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Choosing a Guardian for Your Minor Children

by Michael Bond, Esq.

For many parents, choosing who will raise their minor children if both parents die is not only disturbing to think about, but is often the most difficult decision they have to make when planning their estate. However, it is also one of the most important. Failing to make and document the decision can lead to outcomes the parents never would have wanted for their children.

This article first discusses the factors you should consider when making the guardianship decision, and then outlines how a well-considered estate plan can help ensure that your children are raised by the people you want to raise them, that their needs while still minors are provided for, and that your assets pass to your children in a responsible way once they reach adulthood.

Considerations When Naming a Guardian

When a parent dies and leaves behind a minor child, the surviving parent usually automatically becomes the child's guardian (although there are special considerations for same-sex and unmarried couples, discussed below). The issue of guardianship primarily arises when both parents die or become incapacitated. Admittedly, it is a difficult thing to contemplate, but it can happen, and if it does happen what can be more important than making sure your children are raised well and loved by someone you trust to provide for them?

Some of the questions you should ask yourself when choosing a guardian are:

1. Whose parenting style and values most closely match your own? The importance of this consideration will vary from parent to parent, but it is important to decide to what extent a prospective guardian should share your values, including religious beliefs.
2. Who is most able to take on the responsibility of a caring for a child — emotionally, financially, physically, etc.? Oftentimes, parents of a minor child assume one set of the child's grandparents will be ready, willing, and able to assume the role of guardian. However, it is important to discuss these factors in advance with the prospective guardians—whoever they are—to make sure raising a child is a responsibility they want to take on, and one they can handle. Additionally, will you be able to provide enough assets for the guardians to raise your child? If not, do the prospective guardians have the means to do so on their own? Are they mature enough to raise a child? Do they have the physical stamina you know from experience is important to safely raising a healthy and happy child?
3. Does the child feel comfortable with the prospective guardian already? Would your child need to move far away? These considerations go hand in hand because losing both parents is

already a traumatic event for a child. Further trauma can be minimized if the child's new guardian is someone the child is already comfortable around, and if the child won't have to change schools and make new friends in a strange place.

Once you have made a choice, or narrowed down your options, you should discuss it with the prospective guardians to find out if they are interested in raising your child if you are not able to. You should be candid about your wishes for your child and the responsibilities involved, and also make it clear that you want them to be candid with you, too, and that you won't be offended if they do not want to assume the role.

Another thing to consider is alternate guardians, and under what conditions, if any, the alternate guardian would be preferred over the first guardian you designate. Obviously, the death or incapacity of the first guardian would trigger the appointment of the alternate guardian. But what if you named your parents as initial guardians and one of the parents dies or becomes incapacitated? Or, perhaps you named your sibling and his or her spouse as initial guardians. What if they divorce? Would you still want them to be co-guardians? Would you want a sibling-in-law raising your child if your sibling died? You should think through these issues, and your estate planning attorney can help you do it.

How Will My Estate Plan Provide for My Minor Children?

A comprehensive, well-designed estate plan will look at several factors, including who will serve as guardian upon the death of both parents, who will serve as guardian should both parents be alive but become temporarily or permanently incapacitated, and who will look after the deceased parents' estate so that it is available first to provide for the child's upbringing and then, upon reaching adulthood, that it passes to the child in responsible, age-appropriate way.

One thing your estate planning attorney should do is prepare a Designation of Guardian document to name a guardian in the event of your incapacity. A Will is not adequate in this instance because it only takes effect upon your death. For any circumstance short of death, the Designation of Guardian document is needed.

Next, your attorney should make sure your Will names, as an added safeguard, the surviving spouse or co-parent as guardian, with any subsequent guardians to assume the role only upon the death of both parents. If you or your attorney feel a court might take issue with your designated guardians, you can write a letter of explanation to keep with your Will that states the reasons for your choice. Because a judge must always rule in the best interests of the child—a subjective standard indeed—a letter of explanation can be helpful to the judge in reaching a decision. Such a letter can be especially important in situations where a same-sex couple co-parents a child, even when one of the partners is still alive. In such situations there are also other steps you and an estate planning attorney sensitive to and knowledgeable about same-sex considerations can and should take to help ensure your relationship—and guardianship decision—are recognized and respected by a court.

Because a minor cannot inherit outright before reaching adulthood, your Will should direct that a trust be created upon your death to hold and administer your estate until your child is of suitable age to receive your estate outright. In recognition of the

expenses associated with raising a child, the trust will also direct that funds be dispersed generously to aid your child's guardian in providing for your child's well-being, education, etc. The trustee of this trust can, but need not be, the same person who serves as guardian. Some people designate a different person (or entity, such as a financial institution) to serve as trustee, because the guardian—while well-suited to raise the child—might not be the best money manager; sometimes a separate trustee is named as a kind of check on the guardian—with one person being in charge of raising the child, and the other being in charge of making sure the child is provided for financially in a fiscally responsible way. An estate planning attorney can help you think through the different options.

Once your child reaches adulthood, he or she can inherit. However, while 18 might be the age of majority, in most cases it is not the age of *maturity*. How your child receives his or her inheritance is your decision, but one route to consider is establishing a trust that will allow the trustee to distribute funds to your child at the trustee's discretion—for education or other reasonable, responsible purposes—from age 18 to 30, while paying out a certain percentage of the trust's principal at various set intervals, such as every two years beginning at age 22, with the entirety being paid out by age 30. You and your estate planning attorney can discuss an appropriate payout schedule depending on various factors such as your child's sense of responsibility, financial obligations, health, or other special needs. In the case of multiple children, you might wish for one child to receive trust assets on one schedule, with another child receiving assets on a different schedule.

This article has highlighted some of the basic considerations involved in a relatively straightforward situation. As mentioned above, additional measures should be taken by same-sex and unmarried couples to provide for guardianship of their children. Even for a heterosexual married couple with children, various complexities might emerge. To name a new examples: What if you don't think your family will like your choice of guardian? What if you don't like your choice's spouse? What if you have children from previous marriages? These and other circumstances can be met head on with the help of an estate planning attorney who is interested in learning about the particulars of your family and financial situation, and who knows how to create a plan for the guardianship of your children that reflects your wishes and is constructed with the mechanisms necessary to carry out those wishes. Although the unpleasant nature of the decision might make it difficult to get the process started, the peace of mind you'll have once your plan is in place will give you invaluable peace of mind.

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