

Planning For The Unimaginable: Considerations In Setting Up Guardianship For Your Minor Children*

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Introductions

One of the most common reasons that younger people engage in estate planning is to insure that their children will be taken care of in the event of a tragic loss of both of the parents. Turning this impulse into a workable estate plan presents challenges to the parents and to the party assisting with the estate plan. Many attorneys pass quickly over this portion of the process, emphasizing the small likelihood of something happening to both parents. But such an oversight minimizes one of the principal reasons that their clients have undertaken the estate planning process, and can lead to significant problems down the road. As with the rest of the estate planning process, success depends on a thorough understanding of the laws applicable to guardianships and careful drafting to implement the clients' wishes. Whether you are an attorney helping clients through this process or a parent making these decisions yourself, considering the following issues will result in a better estate plan.

Guardianship Statutes

There are two general categories into which all state guardianship statutes fall. The first are those states which require a court to approve and appoint the guardian. Courts in these states, including Illinois, will give "due regard" to appointments made in a will, but they will also consider a host of other factors. The second category includes those states which will appoint the guardian designated by the parents. Even in these states, the courts will reject an appointment if it is not in the best interests of the child. The principal procedural difference between the two categories is that a court will immediately issue "letters of guardianship" in the latter case. A sub-category exists which also includes Illinois. Certain states permit a minor fourteen years old or older to object to an appointment.

Many estate planners neglect to inform their clients of these distinctions. In doing so, they may leave the clients with an improper understanding of what they have accomplished during the planning process. As parents or as attorneys, one should keep in mind the real ramifications of the choices one makes in an estate plan. Only then can all the parties involved be confident that they have made the best decisions with respect to this sensitive and important issue.

Types of Guardian

Most states, including Illinois, permit the separation of the role of guardian into two distinct offices. The guardian of the estate (also referred to as the guardian of the property) is the individual charged with the responsibility of managing a minor's

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property. The guardian of the person is the individual given legal custody of the minor. Choosing whether or not to sever these roles by appointing two separate individuals is a critical component of the planning process.

Choosing a single person to serve both roles is obviously a simpler and more streamlined solution. Many estate planning specialists recommend this structure under most circumstances. There are times, however, where separating the roles will provide a solution that suits the needs of the child. Most commonly, clients may feel that the person best suited to raising a child in their home may not be financially sophisticated enough to handle the task of administering the child's trust. On the other hand, what may look like a panacea from a distance can also lead to problems. Placing family members into these separate roles can sometimes lead to tension or outright hostility between the parties. Only careful deliberation by the clients, with the guidance of their counsel will yield the proper solution for their particular circumstances.

Factors to Consider When Choosing A Guardian

Among younger clients, there is no single issue which causes more discussion, consternation, and sometimes outright conflict, than choosing whom to appoint as guardian. There are three common problems faced by families making these decisions. The first is a lack of options. Family size continues to shrink and more families find themselves scattered around the country, leaving fewer attractive options for guardians. The second problem is the inverse of the first, too many quality options with too little to distinguish among them. Finally, there are those families faced with making a decision that generates conflict between the clients. Each parent often advocates on behalf of someone from their side of the family, and tensions can escalate dramatically as they work this out. A compromise is out there.

Each of these three scenarios poses its own problems, but objectively looking at certain factors can help families and lawyers arrive at a satisfactory conclusion. Exercises such as ranking the options from best to worst in each category, writing pros and cons and even role playing can help take some of the heat out of the discussion.

1. Be inclusive when first making a list of possible guardians. Refusing to consider someone out-of-hand can lead to immediate tension. Furthermore, there may be a less than obvious choice who would be an excellent candidate.
2. Do not rule someone out purely on the basis of their current financial status. Keep in mind that the estate plan being drafted is going to provide substantial support for the minors. If someone is an ideal guardian for other reasons, there are drafting tips (discussed below) available to make sure that it can work financially.
3. Consider the age and health of the guardian. Younger parents often reflexively want to choose their parents as the guardian. That is often a valid option, but one must consider their age and the age of the children.

4. Consider the number and ages of any children in the guardian's home. This is particularly important for parents with more than one child.
5. Evaluate the lifestyle of the household as well as the individual. A candidate may be a nurturing and capable parent, but may have extensive obligations at the office or other activities outside the home. One cannot expect this to change simply because they have been appointed as a guardian.
6. Establish criteria for evaluating the spiritual or religious values of the candidates. Explicitly stating the core values of most importance to the parents can help evaluate the candidates they are considering. Don't emphasize piety at the expense of practical values.

It is most important to keep in mind that there is no perfect candidate. Nobody is ever as qualified as the parents themselves, and planner and parent alike must keep in mind that they are just trying to arrive at the best option. Considering the foregoing issues should help make that process somewhat easier, but it is still a difficult and emotional process.

Getting The Most Out Of The Estate Planning Process

There are a virtually infinite number of drafting options and tools available to make sure that all of the issues which confront parents with respect to guardianships are addressed to their complete satisfaction. Nowhere else in the estate planning process is more ripe for cultivation through the imagination of the clients and the creativity of the planner. Creating a workable and satisfying guardianship framework involves many components.

First and foremost is the need to provide for successor guardians. While this is particularly critical in the scenario which finds a child's grandparent being appointed guardian, it is essential to make such provisions in every case. Failing to do so could undermine the entire process, leaving the courts without direction as to the parents' wishes.

Do not overlook the need to provide for the guardian. In addition to the awarding of stipends directly, provisions may be drafted which allow distributions to the guardian for childcare and household expenses, as well as the costs of improved housing. Keep in mind that the clients are adding immediately to the family of the guardian, and such an addition is not without its costs. One general method for making sure that a guardian does not suffer undue hardship is to authorize distributions for any expense which the guardian would not incur but for his or her role as guardian.

It may be beneficial to provide that the client's home be maintained as the residence for the children and the guardian's family. Again, this is the sort of arrangement that should only be created after careful analysis of the particular client's situation as well as discussion with the potential guardian.

Directions given to guardians with respect to the education of the children may be general or specific. Objective standards, such as state school report card rankings, can and should be used wherever possible. Religious education should be considered as well.

Conclusion

The priorities and goals of parents undertaking this process are many and varied. Fortunately, there are myriad tools available to make sure that client and planner are able to meet those goals. The factors listed above will help the client choose the right guardian, and the drafting tools discussed herein demonstrate the manner in which a plan can be tailored to every need. Planning for the worst case scenario is never a pleasant exercise, but by considering these topics it can be made easier and, in the end, a relief to parents.