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Guardianship and Separation: What you need to know

A guardian is a person who has the duties, rights, responsibilities and powers associated with bringing up a child. These responsibilities and powers can include things like making decisions over a child's name, where a child should live, what medical treatment a child should receive, what school a child should go to and a child's culture, language and what religion (if any) they practice.

Both parents are usually joint guardians of a child. A mother is automatically a guardian and a father is a guardian if:

1. He is named on the child's birth certificate;
2. He was married to (or in a civil union) with the mother at any time from conception to the child's birth;
3. If the child was conceived before 1 July 2005, he was living with the child's mother when the child was born; or
4. If the child was conceived after 1 July 2005, he was living with the mother at any time from conception to birth.

People other than parents can also be guardians of a child if they are appointed by the Family Court or are a testamentary guardian (which is where one parent dies and appoints another guardian of their child in their Will). If a child is not living with their parents, for example if they are living with their grandparents or other family members, usually that person will be appointed a guardian of the child if they apply to the Family Court.

Guardians have an obligation to consult with all of the child's other guardians when making decisions about the child's upbringing. This can cause conflict when parents have separated and are no longer on good terms and are not able to agree about decisions affecting the child's upbringing.

It is a common misconception that when parents separate the parent that has the day-to-day care of the child is the only one that can make decisions about the child's upbringing. This is not the case – even if one parent only sees the child once a week, a month or a year, the parent with the day-to-day care must still consult with the other over guardianship decisions.

If guardians cannot reach agreement over a guardianship matter they can receive counselling through the Family Court to try to resolve the matter. The Family Court provides up to six free counselling sessions. If, after counselling, parties have still not reached agreement over a guardianship dispute then they can make an application in the Family Court to have a judge make the decision for them. A judge will make the decision for the parties based on what he or she judges to be in the best interests and welfare of the children.

A common dispute that guardians face arises when a child has the same surname as their father but their father has not been in the child's life for a number of years. A mother will often want to change their child's name to their own surname as they believe the child does not really know their father and that the child identifies more with the mother's family. Hence they want them to have the same family name. Although a father may not be part of the child's life, the mother is still obligated to consult with the father and seek his permission to have their child's name changed. If a father will not consent to a name change or cannot be found then the mother will need to apply to the Family Court for an order stating that the child's surname can be changed.

Another common dispute that guardians face is when the parents have separated and one wants to move to another town or region with the child. If the other parent will not consent to the child moving then one of the guardians will need to apply to the Family Court to hear the dispute. At a hearing a judge will decide whether it is in the child's best interests and welfare to move towns or regions. It is important to remember that just because the parent wanting to relocate has the day-to-day care of the child this does not mean the Court will allow that child to move – there are a number of factors the Court will look at to make their decision.

Annabel Dennett is a lawyer in Govett Quilliam's family team. At Govett Quilliam we are experienced in all aspects of guardianship and can assist parents and guardians through the process. If you have any queries about guardianship, contact one of our family law specialists.



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