



CESTNICK

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TAX MATTERS

# Naming a guardian in your will is key to a child's well-being

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Carolyn and I were revising our wills when our kids were younger. I've shared before how difficult it was for us to name a guardian in our wills. At that time, Carolyn insisted that we name someone who is loving and of high moral character. I pondered that comment: "Carolyn, if we knew someone like that, why wouldn't we just give the kids away today?" She vetoed that idea faster than a sprinter out of the blocks. So, we kept the kids. Today, they're grown up and the question of who should be their guardian is no longer an issue.

As I think back, we delayed having our wills revised because we didn't know who to name as a guardian. That wasn't the right decision. Today, I want to share four key issues to consider around guardianship. I want to thank Karen La Caprara, a lawyer at the firm Fasken LLP, for her thoughts on some of these issues.

## **1. Ensuring stability and continuity.**

The key reason to carefully consider who will look after your minor children if you and your spouse are gone is to ensure the ongoing nurturing and guidance of your

kids. And naming a guardian goes beyond just caregiving because it can provide a sense of stability and continuity for your children, knowing that you've prepared a plan for their care. When you name a guardian in your will, you can also name alternate guardians. Consider using a letter of wishes, which can be referenced in your will, to provide guidance about your intentions around who should act as guardian and in what circumstances. For example, you might appoint a child's grandparents but only if they're still in good health and feel capable of taking on the role at the time. Or perhaps you want your sibling to be guardian, but only if they agree to move back to your province from abroad. A letter of wishes can also be used to address other concerns you might have. You might, for example, provide guidance around your wishes for education, sports or other activities you hope for your kids, or request that your children spend time with specific others who may share your religious or cultural beliefs. You should speak to your family and friends in advance about these things.

**2. Minimizing legal disputes.** If you fail to name a guardian, the court will be left to appoint someone, which can lead to family and legal disputes. The naming of a guardian for your children is a matter of provincial law, so make sure you speak to a lawyer in your province. In most provinces, naming a guardian in your will is not a permanent appointment. The individual you've named will have to apply to the court, within a certain time (for example, it's 90 days in Ontario), for a permanent appointment. When considering an application, the court will consider who you've appointed in your will, but if anyone objects to that appointment, the court will consider this. The court's job is to consider what's best for your children at that time. As an aside, you and your spouse should name the same guardians in your wills for the appointment to be effective in the event you die at the same time or in circumstances that make it uncertain who survived the other.

**3. Providing continuity of values.**

Perhaps the most important consideration when naming a guardian is to choose someone who shares your values, culture and, where applicable, your faith. You can always use your letter of wishes to provide more details around how you'd like your children to be raised, but keep in mind that these are wishes only and not legally binding directions – so you'll want to name a guardian who is like-minded if you can.

**4. Securing financial support.**

Raising and caring for your children can be expensive. You should consider using life insurance to fund a trust upon your death. A trustee named in your will can manage this trust and can compensate or reimburse the guardian for expenses related to caring for your children. You might consider giving the guardian a regular monthly allowance to cover costs related to your children. You could simply name the guardian as the trustee, but if you have concerns about the guardian's ability to manage money, or to remain objective when using the trust funds, you may want to name a different individual as a check and balance. Again, you can provide more guidance in your letter of wishes as to how the funds you leave behind should be used – although the terms of your will should also provide the trustee with specific powers to manage the funds.

*Tim Cestnick, FCPA, FCA, CPA(IL),  
CFP, TEP, is an author, and co-founder  
and CEO of Our Family Office Inc.  
He can be reached  
at [tim@ourfamilyoffice.ca](mailto:tim@ourfamilyoffice.ca)*