Estate Planning

Naming a guardian for minor children is an important aspect of estate planning.

By Eva Stark, JD, LL.M.

Perhaps the most critical component of the estate plan of parents with minor children is the selection and designation of a "guardian." The guardian is generally responsible for raising and caring for minor children—with responsibilities similar to that of a parent—if the child's parents become incapacitated or die prematurely.

If no guardian is designated, and no family member or friend steps forward to become guardian, the children will typically be placed under the care of the state or the foster care system until they reach the age of majority. Where no guardian is designated and multiple family members seek appointment simultaneously, chaos and family disharmony may arise, making an already stressful situation for the children even more difficult.

The following overview of guardianship provides issues that parents should consider when making this important decision.



Nomination vs. appointment

A guardian is typically nominated in the parents' wills or other estate planning documents. However, just because a guardian is validly nominated does not mean that such person will actually be appointed. The nomination of a guardian by the parents serves as a suggestion to the court—an expression of the parents' wishes—which generally carries substantial weight with the court but is not determinative. The court will appoint a guardian based on its own determination of the children's best interests considering various factors that include the parents' expressed wishes.

Guardian vs. conservator

While the guardian has physical custody of the child, cares for the child, and raises the child, the "conservator" manages the child's assets. This is generally accomplished under court supervision with periodic reporting to the court regarding the child's finances. The court may also require that a bond be posted by the conservator. Often, the same individual is appointed both guardian and conservator, but in some situations, it may be beneficial to nominate different individuals for such roles. Where different individuals are appointed guardian and conservator, consideration should be given as to whether the two individuals would work well together.

Selection

Evaluating who would be the best guardian is not easy. The parents' closest friend or the child's grandparent may not necessarily be the best option for guardian. A potential guardian's experience in parenting children, living situation, career demands, health, age, religious and moral beliefs, financial situation, etc., are all important considerations.

Parents may want to ask themselves:

- Is the desired guardian good with children? Does he or she have a demonstrated ability to raise children?
- What is the desired guardian's home, family, or living situation? Would that be desirable for the children?
- If the desired guardian is not local, might relocation of the child be desirable? Is a move to another state or country envisioned? State laws differ regarding the moving of minors out of state. If an out-of-state or out-of-country move is being contemplated, the parents should specifically explore the risks and implications of their choice of guardian with an attorney to ensure that steps are taken to maximize the chance that such parental choice would be respected.
- Would the desired guardian's health, age, career demands, etc., limit his or her ability to care for the child?
- What are the guardian's moral or religious beliefs?
- For older children, what are the children's wishes as to guardians?

No matter who is selected, it is critical for parents to discuss their intent with their desired guardian to ensure that he or she is willing and able to take on the responsibility should the need arise.

Nominating alternates

It is generally recommended that parents nominate at least one alternate to their guardian of choice. If the person nominated is unable or unwilling to serve and no alternate is nominated, the court will appoint an alternate without parental input.

There is no limit to the number of alternates that can be nominated—typically in successive order—and it is not unusual to have two to three alternates.

Parents also should periodically review their nominations of guardian to ensure the nominees continue to meet the parents' goals and desires as circumstances change over time.

Letter of instructions

Many practitioners also recommend that a nomination of guardian include instructions as to the raising of the children. If the parents have specific preferences as to what school the children should attend, extra-curricular activities that they wish the children continue, religious preferences, and so forth, including a letter of instructions can give the guardian a clearer understanding of what the parents wanted.

Acting sooner rather than later

It is easy for young and healthy parents of minor children to think that the unexpected will not happen to them. While there is much discussion in the estate planning arena about minimizing taxes or passing assets as desired, ensuring the safe, stable, and happy upbringing of minor children is fundamentally more important.

Parents whose estate plan has yet to incorporate a formal nomination of guardian or whose nomination may be outdated should explore the issue with their attorney and other professional advisors sooner rather than later. This can help ensure that, should the need arise, a guardian is appointed with parental input as expeditiously and smoothly as possible.



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