

The Role of Legal Guardians – Lastingpost.com

Introduction

The Legal Guardian of your children is the person or persons named in your Will to take over the day to day care and control of your children in the event of the death of both you and your spouse.

This is planning ahead for a very unlikely event but nevertheless it is important that you give serious consideration as to who you want to fulfil this enormously responsible role.

If no Legal Guardian is appointed

The reason you should appoint a Guardian is straightforward. If no one is appointed then unless a family member or friend steps forward to look after your children they could be placed in care. Appointing a Guardian in your Will ensures that this will not happen.

Who can be a Legal Guardian?

Any individual can be appointed as a Guardian with the exception of another child. The appointee will assume all the rights, responsibilities, powers and authority that you as a parent have. For this reason it is essential that you choose someone that you are completely confident will fulfil the role in a way that you would do so yourself.

Who to choose

The person you choose must be someone who loves your children and who can cope emotionally and financially with looking after all of them. They need to be able to provide stability and continuity in very difficult circumstances. They should also share your values so that they bring your children up in a way that you would want.

The most appropriate choice may be the grandparents if they are still relatively young and live nearby. In the event that they are not so sprightly and live elsewhere you may decide that one of either your spouse's or your siblings may be the better choice.

As a further alternative you may decide that close friends who live nearby with similar lives and values to your own are best positioned to provide your children with the love, security and continuity they need.

Appointing more than one Guardian

There is no limit to the number of Guardians that can be appointed. You should however give serious thought before appointing joint Guardians as there is considerable scope for ongoing problems and conflicts with this solution.

A better solution is for you to choose two or more Guardians but state your order of preference. Depending on circumstances the decision can then be made at the time as to who is most suitable to take on the responsibility.

Obtain their permission

You should obtain the permission of the person or people that you want to appoint as Guardian(s). As people sometimes verbally agree without giving much thought to what it entails it is advisable to obtain their written permission. This is a way of marking up the seriousness of what they are agreeing to and provides an opportunity for them to properly reflect on what the role entails.

You should include this written permission with your Will so that there can be no doubt as to your decision and no room for disputes with social services, the courts or indeed family members.

Inform your family of your decision

You should also inform your family and close friends of your decision. This will ensure that all appropriate people have the opportunity to question your choice.

As the appointment of a Legal Guardian can be contested in court after your death (even though it is formally stated in your Will) it is important to have the tacit agreement of the people that matter.

Explain to your children

This is a difficult subject for a child to comprehend. If your children are older you may want to mention it to them. If done in a matter of fact way with strong reassurance placed on the highly unlikely of it happening, then the subject can be covered without emotional strain. By mentioning the subject you will give your children the opportunity to express any concerns they may have as to your choice.

If your children are younger then one way to address the situation is to leave a letter for them with your Will explaining your choice. They will then be able to understand at the appropriate time the reasoning behind your decision.

Single parents

If you are divorced and have joint responsibility for your children then usually they will go and live with the other parent.

If you are a lone parent with no co-parent involved in your children's care then the appointment of a Guardian in your Will is clearly essential.

Provision in your Will

There is nothing to stop you leaving your estate outright to your children in your Will. As minors are unable to receive assets until they attain the age of eighteen these assets will be held by an adult for them in a bare trust (this is a simple trust where the trustees are given no discretion as to what to do with the assets). The adult will have the responsibility of looking after them.

As most people would conclude that eighteen is too young to receive an inheritance a more popular solution is to leave the estate in a trust for your children. Under the terms of most such trusts the children will receive the capital when they reach a specified age such as twenty one or indeed older. In the meantime the trustees, as appointed by your Will, will usually have the power to apply both income and capital for the benefit of the child.

You may also decide to leave a legacy in your Will to the person you appoint as your children's Guardian as a token of your gratitude for their fulfilling the role.

Guardian and Executors

A Guardian can also be appointed as an Executor in your Will. However, it is usually advisable to choose different people to undertake these roles.

The main reason for this is that the Executors will be responsible for investing funds for the children until they reach the age that you want them to inherit. The funds will be released to the Guardian for the children's maintenance, education and benefit so that the children are properly provided for. As a result there is clearly room for a potential conflict of interest.

As importantly, the person who would make a good Guardian for your children may not make a good Executor and vice versa.

Review your choice

As part of the periodic review that you should undertake of your Will, you should review the choice of Guardian for your children. People's circumstances change and you may conclude that there is a more appropriate person that you want to fulfil the role. We recommend that you should review your Will at least every three to five years.

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