

Patti Spencer's Taxing Matters Column for February 11, 2002

Naming a guardian to care for your children

Do you have minor children? Who will take care of the children if you die? This is the number one reason for you to make a will. You do everything you can to be a good parent. Make sure you make a will and have plans for your children's care if you are no longer around to do it.

Pennsylvania permits a parent to appointed a guardian of his or her minor children in a will.

The appointment must be made in a valid will. A letter or memorandum written by a parent requesting the appointment of a guardian in the event of his or her death is not binding. If there is no will and the parents are deceased, the court will select and appoint a guardian.

A guardian is a sort of substitute parent. For so long as the ward (the minor child is called a ward of the guardian) is under the age of majority, age 18, the guardian has the same rights and duties as a parent. As parents, you and your spouse are the so-called "natural guardians" of your minor children. Natural guardianship is a personal right to the custody of a child until the child reaches the age of majority. Where the parents are unmarried, the mother is considered the "natural guardian."

There are really two offices and responsibilities: (1) Guardian of the person, which is physical custody of the minor, and (2) Guardian of the minor's estate, which is the care and management of the minor's property. It is not necessary that the same person hold both offices. You can split the responsibilities.

When you name guardians for your children in your will, it is customary, but not legally required, that you ask the guardians if they would be willing to serve. You should also name successors in case when the time comes, your first choice guardians are also deceased, or are ill, or have other life situations which will make it impossible for them to raise your children. If you choose a couple, a husband and wife, to be the substitute parents for your children, you should address the possible divorce of the couple. Should one of them be the sole guardian in that case?

Another option is to provide a mechanism in the will for the selection of a guardian. For example, instead of naming the proposed guardian, you may provide for a committee who will be charged with selecting your children's guardian. Perhaps, you might say that a group consisting of your parents, your spouse's parents, and you and your spouse's siblings would decide, by majority vote, who will be chosen as a guardian.

Since the age of majority is 18, many parents who make wills name a guardian of the person for minor children, but direct their property to be held by a trustee. By doing this they can instruct the trustee exactly what to do with the money, for what purposes it should be made available to the child, and at what age it should ultimately be distributed. For example, the trustee may be directed to use the income and principal for the child's health, education and support, as the trustee deems appropriate, and distribute the principal of the trust in thirds at ages 21, 25 and 30. Again, sometimes it is appropriate to have the same person who is guardian of the person of the minor as trustee, and sometimes it is not.

If the trustee is someone other than the person who has physical custody of your children, make sure that the guardian with physical custody is paid appropriately, and is compensated if, for example, he or she has to stop working to take care of your kids. Also consider - will the home be big enough to accommodate their kids and yours? Will they have to move? Should your will provide for that expense? Nothing is simple.

If you are divorced with minor children, and you die, custody of your children automatically passes to the other parent as natural guardian, unless proven unfit. A natural guardian, however, does not have any authority to exercise control over the minor child's property, except in limited circumstances where the court has approved an award to the parent. In fact, Pennsylvania law provides that the court shall NOT appoint as guardian of the estate of a minor the parent of the minor, except that a parent can be appointed as a co-guardian with another co-guardian.

Actually, Pennsylvania law permits anyone who gives property to a minor in his will to name a guardian of that property. For example, if grandparents leave their estate to a minor grandchild, the grandparents in their will may name a guardian to manage such funds for the benefit of the minor grandchild even if the parents are living and even if the parents do not agree with the choice.

State law, by the way, also provides that no parent, who for one year or more prior to his death, shall have willfully neglected or refused to provide for his or her child, or who, for one year or more prior to death have deserted the child or willfully failed to perform parental duties has the right to appoint a guardian for such child in his will.