FACTSHEET

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Guardianship of Children and Young People

When providing medical care to children, it is important to be aware of the rights of children's parents / guardians in terms of consent and access to records.

What is Guardianship?

Guardianship represents the collection of rights and duties in respect of a child, and guardians are responsible for the moral, intellectual and physical wellbeing of the child. A guardian has the right to make decisions on behalf of a child such as[1]:

- Deciding where the child will reside and with whom
- Deciding on the child's religious, spiritual, cultural and linguistic upbringing
- Consent to medical, dental and other health related treatment which requires a guardian's consent
- Providing consent under specific legislation e.g. passport applications, employment, taking evidence in criminal investigations
- Placing the child for adoption and consenting to their adoption

Guardianship should not be confused with custody (responsibility for the day to day care of the child) and access (right of a person who does not live with the child to spend time with the child).

Types of Guardianship

1. Automatic Guardianship

- **Mother**

The natural mother of a child, whether married or unmarried, is automatically a guardian of that child.

- **Married Father**

A child's father also has automatic guardianship if he is married to the child's mother; either before or after the birth of the child. Following a separation or divorce, both parents remain the child's legal guardians, regardless of whether one or both parents have custody of the child.

- **Unmarried Father**

A father who is not married to the mother of his child does not have automatic guardianship rights in relation to that child; even if his name is on the child's birth certificate.

An unmarried father can automatically *become* a legal guardian of his child if he has lived with the child's mother for 12 consecutive months, including at least three months after the birth of the child. The three months period does not have to take place directly after the birth of the child and can be fulfilled any time before the child turns 18. In these circumstances, the unmarried father can apply to Court for a declaration of guardianship to confirm that he has acquired joint guardianship rights.

[1] Section 6(c) Guardianship of Infants Act 1964 as inserted by section 40 of The Children and Family Relationships Act 2015

The cohabitation period can only be calculated from the commencement date of the Children and Family Relationships Act 2015. This means that guardianship will only be acquired automatically where parents live together for at least 12 months (including at least three months after the birth) after the 18 of January 2016.

2. Guardianship by statutory declaration

If both parents are in agreement that the father should become the child's joint guardian, they can complete a Statutory Declaration to that effect.

A Statutory Declaration is a formal document executed in front of a practising solicitor, Peace Commissioner, Commission for Oaths or Notary Public.

A separate Statutory Declaration must be made in respect of each individual child.

There is currently no central register for Guardianship Agreements so parents should keep a copy of any Statutory Declaration carefully.

3. Guardianship by Court Order

If the mother does not agree to the father becoming the child's joint guardian, the father can apply to the local District Court in order to be appointed joint guardian, regardless of whether his names appears on the child's birth certificate or not. The Court will make its decision based on the child's best interests.

A Court appointed guardian becomes a joint guardian of the child and their appointment does not affect the position of any existing guardian(s).

4. Non-parental guardianship

Under the Child and Family Relationships Act 2015, a Court can appoint a guardian where that person is:

- Married or civil partner to the child's parent, *or* has cohabited with the child's parent for over 3 years *and* has shared responsibility for the child's day to day care for more than 2 years.
- Providing the child's daily care for in excess of 12 months, where there is no parent or guardian willing or able to take responsibility for the child's guardianship.

5. Temporary guardianship

There is also provision for the Court to appoint a temporary guardian where the child's guardian is suffering from a serious illness or injury. Limits / restrictions may be imposed on the rights and responsibilities of a temporary guardian.

6. Testamentary guardianship

A guardian can appoint a testamentary guardian by will / deed, to act on his or her behalf in the event that the guardian dies before the child reaches the age of 18.

7. Guardianship acquired in other jurisdictions

The Child and Family Relationships Act 2015 provides that guardianship should be recognised when someone acquired the equivalent rights and responsibilities in another jurisdiction.

Parentage in donor-assisted human reproduction

The Child and Family Relationships Act 2015 clarified parental rights in cases of donor-assisted human reproduction. For the provisions of the Child and Family Relationships Act 2015 to apply, the following conditions must be met:

1. The donor-assisted human reproduction took place in a clinical setting
2. The birth mother and her husband/civil partner/cohabitee (known as the other commissioning parent) consented to the treatment and to becoming parents to the child born
3. The donor consents to not being legal parent of any child born as a result

Under the legislation, the birth mother will continue to be mother to her child and therefore an automatic guardian. In the case of an opposite sex couple, the husband of a birth mother to a donor-conceived child will be presumed father (and therefore an automatic guardian) even if they have no biological link to the child.

The legislation allows for declarations of parentage to be made in relation to children born under these circumstances.

Where a same-sex couple has a child through Donor Assisted Human Reproduction (not including surrogacy) after 4 May 2020 and has complied with the provisions of Part 2 of the Children and Family Relationships Act 2015 (ie, they have used a recognised fertility clinic and have signed all the relevant consents and declarations), the spouse, civil partner or cohabitant of the mother will be the legal parent of the child. In this situation, the spouse or civil partner of the biological parent will automatically be a legal guardian. A cohabitant will be a legal guardian if they fulfil the residence requirement (i.e. have lived with the child's mother for 12 consecutive months including at least 3 months with the mother and child following the child's birth).

There is a national Register for donor conceived children which includes details of their parents and the donors involved and children will be entitled to access information regarding their parentage from the age of 18 onwards. However, there is no obligation set out under the Act to tell children they were conceived using donor gametes.

Surrogacy[2]

Where a child is born through surrogacy, the surrogate mother is the legal guardian at birth.

If the commissioning father's sperm was used in the surrogacy procedure, he may apply to the Court for a declaration of parentage. Once granted, this would immediately entitle him to apply to the Court for guardianship.

The commissioning mother, or a commissioning father whose sperm was not used in the procedure, may apply to the Court for legal guardianship once she/they have fulfilled the legal requirements, ie:

- If he or she is married to or in a civil partnership with, or has been cohabiting for at least 3 years, with the child's parent and has shared parental responsibility for the child's day-to-day care for at least 2 years, or
- If he or she has provided for the child's day-to-day care for a continuous period of more than 12 months and the child has no parent or guardian who is able or willing to act as guardian.

[2] Adapted from HSE National Consent Policy, March 2022.

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Children in Care

Foster parents are not guardians. However, some foster parents may be given enhanced rights by a court in special circumstances where they have fostered the child for at least five years. In all other cases, foster parents do not have the same rights as guardians.

When treating a child in care, doctors should establish the nature of the care order. Where a child is in care on foot of a statutory order, an authorised person from the Child and Family Agency (Tusla) (usually a principal social worker) can consent to any necessary assessment, examination, medical or psychiatric treatment on behalf of a child in care. The child's parents or guardians should be consulted where possible. If a child is in care subject to a voluntary or an interim care order, consent to treatment must be given by the child's parent / guardian or by direction of the court.

Proof of Guardianship

It is good practice to protect the confidentiality of patients by insisting on proof of guardianship and formal identification before discussing any patient information with a patient's parents.
Proof of guardianship would include one of the following:

- A marriage certificate showing that the father was married to the child's mother;
- A copy of the Statutory Declaration by the child's mother;
- Declaration from the Court that the "cohabitation period" test has been satisfied;
- A Court Order.

Recording Guardianship in your Practice

When registering a new child patient, you should make appropriate enquiries of the child's parent or guardian.

Frequently, there are misunderstandings as to whether an unmarried father is a guardian. Unfortunately, where statutory declarations are signed by the parents, there is no central register for these declarations and the parents simply keep copies of the declarations themselves.

To avoid confusion, if you are told that a guardian has been appointed to a minor patient then it is good practice to ask for a copy of the court order or declaration and keep it on the child's records for future reference.

Section 4.2 of the National Consent Policy, published by the HSE (available on the HSE website), states that:

"Where a child accesses a health or social care service in the company of an adult, the adult should be asked to confirm that they are the child's parent and/or legal guardian. If the adult confirms that they are the child's parent and/or legal guardian, this should be documented in the child's healthcare record. If the adult is unsure as to what this means, the healthcare worker should refer to the relevant part of this policy and provide an explanation based on this. If the adult indicates that they are not the child's parent or legal guardian, contact should be made with the child's parent and/or legal guardian in order to seek appropriate consent.

If the accompanying adult has a letter from the parents confirming that they have permission to provide consent on behalf of the parent, it is still good practice to attempt to make contact with the parent.

Sometimes the parent or legal guardian is unable to attend but is willing to provide consent by phone or electronic means. In these circumstances, the healthcare worker can accept consent obtained from parents or legal guardians by phone, electronic means or otherwise than in person. As where the parent/legal guardian presents in person, the person should be asked to confirm that they are the parent/legal guardian of the child and if they confirm that they are, this should be recorded in the child's healthcare record. As a general principle, where practicable this conversation should be witnessed by another healthcare worker."

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Disagreement between Guardians

Where guardians cannot reach agreement on important issues concerning the child they can consider mediation and/or collaborative law and/or can apply to the Court for direction. For example, where there is disagreement about a medical treatment, a common example being childhood vaccinations, one guardian can apply to the Court for an Order dispensing with the need for consent of the other guardian. A Court can use its discretion to dispense with a guardian's consent if it is found to be unreasonably withheld; the Court will make its decision based on the child's best interests.

Consent to Treatment of a Child

The consent of a parent or guardian is required to treat a patient under the age of 16. In practice however, it is appropriate to seek consent from a child where they have the capacity to understand the nature and implications of the proposed treatment or procedure. Even when children lack the capacity to give consent, they should still be involved in the decision-making process.

Where there are two or more parents or guardians with appropriate rights who share parental responsibility, it is usually sufficient for one parent or guardian to give consent to day to day treatment. However, where decisions may have profound and/or irreversible consequences, both or all parents or guardians should be consulted. The more complex the decision, or the more serious the situation, the greater the need to include all parents and guardians in your discussions.

The HSE National Consent Policy states:

"Where both parents or all legal guardians have indicated a wish and willingness to participate fully in decision making for their child, this must be accommodated as far as possible by the service provider. However, this also imposes a responsibility on the parent or legal guardians to make this wish known to the service provider in advance, and to be contactable and available at relevant times when decisions may have to be made for their child. If one parent or legal guardian is not contactable or available at the required time, and the intervention is in the best interests of the child, the intervention can proceed on the basis of the consent of one parent only."

If a parent or guardian and a child are in agreement about a medical decision then this should not present a problem. However, if parents, guardians, a child or a medical practitioner are in disagreement then care should be taken. Where there is reason to believe that the parents or guardians may not be in agreement with one another, you should always seek the consent of all parents or guardians.

In all cases, the best interests of the child must be the paramount consideration.

Medical Council Guidelines

Paragraph 18.1 of the Medical Council *Guide to Professional Conduct and Ethics for Registered Medical Practitioners* (available on the Medical Council website) provides for treatment of minors and advises:

> *18.1 When treating children and young people, your primary duty is to act in their best interests. You should involve them as much as possible in discussions about their healthcare, give them information suitable for their age, listen to their views and treat them with respect.*
>
> *18.3 Where the patient is under the age of 16 years, the parent(s) or guardian(s) will usually be asked to give their consent to medical treatment on the patient's behalf.*

It is generally accepted that children under the age of 16 years should be involved in healthcare decision making but that the decision making rests with the child's parents, bearing in mind the paramount responsibility to act in the patient's best interests.

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The Ethical Guide provides some guidance in relation to conflict between the interest of a parent and child and states at paragraph 18.5 that:

> *If a young person* (generally considered to be a person under age 16) *refuses to involve a parent/guardian, you should consider the young person's rights and best interests, taking into account:*
>
> - *the young person's maturity and ability to understand the information relevant to the decision and to appreciate its potential consequences;*
> - *whether the young person's views are stable and reflect their core values and beliefs;*
> - *whether the young person's physical or mental health, or any other factors are affecting their ability to exercise independent judgement;*
> - *the nature, purpose and usefulness of the treatment or social care intervention;*
> - *the risks and benefits involved in the treatment or social care intervention;*
> - *any other specific welfare, protection or public health considerations, covered by relevant guidance and protocols such as the 2011 Children First: National Guidelines for the Protection and Welfare of Children (or any equivalent replacement document).*

Accessing Records

As a general rule, parents who are legal guardians of their children have a right to request access to their children's medical records.

If it is felt that the minor is sufficiently mature to understand the implications of the release of his or her records, then his or her consent should be obtained before allowing access.

You should be aware; however, that parents/guardians may have access to a child's records up to 18 years and it is, therefore, important for the child to understand that their confidentiality cannot be guaranteed.

If the patient is too young and/or lacks capacity to consent to the release of the records, then the records should only be released when you are satisfied that it would be in the patient's best interests to do so. In situations where it may not be in the child's best interests to release the information, then you are advised to err on the side of caution and consult Medisec for further advice.

If you are faced with a potential involvement of a guardian in a child's treatment decision, it is important to firstly clarify the precise role of the guardian and whether they have the necessary rights to consent on behalf of the child. If a doctor is aware that a child's guardians do not both agree with certain medical treatment, it would be advisable to speak with both guardians together if possible to go through the options and answer any questions they may have. If agreement is not possible, a doctor should not proceed with treatment and it may be necessary for the court to make a decision regarding treatment.

Above all else, it should be remembered that your paramount responsibility is to act in the minor patient's best interests. Please contact Medisec if you have any queries.

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