

GUARDIANSHIP OF MINOR CHILDREN

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Choosing and appointing a guardian for your minor children in the event of your death could be one of the most important decisions you make on their behalf. Our first inclination in planning for this possibility is to make financial provision for them, but appointing a legal guardian is just as important. The guardian/s will be responsible for caring for your children if you are no longer alive to do so.

In terms of our law, minor, below the age of 18, children do not have legal capacity. They are, therefore, not able to manage their own affairs and this makes the role of a guardian crucial.

Your appointed guardian is not responsible for providing for your children financially, so it is essential that you make provision for this during your lifetime. This can be done through life insurance policies or by ensuring that enough liquid assets are built up in your estate. Should you die, the guardian will then have sufficient funds to administer and manage on behalf of your children. If you have created a trust for the children's benefit, the guardian and trustees will administer it together until the children reach the age of majority, age of 18. You can also select another age at which you feel they will be able to manage the funds responsibly.

If you do not make provision in your will for a testamentary trust for the benefit of your minor children, the children's share in the estate will become the responsibility of the Guardian's Fund. This Fund is administered by the government and the guardian will have to apply to it when funds for your minor children are needed.

It is essential that you appoint a guardian in your will in the event of your death. Clause 27(1) (a) of the Children's Act, 38 of 2005 states that, 'a parent of a child may appoint a fit and proper person as guardian in the event of death of the parent'. If a guardian is not appointed in your will, your family members or friends will have to apply to the High Court of South Africa to be appointed as your children's legal guardian. This is not an automatic process so do not assume that it will happen.

Section 24 of the respective Act states that, 'any person having an interest in the care, well-being and development of a child may apply to the High Court for an order granting guardianship of the child to the applicant'. When considering a guardianship application, the court must consider:

- The best interests of the child;
- The relationship between the applicant and the child, and any other relevant person and the child;
- Any other fact that should, in the opinion of the court, be taken into account.



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If you have more than one child, from a psychological and emotional perspective, you may not want to separate the children to individual guardians. If the guardian already has children of their own, consideration must be given to whether they will practically be able to look after your children, in addition to their own.

Clause 25 of the Act further states, 'in the event that a non-South African citizen applies for guardianship of a child, the application must be regarded as an inter-country adoption for the purposes of the Hague Convention of Inter- County adoption'. Clause 45(3(d) states that, 'the High Court has exclusive jurisdiction over the departure, removal or abduction of a child from South Africa as upper guardian of all children'.

Appointing a guardian is a serious decision and you need to carefully consider all these factors when making your selection. If the guardian resides offshore, the above complicated, time-consuming and costly process will have to be followed. Should provision not be made in your will for funds to be held on behalf of the minors, application will have to be made to the Guardian's Fund when funds for the children's care are required.

If your appointed guardian resides offshore, where the children will reside and who will look after them from the time of your death until the process is finalised, must also be considered. The offshore guardian can only legally take your child abroad once your will has been finalised.

To summarise, the nomination of a guardian for your minor children is a tough decision, but probably one of the most important you can make on their behalf. Careful consideration must, therefore, be given to all the factors discussed here.



Is this something that you need to do?

Please remember that AFS can assist you in having your will drawn up by a professional. Speak to your financial advisor if you need assistance in this area.

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