

## CHILDREN (GUARDIANSHIP) (PRACTICE AND PROCEDURE) RULES, 2024

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On 4th October 2024, the *Children (Guardianship) (Practice and Procedure) Rules, 2024* (“**the Rules**”) were published in the *Kenya Gazette* by *Legal Notice No. 159*. The Rules outline the procedures for guardianship of children under the *Children Act (Cap. 141)* (“**the Act**”).

Overall, the Rules are designed to protect children’s welfare while providing a clear procedural framework for guardianship applications in Kenya, emphasizing the necessity of acting in the child’s best interests throughout the legal process.

A summary of the key features of the Rules is provided below.

### Eligibility for Guardianship

Any child who is a resident of Kenya is eligible to be placed under guardianship whether or not they were born in Kenya or are a Kenyan citizen.

### Qualifications of Guardian

In order to qualify for appointment as a guardian a person must:

- be a Kenyan citizen;
- be a person in respect of whom it is shown to the satisfaction of the Children’s Court to be of high moral character and integrity, and who is capable of exercising proper care and guardianship of a child;
- not be a person with mental illness as determined under the Mental Health Act (Cap. 248); and
- not have been convicted of any of the offences specified in the Third Schedule to the Act which include sexual related offences, robbery, indecent assault on a person under the age of 16 years or involving the infliction of grievous bodily harm, and drug trafficking.

A person who is not a relative of the child cannot be appointed to be the sole guardian unless exceptional circumstances exist, having regard to the welfare and best interests of the child.

### Modes of Appointment as a Guardian

A guardian can be appointed:

1. by the Children’s Court:
  - a. as prescribed under the Rules; or
  - b. on application by any person in accordance with the customs, culture or tradition of a specific community.
2. As a testamentary guardian through a testamentary instrument made by a parent or a guardian of the child.

The guardian can be appointed in respect of a child, the child’s estate or both.

### Court Procedures

The Rules set out the specific forms and procedures to be followed for various guardianship-related applications to the Children’s Court including:

1. Applications for appointment as a guardian in respect of a child, a child’s estate or both.
2. Applications for appointment as a testamentary guardian through a will or deed.
3. Applications for appointment as a joint guardian.
4. Applications for leave to remove a child from Kenya.
5. Applications for the extension of the appointment of guardian beyond the child’s 18th birthday.
6. Applications for the termination of guardianship.
7. Provisions related to the service of court process and pre-hearing proceedings.

8. Provisions relating to hearings.
9. Provisions relating to orders.
10. Provisions relating to the procedure after issuance of orders.

### **Provisions Relating to Orders**

The Children's Court considers various factors before issuing a guardianship order, including the child's views, family relationships, and the guardian's suitability.

The Children's Court can issue general or limited guardianship orders, specifying the duties and responsibilities of the guardian.

General guardianship orders last until the child's 18th birthday, while limited orders have a specified duration.

Parties can apply to the Children's Court to set aside, amend, or vary guardianship orders.

### **Mandatory Registration**

The introduction for mandatory registration of a guardian is a key feature under the Rules.

Any testamentary instruments appointing a guardian must be registered with the Children's Court within 30 days of execution of the instrument. The Children's Court may for sufficient reason extend this period.

If a testamentary instrument is subsequently amended by adding or removing a guardian or revoking an appointment, the document must be presented for registration within 14 days of its execution in order for the instrument to become effective.

In instances whereby the maker of the instrument passes away before registration of the instrument is concluded, the instrument may be submitted for registration within 30 days of their death by the deceased's appointed guardian, surviving parent or advocate.

The registered instrument shall be confidential and shall not be disclosed to any person without a court order.

### **Removal of Children from Kenya**

A guardian who is not the father or mother of a child requires court permission to remove the child from Kenya.

The Children's Court shall grant leave to remove the

child having regard to the urgent needs of the child at the time that the application is made, the need to protect the child from child trafficking and other harmful practices, and the best interests of the child.

The guardian is also required to produce the child to the Children's Court upon return to Kenya.

### **Conclusion**

The role of a guardian is to act as a legally appointed caregiver and decision-maker for a minor child. The guardian is to make decisions, which are in the best interest of the child at all times.

The Rules have introduced stringent obligations and requirements on the appointment, eligibility, duties and registration of guardians which persons ought to be aware of when appointing or changing their guardians. For persons who have already appointed guardians through a testamentary instrument such as a will or codicil or a deed, they will need to consult an advocate to advise them on what steps need to be taken in order to comply with the Rules.

If you require any further information or clarification, please contact us.



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