

Important Considerations in Choosing Guardians for Your Minor Children

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Your Children's Future May be at Stake. Deciding who should be guardian for minor children -- who will raise your children who are under age 18 if you and your spouse dies prematurely -- is one of the most difficult estate planning choices confronting parents. 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 the choice is among the reasons that a majority of Americans have no wills.

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

- *Someone you may dislike could end up with your children.* Unless you name a guardian, a judge could appoint anyone who applies and who seems fit for the job.

- *The battle could become a bare-knuckles brawl.* More than one applicant may have to duke it out in court. You could be setting your family up for an expensive tug-of-war which will make only the lawyers happy.

- *Or the worst possible scenario: no one applies, leaving your kids to be dumped on 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).

Considerations Which May Help You Decide.

- *Make a list of the criteria most important to you.* Consider the case of a client of ours, a divorced mother of a minor son. She put aside her differences with her ex-husband so they could choose a guardian to replace them if they both should die. Our client and her ex-husband 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 think about what was really important to me, in terms of how my son might be raised”. Making the list also imposed a degree of logic on something which tends to be driven by emotion. The list might limit candidates to two parent households with no more than a defined number of children who are close in age to your minor

children; candidates who are economically independent and have a standard of living similar to yours; parents who practice a particular faith and share your value system, and those who live locally so your children will not be separated and removed from their schools, social groups, sports, etc. (These criteria and others are described later in this memorandum).

➤ *Try thinking unconventionally.* Many people name their siblings, but you also can consider close friends, neighbors -- even the child's grandparents if they are relatively young. Some name the oldest child to look after the others, although 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.

➤ *Consider separating the child-rearing and financial functions.* Some people are great at raising kids but not so good with money -- or vice versa. Fortunately, you need not find someone who can both nurture the children and manage the funds. 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. Many of the arguments stem from a lack of understanding of the very different child-rearing and financial roles. Even if all of your candidates are good at both, you might still want to name someone other than the guardian as trustee of your child's money to avoid the possibility that the guardian may get into trouble for commingling personal assets with guardianship funds. Naming a separate trustee under a revocable trust agreement will both avoid intrusive and expensive probate court supervision of the finances and create a system of checks and balances over how the money is spent. It can also make the guardians more circumspect about committing the trust's cash to fund things which, upon reflection, you might not have supported.

Our trust agreements often allow the trustee to expend trust funds for the benefit of the guardian's household and the guardians and the guardians' children if necessary to create a harmonious, integrated extended family. The alternative might be allowing your children travel, recreational and education opportunities unavailable to the guardians' children -- a first and second class structure which could create bitterness and disharmony. Also consider guiding your trustee in the exercise of the discretion you may give him over distributions to your children so that the decisions can be informed by your values.

Consider primary and alternate or successor guardians, not couples. We often discourage our clients from naming couples as guardians. If the couple splits up there could be a legal battle over who gets your child. (Besides, many fights over who to name as guardian stem from one partner's dislike of a spouse. You may be fine with your wife's sister, for example, but less than

thrilled about the idea of her husband getting your kids if the sister should die). If you could live with choosing either person, name the person you want most as guardian, and the partner as the backup.

➤ *What about your former spouse?* An unnerving fact for many single parents: If you as custodial parent die prematurely and your 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. If you've remarried but your current spouse has adopted the children, it may still be an uphill battle to prevent the children's natural parent from taking over.

You should still name a guardian to serve if your ex cannot or will not serve. And if you really think your ex is unsuitable, you can include a letter with your will to explain your feelings to the judge, and hope that he or she will agree with you (or that your ex will bow out gracefully).

➤ *Periodically re-evaluate your choices.* You also can, and probably should, reconsider your choices as your child or children grow. You might want to 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.

Remember the earlier discussion of our client, the divorced mom. She and her ex made their separate lists of criteria. They originally provided in their respective wills that his sister would be their son's guardian, with the client's sister as a backup. The client's sister already had four children. Her ex's sister had only one. A few years later the ex's sister developed cancer and had a poor prognosis. They amended their wills to switch the two couples, naming the client's sister and her husband as the primary guardians. The client's sister's house was also by then less crowded because one of her children was away in college.

➤ *As always, let your values and instincts guide your choice. Ask yourself:*

Who already has a good relationship with the child? Losing her parents will be traumatic enough. Would it compound her anguish to send your daughter to live with people she doesn't know? 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 their relationships with potential guardians against the possible psychological strain of splitting them up.

Where do they live? Uprooting your 5-year-old son may not be as big a deal 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.

Do they share my values? It goes without saying that the most important issues are discipline styles and feelings about education, religion and spirituality. Most of my clients place the highest premium on guardians who share these values. If you were careful to raise your children in an environment of scarcity, living below your means, will all of your efforts to foster virtues of thrift and frugality be wasted if your impressionable son goes to live with your conspicuously consuming brother-in-law and his spoiled children?

How old are they, and are they physically up to the task? These factors often rule out grandparents, but even younger prospects might not be up to the task of raising a child to adulthood -- particularly if your children are under age 10.

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

How do they feel about being named guardians? This may surprise you, but your top choices may turn you down. Guardianship is a huge responsibility. Not everyone will feel up to the task. Getting a negative or non-committal response from your top choice will allow you to focus on other candidates you might not otherwise have considered so critically. Discrete discussions with your candidates could rule some out, making your decision easier. (You may, of course, wind up having to explain to some obvious candidates why they were passed over, requiring even more discretion).

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 a financial strain on your guardian. But what if your assets prove to be insufficient? The United States Department of Agriculture reported that it would cost an inflation-adjusted \$233,030 to raise to age 17 a child born in the year 2000. That figure includes only costs for food, shelter and other necessities -- not sports, camps, private schools and college tuition seen as essentials by many parents these days. Will imposing this added financial

strain on the guardian and their children create resentment and a bad environment for all members of the household?

If you've gotten this far and still remain deadlocked with your partner on whom to choose, consider acceding to your partner's choice. Unless you believe that his or her candidate will not love and nurture your child, your kids will be better off if you name someone -- even your second choice -- than no one at all.