

**An Estate Planning Blind Spot:
Choosing Guardians for Minor Children**

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A. INTRODUCTION

For parents of minor children, deciding who should be guardian for the children¹ in the event of the parents' untimely death is one of the most difficult estate planning choices they must confront. In many cases the decision can be so difficult and divisive that the parents either procrastinate or find themselves deadlocked, unable to agree over a suitable candidate. Paralysis over this issue is among the reasons that a majority of American parents of minor children have no wills.

The choice of a guardian is, however, one of the most important aspects of these parents' estate plan. If called upon to serve, the ideal guardian will oversee the upbringing of the children by providing a safe and loving home. The guardian will serve as an adult role model, providing supervision, encouragement and discipline as needed. He or she will attend to each child's social and intellectual development, helping the child through the trials of adolescence and beyond, assisting with educational and career decisions, and generally supporting the child on the road to becoming an independent adult.

Despite its importance, the careful crafting of guardianship provisions in wills and revocable trusts are often overlooked by estate planners who are apt to focus more attention on things like tax avoidance. This is unfortunate; a parent will lose far more sleep agonizing over the welfare of their possibly orphaned offspring than the risk of forfeiting a unified credit.

This article offers information and options that an estate planning attorney can use to provide more meaningful counsel to clients on:

- (i) New Hampshire law regarding the appointment and supervision of guardians of both a minor's person and estate;
- (ii) factors the client should be encouraged to consider in choosing among guardianship candidates, and
- (iii) related economic and financial planning issues.

In appendices to be posted with the online version of this article (See Publication Archives at www.nhbar.org) language is provided for insertion to the clients' documents to give the chosen guardian sufficient guidance and financial wherewithal to perform critical guardianship duties in an informed manner and without undue financial stress or concerns about conflicts of interest.

In light of my purpose to aid New Hampshire attorneys, the balance of this article will be directed toward a hypothetical client: a parent or married couple with one or more minor children.

**B. PARALYSIS: A NATURAL RESPONSE,
BUT A POTENTIALLY COSTLY ONE**

If you are inclined to avoid the issue completely and neglect this aspect of estate planning, consider the toll on those you most want to protect —your children:

1. **Someone you dislike could end up as guardian.** Unless you state your preferences, a judge could appoint anyone who applies and who seems appropriate for the job.²

2. **The guardianship hearing might be contested.** More than one applicant may have to litigate the issue,³ thus setting the family up for an expensive dust-up which will cost everyone but the lawyers.

3. **Or the worst possible scenario: no one applies, leaving the children to be left with a reluctant or unsuitable family member.** Or they may end up in foster care — an uncommon result but not without precedent (look what happened to Cinderella).⁴

C. IMPORTANT CONSIDERATIONS IN CHOOSING SUITABLE CANDIDATES.

1. **The desires expressed in the will are non-binding but are almost certain to be respected.** Generally, if you are married, you will express your preferences as to guardian in your wills.⁵ Under the laws of roughly half the states, a parent's nomination is binding and the court has no discretion to overturn it.⁶ In New Hampshire and the other states, however, a probate judge can disregard the parents' choice if, after a hearing, the court determines that the chosen guardian is unfit or unsuitable.⁷ The probate courts have a protocol for background checks on prospective guardians — both criminal records' checks conducted by the New Hampshire State Police and a search of the abuse and neglect registry maintained by the Division of Children, Youth and Families (DCYF).⁸ The court is required to take into account the minor's preference and "give it such weight as under the circumstances may seem just".⁹ If one or more of the minor children is over age 14 the presiding judge will give particularly careful consideration to their expressed desires.¹⁰

Thus, as a practical matter, the court will give first consideration to the individual nominated by your will. But be aware, however, that there is no absolute guarantee that this choice will be carried out.¹¹

2. **Make a list of the criteria most important to you.** Consider the case of a client of ours whom we will call "Mary". Mary was a divorced mother and primary custodial parent of her minor son "John" who was then age eight. Mary characterized as "frosty" her relationship with her ex-husband Don (John's father). Still, she and Don were able to put aside their differences to cooperate in choosing a guardian to replace them if they both should die.

To start, Mary and Don each made lists of the criteria they felt were most important before meeting to go over candidates. She told us that the process "forced me to consider what was most important to me concerning how John might be raised in my absence". Making the list also helped rationalize an exercise which might otherwise have been driven by emotion. The list Mary and Don made was confined to candidates in two-parent households with no more than three children who were close in age to John; those who were economically independent and had a standard of living similar to Mary's; parents who in the raising of their own children demonstrated that they shared Mary's and Don's religious convictions, value system and child-rearing philosophy, and those who lived nearby so that John would not be separated and removed from his school, social groups, sports, etc.

3. **Try thinking unconventionally.** Many people are instinctively inclined to name their siblings. But you also can consider close friends, neighbors — even the child's

grandparents if they are relatively young (more on the grandparents later).¹² Some name an adult child to look after his or her minor siblings. Beware, however, that this can often be unfair to both the caregiver and the minor children — if, for example, the oldest son is chosen and he has just entered college only to inherit the responsibility for his little brother and sister. This possibility of naming an adult sibling has become increasingly rare in today's smaller families. There is less likelihood of a significant age differential between the oldest and the youngest children. But it can be a good solution in the right circumstances. One concern regarding this type of arrangement is each minor child's perception of the older sibling's moral authority (a factor which should be easy for any parent to assess).

4. **Consider separating the nurturing and financial functions.** Some people are great at raising kids but not so good with money, or vice versa. There are two types of guardianships available for minors: a guardian of the "person" responsible for the care, custody and rearing of the child;¹³ and a guardian of the child's "estate", responsible to manage any funds owned by or left to the child.¹⁴

Fortunately, you need not find someone who can both nurture the children and manage the funds.¹⁵ Naming separate people to handle the child-rearing and the money will often end an impasse between partners who disagree over who is best among a list of candidates. Such deadlocks often stem from a lack of understanding of the very different parenting and financial roles, and the couple's mistaken assumption that the same person must perform both of them. Even if all of your candidates are good at both, you might still want to name someone other than the guardian as manager of your child's money to avoid the possibility that the guardian may get into trouble for commingling personal assets with guardianship funds – an act of prohibited "self-dealing" and a breach of the guardian's "fiduciary" duties to the child.¹⁶

Note also that the primary financial manager need not be a probate court-appointed-guardian of the child's estate. We encourage most of our clients to name a separate trustee under a revocable trust agreement to serve as both the court-supervised guardian¹⁷ of the child's estate¹⁸ and non-court supervised trustee of the children's trust.¹⁹ This avoids intrusive and expensive probate court supervision of most (if not all) of the finances, and creates a system of checks and balances over how the money is spent. It also requires the personal guardian to make a case to a third-party trustee to commit the children's trust for unusual expenditures.

The "pour over" revocable trust agreements we prepare for parents of minor children often allow the trustee to expend trust funds not only on the children directly, but also for the benefit of the guardian's household and the guardian and the guardian's children if necessary to create a harmonious, integrated "blended" family. This avoids the situation where your trust might allow your children travel, recreational and education opportunities unavailable to the guardian's children, effectively creating a first- and second-class citizen structure within the family. [Examples of such provisions are posted as Appendices A and B in the online version of this article.]

5. **Avoid the "separate share" approach and opt instead for a "single family pot" trust arrangement.** Another feature of our revocable trusts prepared for parents with multiple children, some or all of whom are minors: we design the children's trust as a "pot" trust from which the trustee may make equal or unequal distributions in his or her discretion among the children from time to time, according relative to need and not strict

equality.²⁰ The alternative would be immediately to create a separate equal share of your property for each child, and administer that share exclusively for the benefit of the child for whom it was set apart to the exclusion of the other children.

The disadvantage of the separate share approach is that it can effectively result in an economic penalty on the younger children as the older children will likely have had more educational, medical and other expenses paid out of the parents' co-mingled assets before their deaths. Generally, when we raise our minor children, as parents we do not keep track of the benefits each receives through his or her formative years for things like orthodontia, youth sports, summer camps, private school and college education. We have no concern that the total expenditures we spread among our respective children for such purposes should be "equalized" in some fashion when they all reach adulthood. Providing for the creation of a co-mingled pot trust arrangement until the youngest of your children reaches age 25, when all of them would have been reared and educated on the family dole, will allow the trustee to achieve rough justice in a manner that best mimics how a parent would have marshaled household economic resources for the benefit of the children — individually and collectively — had they survived.

6. Consider primary and alternate or successor guardians, not couples. We often discourage our clients from naming couples as co-guardians.²¹ If the couple splits up, there could be a legal battle over who gets your child. Besides, many fights over whom to name as guardian stem from one partner's dislike of a spouse. If you can live with choosing either person, name the person they want most as guardian, and the partner as the backup. Even if the preferred partner is named as the actual guardian, an undesirable spouse will undoubtedly have a significant, albeit *de facto*, role to play. Sometimes, an unacceptable spouse may disqualify an otherwise desirable family member as an optimal candidate.

7. What about a former spouse? An unnerving fact for many divorced custodial parents: if you die prematurely and your deadbeat ex wants the kids, there is little you can do to prevent it unless your former spouse has serious problems such as documented mental illness, chronic drug or alcohol abuse, or physical or sexual abuse of the child.²² Even if you've remarried and your current spouse has effectively (but not legally) adopted the children, it will almost certainly still be an uphill battle to prevent the children's surviving natural parent from taking over after you're gone.²³

Clients in this circumstance can still name a guardian to serve if the ex-spouse cannot or will not serve. And if the client seriously believes the former spouse is unsuitable, a letter can be included with the will to explain the client's conviction to the judge, and it may factor into the judge's decision-making.²⁴ The ex-spouse may even bow out gracefully to avoid an embarrassing hearing at which his or her jaded past is revealed.²⁵

8. What if the parents are divorced, and cannot agree on who should serve? Not everyone is as mature or fortunate as our Mary and Don. They took the high road by working through their bitterness for each other, focusing on John's welfare in making their lists and ultimately agreeing on common guardianship provisions in their wills. For divorced couples who are not so fortunate, and express different choices in their wills, the court will most likely defer to the choice made in the will of the last parent to die.²⁶ Thus, unless both of the divorced parents agree to coordinate their choices of their child's guardian, there will be uncertainty over the child's upbringing in the event of the parents'

premature death. This is all the more reason to work hard to find a compromise candidate.

9. Periodically re-evaluate the guardian choices. As the children grow, the suitability of guardians may change. For example, you may start with your married brother, who is great with young ones, but be willing to consider your spouse's unmarried sister when the children reach high school and are more independent. Illness, death or divorce can also change your feelings.

Return to Mary, our divorced mom. After comparing their separate lists of criteria, they originally provided in their respective wills that Don's sister would be their son John's guardian, with Mary's sister as a backup. Mary's sister already had four children. Don's sister had only one child. A few years later, Don's sister became terminally ill. Mary and Don amended their wills to reverse the order of preference, naming Mary's sister as the primary guardian. By that time, Mary's sister's house was also less crowded because two of her four children were away in college.

10. Consider leaving a separate "letter of wishes" expressing your parenting philosophy and values. You should consider providing, in a letter or memorandum separate from your will, detailed guidance to the appointed guardian concerning the sort of experiences and family environment you would like the guardian to provide for the children. Strongly held values should be made explicit in such a document. These will be couched in the form of an expression of desires, but not direction, and will inform many of the guardian's choices as the children grow and mature.

11. If the choice is difficult, here are some questions parents can ask:

Who already has a good relationship with the children? Losing her parents will be traumatic enough. Would it compound your young daughter's anguish over her parents' deaths to send her far away to live with people she doesn't know?²⁷ If yours is a blended family or you have children of very different ages — a toddler and a teenager, for example, you may well want to name different guardians for different children. Weigh your children's relationships with potential guardians against the possible psychological strain of splitting them up. You may state your preference that all of your children have the same guardian and reside in the same residence. And, if keeping your children together creates a financial hardship for the guardian, permit distributions from the children's trust to reimburse the guardian for the extra costs and inconvenience.²⁸ To give effect to this intent, the children's trust provisions may authorize the trustee to pay any expenses of the guardian that he or she would not otherwise incur but for the guardianship obligations. For example, the trustee may be authorized to pay for housekeepers or other personnel necessary to assist the guardian in connection with his or her duties. If the guardian's spouse or the guardian him or herself is forced to leave a job to manage a substantially larger household, consider a provision which might replace all or a portion of the household's lost income.

Should we encourage and subsidize family visitation? Parents often have a difficult time deciding whether to appoint a guardian from the wife's side or the husband's side of the family. It may be comforting to the parent who concedes his or her preference if the children's trust allows funding for visitation. A well-drafted provision can explain the parents' intent and strong desire that the child spend time with both sets of grandparents and their aunts, uncles, and cousins, perhaps as frequently as once or twice a year. It may direct the children's trustee to work with the guardian to make any

arrangements necessary to accomplish this intent and pay out of the trust any expenses that may be incurred such as the cost of any domestic and international travel for the children to visit a relative or even for the relative to visit the children. This can be particularly helpful where the extended families of one or both parents live overseas or across the country.

Where do the prospective guardians live? Uprooting your five-year-old son may not be as much a hardship as transplanting a 15-year-old, but either can be difficult. Even a young child can develop close bonds to friends, neighbors and nearby relatives. If moving is inevitable, you may want to give more weight to the guardian who will be able to help your children maintain their ties. Our revocable trust documents typically give the guardian and his or her family the right to direct that your residence be maintained in the children's trust, and allow the guardian and family to move in with your children if that choice is best for both the guardian and your children.

Do they share my values? This goes back to the earlier "letter of wishes" suggestion. It goes without saying that the most important issues are philosophical: discipline styles and feelings about education, religion and spirituality. Most of our clients place the highest premium on guardians who share these values. If you attend Synagogue each Sabbath as a family and your children regularly attend religious education classes, look for candidates who do the same with their families. If you were careful to raise your children in an environment of scarcity, taking pains to live below your means, will all of your efforts to foster virtues of thrift and frugality be undone if your young and still impressionable son goes to live with your conspicuously consuming brother-in-law and his spoiled children?

How old are our candidates and are they physically capable? These factors often rule out grandparents, but even younger prospects might not be up to the task of raising a very young child to adulthood. If your parents are elderly and frail they may be unable to raise children a second time. If your parents are in their mid-60s and in great health and you sign your will when the oldest of your three children is 5, will the grandparents still be able and willing to perform when the children range in ages from 10 to 15? It is difficult to imagine the emotional trauma suffered by a child who lost both his or her natural parents and later his or her beloved grandparent who was serving as guardian, forcing relocation to a third household.

But do not reject the grandparents out-of-hand. In many cases, an advantage to naming a grandparent is availability. A candidate who is a contemporary of the natural parents may be well-meaning but too career-driven to have the time or patience it will take to deal with a grieving child. If the grandparents are retired or semi-retired and comparatively young and healthy, and their grandchild is at least close to adolescence, the grandparents may be able to provide the child with more time and emotional support.

Are there other children in the house? This consideration can cut both ways. Many people choose a guardian who already has children of his or her own. What is your ideal number for a well functioning, manageable household? (Remember that the Brady Bunch was just a TV show.) Some parents feel strongly that their only child, accustomed to receiving his parents' undivided attention and emotional and financial support, should not be the fourth or fifth child in a household that already has three or four. Others might like the idea of the child being with lots of cousins.

Should you ask your candidates how they feel about being named guardians?

That's always a tough call. On the one hand, broaching this sensitive issue can give you the comfort of knowing in advance that your choices will be willing and able to answer the bell if it rings, while allowing the candidates to consider their decision objectively and dispassionately, unencumbered by the grief of losing a beloved friend or sibling. If you decide to go this route, be forewarned: your top choice may politely demur. Guardianship is an awesome responsibility. Not everyone will be willing to take it on. Getting a negative or lukewarm response from your number one choice will allow you to focus on other candidates you might not otherwise have carefully considered. Delicate discussions with your candidates could rule some out, making your decision easier. You may also wind up having to explain to some obvious potential candidates why they were passed over, requiring even more diplomacy. If your first-choice candidate declines your offer, try not to view this as an insult, but rather as an indication of his or her high regard for you and your children and the gravity of your request by providing an honest answer.

On the other hand, you might feel so awkward about offending people that you choose to avoid approaching candidates in advance to preserve your good personal relationships with them. Our experience is that roughly one-half of our clients choose to have these discussions with their candidates, and the other half choose not to.

How are they fixed financially? Ideally, you will have provided enough cash (through life insurance and other liquid assets) so that raising your brood will not be too much of a financial strain on your chosen guardian. But what if your assets prove to be insufficient? The United States Department of Agriculture reported that based on 2001 dollars, it would cost an inflation-adjusted \$250,266 to raise to age 17 a child born in the year 2001.²⁹ That figure includes only costs for food, shelter and other necessities — not travel sports, camps, private schools and college tuition seen as indispensable by many parents these days.³⁰ While legally the guardian is not required to apply his or her own family resources in supporting your children³¹, as a practical matter your friend or relative who thinks enough of you to take on the responsibility of raising your kids will probably feel morally obliged to do so even if the money you left runs out. Will imposing this added financial strain on the guardian and their children create resentment and a bad environment for all members of the household?

To avoid such problems, we work together with our clients' financial planners, insurance agents and accountants to assess whether, after the clients' deaths and the payment of their debts, taxes and expenses of administration, the "residue" of liquid assets will provide an adequate fund for the guardian. We define adequacy as an amount that in a worst-case scenario — the immediate simultaneous death of both parents — will support both the clients' children through their minority and even beyond, and, if necessary, the guardian and to some extent, the guardian's family. If there is an anticipated shortfall, we encourage the clients to consider purchasing additional life insurance.³²

D. SUMMARY

Undoubtedly, the reason most of our shy away from discussions about a guardian is the intensely personal nature of the decision. There is no perfect guardian for the minor children — only the parents truly fit that bill. Nonetheless, as estate planning attorneys we

can help these clients give the issue the careful consideration it deserves and provide valuable counsel by presenting flexible options including those mentioned here. If despite your best efforts your clients remain stalemated, remind each of them that their kids will be better off if someone is named — even if it is one spouse’s second or third choice — than if they allow a court to decide.

ENDNOTES

1. Guardianships in New Hampshire are governed by RSA Chapter 463, Guardianship of Minors and Estates of Minors. This chapter was recodified in 1996 as a “rewrite and reenactment of [prior] RSA 463 relative to guardians of minors which is a very old statute, and which has been subject to extensive case law interpretation due its ambiguity.” Judiciary and Family Law Committee Report on Recodified RSA Chapter 463 (1996). Because the new chapter is a recodification of guardianship law, not entirely new law, the pre-1996 case law under former Chapter 463 and its predecessor remain relevant in interpreting and applying the revised statute. See generally DeGrandpre, 11 New Hampshire Practice: Probate Law and Procedure (3rd Ed., 2001), §70-1 at 356 (hereinafter cited as “DeGrandpre”).

Clients (and sometimes even lawyers) tend to confuse the roles of guardians and adoptive parents. Some conflate the two roles, assuming that the legal guardian of a minor child is also legally adopting that child. In fact, a person who becomes guardian over a minor’s person in many respects stands in loco parentis, but does not have all of the rights and responsibilities of a natural or adopting parent. See RSA 463:12, I (“...a guardian of the person of a minor has the powers and responsibilities of a parent regarding the minor’s support, care and education, but a guardian is not personally liable for a minor’s expenses and is not liable to third persons by reason of the relationship for acts of the minor”). Unlike an adopted child, a minor child has no legal rights upon his or her guardian’s death under the intestacy and pretermitted heir statutes. See generally RSA 162-B:2 and 3 (defining mother-child and father-child relationship, respectively), and RSA 168-B:9, I(a) and (b) (only statutorily-defined children are (i) eligible intestate takers of a parent’s estate, and (ii) qualified to take against parent’s will). A person other than a minor’s parent can serve as legal guardian while one or both of the parents still living, and unless a court order terminates the parents’ parental rights, the minor’s parents retain those rights (and responsibilities as well). See RSA 463:13, I.

Legal adoptions are governed by RSA Chapter 170-B. An adopting parent generally assumes all parental rights and responsibilities for the adopted child. See generally DeGrandpre, *supra*, 11 N.H. Practice at §75-1 *et seq.* After a guardian is appointed for the minor children of the deceased parents, that guardian may commence a separate action to adopt the child, thereby expanding the former guardian’s rights and responsibilities to those of a parent. But a guardian is, of course, under no legal responsibility to do so. In my experience such adoptions by guardians are both unnecessary and rare.

2. A New Hampshire probate judge may choose among a broad range of specified persons or agencies whose appointment the presiding judge deems “appropriate”. RSA 463:10, I (1996). There is no requirement that any natural person who was nominated in a deceased parent’s will as guardian, or who petitions the probate court for appointment as guardian, must be a member of the family of the minor child or the deceased parents of the minor child. RSA 463:2, I indicates that agencies authorized to petition for guardianship include child-placing agencies described in RSA 170-E. Child-placing agencies are defined in RSA 170-E:25 as “any legal entity or firm which receives any child for the purpose of providing services related to placement of children in a foster family or group home or other child care institution.” RSA 170-E:25, IV.

3. The procedure for appointment of guardians is outlined in RSA 463:5 *et seq.* The rules for the conduct of the hearing on a guardianship nomination in a will or a petition for guardianship is provided in RSA 463:8.

4. The harsh orphanages and work houses notoriously depicted by Dickens in post industrial England and less frequently in our own literature have been replaced by a modern social service network dedicated to ensuring to the greatest extent possible that no orphaned child will fall through the cracks of society. Generally, the probate courts and agencies like the DCYS and Child and Family Services of New Hampshire make every effort to place minor children with friends and family members and, in perhaps the worst case, loving and carefully vetted foster parents or group home arrangements operated by groups such as New Hampshire Catholic Charities, Inc.

5. RSA 463:5, I specifically contemplates nominations of guardians by “. . . a will, by petition, or by written consent to a petition by another.”

6. 25 states and the District of Columbia allow a parent’s testamentary nomination to control and give the probate judge no discretion to overrule it. Notable among those states located in the northeast include Maine, Massachusetts, New Jersey and New York.

7. The probate judge may refuse to appoint a testamentary nominee “for cause”. RSA 463:5, I. The presiding probate judge will weigh all relevant factors in deciding whether appointing the nominee, or appointing some alternative guardian suggested by another interested person, is in the best interest of the child. See generally DeGrandpre, *supra*, 11 N.H. Practice at §70.9 at 373; *Hutchins v. Brown*, 77 N.H. 105, 88 A. 706 (1913).

8. RSA 463:5, VI (a). Probate Court Administrative Order 8, effective August 1, 2000, outlines the procedure. When the background check discloses information bearing adversely on the proposed guardian’s fitness, the Order requires that the court inquire of the proposed guardian as to the existence of extensive matters such as state or federal convictions, state or federal probation pending domestic violation proceedings, registration in any abuse or neglect registry, termination of parental rights or pending divorce, etc. The inquiry of the proposed guardian should “be on the record”. If the inquiry is not on the record, the court is ordered to make a finding that these questions “were asked of the proposed guardian and no adverse responses were given.” *Id.*

9. RSA 463:8, IV.

10. For a discretion of the special rights and consideration given to the expressed preferences of minors over the age of 14, see DeGrandpre, *supra*, 11 N.H. Practice, §70-7 at 371-72.

11. “[T]he court will give first consideration to an individual nominated by a parent in his or her will when determining who should be named as guardian of a minor where both parents are deceased. For this reason, executing wills becomes important for parents with young children if they have strong feelings about who they would prefer to have the custody and care of their children in the event of their deaths.” DeGrandpre, *supra*, 11 New Hampshire Practice, §70-8 at 373-74.

12. The grandparents can be given an important role short of guardianship through a precatory expression in the client's will urging that if none of the client's chosen candidates are able or willing to serve, the court should consult the grandparents concerning the selection of a suitable alternate, encouraging the court to give primary consideration to the grandparents' stated preferences.

13. RSA 463:12 enumerates the powers and duties of guardians of a minor's person.

14. The powers and duties of a guardian of the estate are described in RSA 463:19, *et seq.*

15. Pop psychologists speak of "emotional intelligence", measured by an "EQ", as distinguished from raw intelligence as measured by a person's "intelligence quotient", the better known and accepted "IQ". See generally Bradberry and Graves, *The Emotional Intelligence Quickbook* (Simon and Schuster, 2005). There is a notion that many persons with high IQs lack social skills and common sense, and may not be the best nurturers. By contrast, persons with liberal doses of EQ might be better communicators, possessed of superior mentoring skills and empathy, but be highly disorganized and unable to manage their own financial affairs, let alone the affairs of others. While we as attorneys might suspect such stereotypes, they may resonate for many of our clients.

16. No provision in our minors' guardianship statute expressly states that a guardian of a minor's estate serves in a fiduciary capacity. The general fiduciary duties of prudence and loyalty, however, are implicit in several provisions: RSA 463:19, I, which imposes on such guardians of the "duty. . . to protect and preserve the minor's estate. . . [and] to account for it faithfully"; 463:19, II, granting the guardian the power to perform ". . . every act which persons of prudence, discretion and intelligence in exercising judgment and care as in the management of their own affairs would perform. . ."; RSA 463:20, II, prohibiting the guardian from purchasing property of the minor or selling property to the minor without court approval, and RSA 463:21, requiring the guardian to certify that any court-approved sales or disposals of assets of the guardianship estate were ". . . to the utmost advantage of the minor or to the minor's estate, without any self-interest whatever."

17. Our system of court supervision of a guardian of the estate is intensive, and the restrictions on the guardian's actions are quite burdensome. RSA 463:19 III and V require the filing of initial inventories and annual accountings identical to those required for testamentary trustees and executors. RSA 463:20 mandates a probate court license for the sale of any property comprising the guardianship estate – something which one could argue is unduly burdensome, especially if prompt sale of a volatile asset (i.e., high "beta" publicly traded stock) is required to preserve its value. RSA 463:26, relating to investments by guardians of minors' estates, provides a "legal list" which under subsection III limits the guardian to the purchase and retention of ". . . stocks, bonds, or securities as are legal investments for savings banks in this state. . . ."

This specific enumeration of permitted investments cannot be reconciled with RSA 463:19 II, which adopts for guardianships the powers specified in the Uniform Trust Code, specifically RSA 564-B:8-816, the prudent investor standards. These standards authorize a trustee's purchase and retention of a much broader array of investments than are contemplated by RSA 463:26. See DeGrandpre, *supra*, 11 N.H. Practice, §70-11(b) at 381 (citing what ". . . appears to be a conflict between RSA 463:26 . . ." and the prudent investor standards incorporated by references in RSA 463:19, II). You will do your clients' fund manager a tremendous service by allowing all important management to be done under the permissive provisions of an *inter vivos* trust agreement which allows a broad palate of investment choices, as described in note 19, *infra* and the accompanying text.

18. The child's estate will include any assets the deceased parents may have held for the child prior to their deaths, plus any assets the child inherits from the parents outright and acquired for the child by the guardian of the child's estate after the death of the parents, including, without limitation, the child's entitlement to receive federal social security survivors' benefits.

19. The revocable trust will receive all of the children's inheritance if the parents executed the typical "pour over" will directing that the probate residue be distributed to the companion revocable trust. The parent should also designate the revocable trust as beneficiary of assets subject to contractual beneficiary designations, such as life insurance death benefits, except for IRAs and other tax-qualified retirement accounts which perhaps the children should receive outright in "inherited IRAs" to maximize the available federal income tax deferral opportunities. In most cases, it will be best for the trustee also to serve as guardian of all of the minor children's respective estates to coordinate investment management and distributions from all funds in which the children are interested.

Integrating most (or if possible all) of the children's inherited "taxable" assets in the revocable trust will avoid the problems with the "separate share" approach described in note 20, *infra* and the accompanying text, and all of the constraints on investments and asset sales described in note 17, *supra*. It will also enable the trustee to continue the management of the children's funds until after they reach age 18. Generally, under RSA 463:15, a guardianship of a minor's estate terminates when the minor reaches age 18 and may be extended only under limited circumstances (such as if the minor is still attending high school) until the minor reaches age 21 (or graduates, if earlier). The guardian of the minor's estate may also elect, with court authorization, to effectively extend the management of the minor's funds by transferring those assets to a trust created and funded by the guardian, RSA 463:19-2, but any such trust will suffer from the separate share trust limitations described in the text.

20. Estate planners often refer to these trusts as fully discretionary "sprinkle" trusts. Their defining characteristic is a trustee's discretion to distribute all or a portion of the trust's net income and principal among the deceased parent's children. Such fully discretionary trusts offer the most flexible trust design available – an important attribute given the unpredictability of the extent and frequency of the needs that might arise from time to time among a class of multiple minor and young adult children.

21. RSA 463:10, III allows the appointment of co-guardians, and states that they will ". . . share jointly and equally the authority granted, except as otherwise ordered by the court." Upon the death, resignation or removal of one of the co-guardians, the other guardian will assume all powers and duties which were previously jointly exercisable.

Note that the legislature did not say "jointly and severally", which would allow one co-guardian to act in the absence of the other. Requiring concerted action can be cumbersome when one co-guardian travels extensively or is not otherwise available when prompt and decisive action must be taken.

22. RSA 463:1 formally states the intent of Chapter 463. "[I]mplicit in this chapter shall be the recognition that the interests of a minor are generally best promoted [by giving the minor's parent custody], unless the best interests of the minor require substitution or supplementation of parental care and supervision." RSA 463:3, I implements this intent by providing that the father and mother of every minor child are joint guardians of the person of the minor and that the powers, rights and duties of the parents are equal. Upon the death of either parent, the survivor is sole guardian of the person of the minor. *Id.*

It has been said that these provisions and their common law gloss create a "*prima facie* right of a surviving parent to serve as guardian." DeGrandpre, *supra*, 11 N.H. Practice, §70-3(a) at 363. The burden is on the non-parent party seeking his or her appointment as guardian to rebut the presumption that the surviving parent is "suitable". *Brown v. Jewell*, 86 N.H. 190, 192, 165 A. 713, 714 (1933). In determining whether a non-

parent nominee or petitioner has carried this burden, the court may consider the "character and resources of the [surviving parent, his or her] fitness, temperamental and otherwise. . . and the advantages which may be expected to accrue to the child in the event custody is given to [the surviving parent] The court may investigate the parent's past conduct as a guide to what may be expected in the future. . . ." *Sheehy v. Sheehy*, 88 N.H. 223, 227-28, 186 A. 1 (1936).

Two cases illustrate how difficult it can be to overcome the presumption of a surviving parent's suitability. In *Pendergast v. Titus*, 95 N.H. 191, 60 A.2d 122 (1948), the minor had been living with her father's sister's family for most of her life. Still, the Supreme Court affirmed the lower court's determination that the parents be entitled to custody. In *Leclerc v. Leclerc*, 85 N.H. 121, 155 A. 249 (1931), Mr. and Mrs. Leclerc were divorced parents. The divorce court awarded custody of their minor child to the husband. After the husband's death the husband's sister attempted to gain custody of the child. The lower court rejected the child's aunt's claim that the predecessor to RSA 463:4, providing that the surviving spouse is the sole guardian of the person of the child, was superceded by the divorce decree relating to custody, which the court found adjudicates only the parental rights of the parents only while both are living. The Supreme Court affirmed the lower court's determination. *Id.*, 85 N.H. at 125, 155 A. at 251.

23. See *McLaughlin v. Mullin*, 139 N.H. 262, 651 A. 2d 934 (1994) (parent's surviving father becomes guardian of child as a matter of law on the death of the mother and it is irrelevant that the maternal grandparents had been the child's caregivers for more than 11 years).

24. The client should be urged to take precautions to avoid sounding too strident or vitriolic so that any such letter is perceived as the heartfelt expression of a parent's concern for his or her child, not the parting shot fired at the surviving spouse in the War of the Roses.

25. The inquiry into the surviving parent's suitability and background will be on the record, as described in note 8, *supra*. At the hearing, anything relating to the personal history or circumstances of the minor and the minor's family must be received in closed court. Attendance at the hearings is limited to the parties, their witnesses, counsel and representatives of any agencies involved. The records and reports and evidence are confidential to the extent that they relate to the personal history or circumstances of any of the parties. All case records are confidential. NH RSA 463:9. Thus, although a parent with a past might be influenced to defer to the deceased parent's testamentary nominee to avoid the embarrassment of a spectacle focusing on his or her behavior, that parent can be sure that any such hearing will be a private, not a public, affair.

26. This injects an element of "mortality roulette" into the equation – all the more reason to strive to agree on a consensus candidate.

27. This brings up venue and jurisdiction questions when the nominated guardian lives outside of New Hampshire. In my experience, a nomination of a foreign guardian (i.e., out-of-state) is at least as likely to be the case as it is not. RSA 463:4, II establishes venue for guardianship proceedings in the county where the minor resides or the county where the minor is physically present when the proceedings are commenced. For our clients, this will almost always be the county in which the parent resided with his or her minor child at the time of the parent's death. The out-of-state guardian will appear in the probate court of that county, and letters of guardianship will issue from the presiding judge under RSA 463:11 (assuming that guardian is found to be "appropriate" under RSA 463:10). The out-of-state guardian can then immediately move under RSA 463:32-c, I (b), notifying the court that the minor intends to move or has moved permanently to the foreign jurisdiction. That motion must include documentation from the foreign court accepting the guardianship or a certified copy of letter of guardianship issued by the foreign court. RSA 463:32-c, I(c). If this is done immediately upon receipt of the New Hampshire letters of guardianship, the foreign guardian of the minor's estate can avoid filing any inventory and first and final accounting which would otherwise be required under RSA 463:32-c, III(b).

28. Such language appears in the provisions attached as Appendix "A" to the online version of this article. Those provisions are designed to allow that distributions be made to or for the benefit of the guardian and the guardian's family. Such distributions might otherwise be construed as unjust enrichment of the guardian's family and a breach of the trustee's duty of undivided loyalty to the deceased parent's children as beneficiaries.

29. Consumer Expenditure Survey, U.S. Department of Agriculture (1990-92). The USDA has updated these figures to 2001 dollars using the Consumer Price Index.

30. Financial planners have software programs which compile and update data drawn from various published sources to enable parents to forecast the costs of raising their children based on their ages and the USDA's inflation-adjusted data. There are also free calculators available on various websites. One of those sites, www.babycenter.com, incorporates in its calculator the USDA's updated data, and estimates also the cost of a public or private college education drawn from The College Board's *Study in College Pricing: 2001*. I ran calculations on that program for a hypothetical higher income parent living in the northeast. The program returned a figure of \$676,712 to raise and educate at a private college a child born in 2006 from birth until age 22.

31. RSA 463:12, I (guardian of the person of minor has the powers and responsibility of a parent regarding the minor's support, care and education, but is not personally liable for the minor's expenses, and is not liable to third persons by reason of the relationship for acts of the minor).

32. A financial planner and a good life insurance agent can be critical in helping quantify the insurance need and design. For example, single life term policies on both a husband and wife can help pay off a mortgage on a home and provide the surviving spouse and dependent children with sufficient liquid assets to meet the financial needs of the surviving spouse and the dependent children. Those policies, perhaps together with a separate survivorship whole life policy with a death benefit payable on the simultaneous deaths of both parents or the death of the surviving parent, can provide supplemental funding for the children's trust. Of course, the need for insurance funding to raise the children will diminish as time passes and the children are reared and educated, suggesting the need to revisit the issue with the financial planner and/or insurance agent every three to five years until the youngest child reaches age 25. This will help reduce or eliminate obsolete policies to ease any cash flow strain created by the premium payment obligations. Higher net worth parents should consider arranging the ownership of any such policies in one or more irrevocable life insurance trusts to avoid estate taxation of the death benefits.

Author

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