who has a genuine interest in the well-being of a child may make a complaint to the clerk of the children's court about a guardian or tutor who is not acting in the best interests of the child. The complaint must be submitted on **Form 10D** submitted together with **Form 6**. Both of these forms are appended to the Child Care and Protection Regulations. **The complaint can be made anonymously.**

Notification: The clerk of the court must notify the guardian or tutor who is the subject of the complaint on **Form 7**, which is appended to the Child Care and Protection Regulations, enclosing a copy of the complaint.

Investigation: When the children's court receives such a complaint, it must order an **investigation by a designated social worker** within a timeframe specified by the court. This report must be submitted to the court on **Form 10E**, which is appended to the Child Care and Protection Regulations.

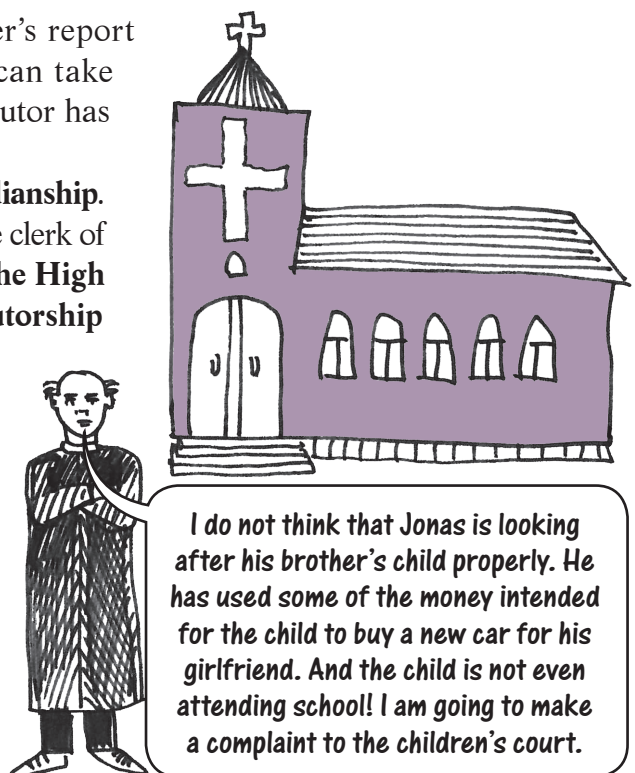
The children's court may subpoena the social worker who prepared the report, or any other person, to give oral evidence to the court before the court decides whether or not to alter an appointment of guardianship or tutorship.

Decision: After considering the social worker's report and any other evidence, the children's court can take appropriate steps if it finds that a guardian or tutor has not been acting in the best interests of a child.

- ⑨ The court may **alter the appointment of guardianship.**
- ⑨ In the case of a **tutor**, the court must direct the clerk of the children's court to **notify the Master of the High Court, who may alter the appointment of tutorship** and if necessary issue new letters of tutorship.

If the children's court alters the appointment of a person as guardian or tutor in response to a complaint, the clerk must arrange for **notice** to the person whose guardianship or tutorship has been revoked.

- ◇ Child Care and Protection Act, section 115
- ◇ Child Care and Protection Regulations, regulation 35



I do not think that Jonas is looking after his brother's child properly. He has used some of the money intended for the child to buy a new car for his girlfriend. And the child is not even attending school! I am going to make a complaint to the children's court.

7. Separating guardianship and custody

Where a guardian is named in a will or appointed by the children's court and there is no mention of a custodian, the guardian will have responsibility for ensuring that the child is cared for properly. But the legal responsibility for custody and guardianship can be separated.

Who can apply to be the custodian of a child after the child's sole custodian has died?

If a child's sole custodian dies without naming another custodian or guardian in a will OR there is for any other reason no competent person to be the child's custodian, **any person who has a genuine interest in the child** may apply to the clerk of the children's court to be appointed as the child's custodian. The applicant does not have to be related to the child.

A person who is appointed as a legal guardian of such a child (under the procedure described in section 5 above) will also be the child's custodian unless a court directs otherwise. But it is possible for one person to be appointed as the child's custodian and another as the child's guardian.

If the clerk of the children's court receives more than one application for custody of a particular child, the court must consider the applications together.

Application: A person who seeks a court order on custody must make an application to the clerk of the children's court on **Form 5B**, submitted together with **Form 6**. Both of these forms are appended to the Child Care and Protection Regulations.

The application will normally be brought by the person who is seeking custody of the child. If an application for custody is brought by someone else, the children's court may grant an order for custody *only after hearing directly from the person seeking to be the custodian*. The children's court must also consider the application in the presence of the person who made the application (or his or her legal practitioner).

Notification: The clerk of the court must notify the following people of the application on **Form 7**, which is appended to the Child Care and Protection Regulations, enclosing a copy of the application:

- ⑨ the child's **parent** (if there is a surviving parent)
- ⑨ the person with **custody** of the child
- ⑨ the child's **care-giver** (if applicable)
- ⑨ **any other person identified by the court or the relevant social worker** as having an interest in the application.

The idea is to make sure that everyone closely involved with the child has a chance to give an input if they wish.

Notice must also be given to other parties. The affected **child** is always a party to the proceedings. Any person with physical control of the child concerned must ensure that the child attends the proceedings of the children's court, unless the clerk of the children's court

or the court directs otherwise. Parties may also include the **Minister**, a **staff member of the Ministry** who is authorised by the Minister and the **Children's Advocate**, all of whom have the right to be parties to any case arising under the Act.

The procedure for giving notice is the same as for a guardianship application. See the box on pages 7-8 of this chapter.

Social worker report: The court must also order a social worker to prepare a report on the child's situation, and set a deadline for the delivery of this report.

The social worker must remember the channelling procedure required for all court reports. See the box on page 9 of this chapter.

Other investigations and evidence: The court may also summon any witnesses and order any other investigation which it considers necessary, and it may order the parent or parents or other applicant to pay the costs of the investigation or witness appearances.

Child protection: If it appears to a children's court during proceedings relating to custody of a child that the child may be in need of protective services, the proceedings must be converted into a child protection hearing.

This could result in the alternative placement of a child in kinship care, with a foster family or in a children's home, or an order for appropriate services to support the child or the family. See Chapter 14 of this *Guide* on child protection hearings for more information.

Preference in appointment of custodian: Preference for appointment as custodian of a child whose sole custodian has died must be given to a person named as custodian in a testamentary disposition *other than* a written will (such as an oral will made under customary law), if the children's commissioner is satisfied that the testamentary disposition is valid and that the person in question is suitable to be appointed as the child's custodian.

In this way, the children's commissioner will try to respect the wishes of the deceased person, as long as those wishes serve the best interests of the child.

Child participation: The child's view must be given due consideration, if the child is of sufficient age and maturity to express a view. Every child has the right to choose **not** to participate, but the child in question must be given sufficient information and advice about the matter to enable him or her to make a decision on participation which is in his or her best interests.

Custody order: The custody order could give custody to a surviving parent or to someone other than a parent. It could give joint custody to more than one person.

Varying or withdrawing a custody order: The children's court may vary or withdraw a custody order. A request to change or withdraw custody works in the same way as an initial application for custody.

Appeals: Any party involved in a matter may appeal to the High Court against an order made by the children's court, or against the refusal to make an order. It is also possible to appeal to the High Court against a decision concerning variation, suspension or rescission of any children's court order.

The children's court order which is being appealed may be suspended pending the outcome of the appeal if this would be in the child's best interests. The court can also make some other appropriate order in the child's best interests pending the appeal.

- ◆ Child Care and Protection Act, sections 4(1) (child participation), 112
- ◆ Child Care and Protection Regulations, regulation 30



The parents of a child die, leaving their 8-year-old child an orphan. The only close relative of the child who is still alive is Julia, the 21-year-old daughter of the mother's deceased sister. She applies to be the guardian of her cousin. She says that she can take care of her cousin, even though she is studying law at UNAM and has a part-time job in the evening. The court may decide that she is not really in a position to focus on taking responsibility for the care of a young child, even if she is the family member who is most well-placed to administer the cousin's assets. The court could appoint Julia as her cousin's guardian and appoint another person to be her cousin's custodian.



The parents of a child die, leaving their 8-year-old child an orphan. The only close relative of the child who is still alive is James, the 21-year-old son of the mother's deceased brother. He applies to be the guardian of his cousin. James is a very caring person and he does a good job taking care of his cousin. However, he has very little education and is not well-equipped to make decisions about the money which his cousin has inherited. The court could appoint James as his cousin's custodian and appoint another person to be his cousin's guardian.