

Choosing a Guardian and Trustee in Your Will

Legal Assistance Attorneys at the Defense Language Institute Presidio of Monterey prepare wills for active duty members, military retirees, and their spouses. During this process, clients are afforded the opportunity to pick a guardian to care for their minor children in the event of their death. This decision may be difficult, and often generates emotional discussions between parents. This article is intended to assist parents in thoughtfully choosing a guardian and a trustee.

Voice Your Choice in a Will

If both parents die, the court will appoint a guardian to provide personal care and supervision for their minor children. The parents' choice of a guardian in their wills, while not absolutely binding on the court, is highly persuasive. However, the preferences of a minor 14 years of age or older for a particular guardian may override the choice of the parents. A person who is unwilling to accept the responsibility will not be appointed. Since the guardian will be responsible for the upbringing of your children, you should give careful thought to your choice, preferably while you are both alive and can discuss your preferences and concerns together. On the death of one parent, the surviving parent will normally be entitled to the custody of the children. However, each spouse's will should reflect his or her choice of guardian in the event the other spouse does not survive.

Less Choice for a Divorced Parent

If you are divorced and you die, the other parent of the child will generally have the first right to raise the child, unless they are declared an unfit parent by a state court. Many divorced custodial parents consider the other parent unsuitable to raise the child and would like to appoint someone else as guardian. In this case, the custodial parent can nominate in the will someone else to raise the child, but it is likely that the other parent will be appointed if he or she wishes to be.

Factors to Consider

The guardian acts as a substitute parent to the children for their custody and care, but is not necessarily responsible for any property they may own. These responsibilities may be taken either by the same person or separate people. It is possible that those whom you choose to raise your children would not be suitable to manage and invest your money and other assets. In addition to providing food, shelter, clothing, health care, and education, for the cost of which the guardian is entitled to reimbursement, the guardian will be the person to whom the children will look for love and emotional support.

- Continuity of Love and Affection

The guardian and the deceased's children ought to feel a close emotional attachment to each other. Ask your candidate first to determine the potential guardian's ability to accept such a great responsibility and their willingness to do so. Most are genuinely honored but may impulsively accept, either ignoring the depth of the responsibility or assuming the need to serve will never arise. If the children are mature enough, consider their feelings about the person in order to select someone in whom they have trust and confidence. A relative or friend of the family who has already established a close

affectionate relationship with the children and has a deep concern for their well-being is a positive choice. It's more disruptive to separate the children into more than one home. So the better choice of guardian is one who can take care of all of them.

- Potential Guardian's Age and Health

Even though willing to serve and with a close relationship to your children, the prospective guardian may not be a wise choice because these practical considerations can't be ignored. Grandparents are usually a poor choice because of their advanced age or poor health. Look for stamina as well as maturity in your selection.

- Potential Guardian's Family Situation

Important to the success of the guardianship is the way your children and the other members of the guardian's family interact. Is there jealousy or animosity between the two sets of children? Would the guardian's spouse be uncooperative?

- Potential Guardian's Financial Situation

Try to alleviate the financial impact of your children on the guardian. The guardian is not legally obligated to support your children out of the guardian's own funds. A Trustee is appointed to manage your children's property and will distribute the funds required for their support. This individual may be the same as the guardian or someone different. Provide a sufficiently large estate to cover the costs of maintaining the children at least throughout the period of the guardianship. If you don't, the guardian will probably resort to his or her own resources, which could strain the guardian's family budget and in turn create resentment toward your children.

A Children's Trust to the Rescue

One method of protecting your children from this stressful situation is by bulking up your estate with life insurance and naming a trust for your children in your will as the beneficiary of the proceeds. Almost all will clients have \$100,000 or more in SGLI (military life insurance). Many service members have additional commercial life insurance on themselves and their spouses. They are astute planners looking beyond their children's minority to give a sufficiently large estate to fund a college education, pay off a mortgage, start up a business, or provide some measure of financial security to their children. A Legal Assistance Attorney can prepare the children's trust you require. During your appointment you will be asked at what age each child should receive their share of the remaining trust proceeds in a lump sum. You will also be asked to designate a primary and an alternate trustee to manage the trust assets, individuals you know and trust. The trustee need not be the same person as the guardian.

These issues may be very difficult to address, but thought should be given to ensure that in the event of death, your children will be taken care of. For more information on this matter or to schedule an appointment, please contact the Legal Assistance Office located in Building 358. Presidio of Monterey, Monterey or call (831) 242-5083/84.