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Who Will Care for Your Minor Children if You Can't?

By: Todd C. Ratner, Esq.

Deciding who will care for your minor children if something happens to you is a tough decision in any circumstance, but it is a decision that you are most qualified to make in your lifetime. Without proper planning, your wishes might not be followed later.

Consider the following scenario. Michael and Alice are a young married couple living in Springfield with two small children. Michael has two sisters, one in Springfield and the other fifty miles away. Alice has one brother in Springfield. Michael's parents reside in another state and Alice's parents live in Springfield. Each set of grandparents are in their seventies.

Michael and Alice did not feel that it was necessary to prepare estate planning documents because the only real asset that they owned was a house, which had very little equity. Unfortunately, Michael and Alice were involved in an automobile accident that killed both of them.

Now, someone must decide who becomes the guardian of their minor children. Should it be Michael's unmarried sister who lives in Springfield or Alice's brother and

his wife who also reside in Springfield but are having marital problems? Should it be Michael's other sister who lives in a different city but whom Michael and Alice have always felt closest to? How about either set of grandparents who provide love and support and have experience in raising children?

In most cases, if you die leaving minor children, the other parent will raise and support them. Similarly, in the case of a divorce, when a custodial parent dies, the non-custodial parent has priority in seeking guardianship and custody unless unfit. However, if the other parent is also deceased, your minor children will require a guardian. This is an individual who is appointed by the court to look after the direct physical well-being of your minor children and the assets of the estate left to them. Generally, the guardian provides whatever care would be given to children by their parents.

It is highly recommended that you assume the responsibility for this important decision, rather than leaving it to a judge who is unfamiliar with your family situation. Even though the court has the ultimate authority to appoint a

guardian, your Will is the only way to convey to the court who you want to raise your children.

Designating a guardian in your Will doesn't only help guide the court; it also helps prevent family arguments over who is better qualified. Technically, your choice as guardian is just a recommendation to the court. However, the Commonwealth of Massachusetts gives high priority to your recommendation. Typically, the court will honor your choice unless there is compelling evidence against your designee.

It should be noted that in Massachusetts, a minor over the age of fourteen may suggest his or her own guardian, and the court will try to honor that request if appropriate.

Prior to designating a guardian in your Will, you should ask the person or people if they are willing to undertake this significant responsibility. A guardian is not legally obligated to serve, and an alternative choice is highly recommended in the event that your first choice refuses or is unable to serve. You also need to consider whether you want to name a person's spouse as co-guardian, as

a future divorce could greatly complicate the matter. Therefore, it is recommended that you just name one person.

In selecting the right guardian for your children, following are some factors to consider:

- Where are the proposed guardians geographically located?
- Which proposed guardians most closely match your parenting philosophy?
- Do you prefer that the proposed guardians are a married couple or an individual?
- What is the age and health of the proposed

guardians?

In Massachusetts, guardianship ends at eighteen. At this time, they are considered to have full legal capacity. This means that they can make all legal decisions unless there is some factor that legally prohibits them from doing so.

At that point forward, any property left to a child is exclusively owned and controlled by that child. Accordingly, it is recommended that a Trust be established for your minor children. By establishing a Trust either inside your Will, called a Testamentary Trust, or a Trust outside of your will, you can condition when and how your minor children will receive your money or other property left to them. For example, you may wish to direct

that your minor children receive property in stages like at age 25, 30 and 35, while having access to the funds for their support.

The greatest piece of mind that parents of minor children can have is to select and know who will take care of their children in the event that something happens to them. Scheduling a consultation with an experienced estate planning attorney is the first step to ensuring that your choice of guardian is appointed.

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