

Nominations of Guardians for Your Children in a Will

By Yahne Miorini, LL.M.

Often the triggering event that will make a young couple execute estate planning documents is the protection of their minor children. Under the laws of the Commonwealth of Virginia, if one parent dies, the survivor is automatically named guardian and has priority over any designation of guardian in a Will of the deceased parent. Generally, the parents do not go to Court to be appointed officially guardians. They are the natural guardians.

Therefore, a guardian designation in a last will and testament is a back up provision in case both parents have predeceased or are incapable of continue to be the natural guardian of their children. When the parents select a couple as guardians, provisions in case of death, separation, incapacity or divorce of the guardians should be incorporated.

It is recommended that the parents write a spiritual letter or ethical will to guide the guardian on how to raise their

children, particularly about religion. This ethical will can include the past history of the drafters, their values (what gives meaning to their lives), their perspective (sharing what life has taught them), the reason of their estate plan, and their feelings (expressing their love and hopes for those they address).

Guardianship relates to the person; the estate of the children will be handled by a Conservator. When a minor receives an estate, the natural parents of the child need to petition the court to be appointed Conservators. The Court will require them to post a bond and the file annual accountings or to have the assets placed in a restricted account if the amount received is small.

A guardian of a minor's estate cannot make any distribution of income or corpus to or for the benefit of a ward who has a living parent, whether or not the guardian is such parent, because the living parent has a obligation to provide for his/her

child. However, the court can authorize the guardian to make distributions upon the finding that the parent is unable to completely fulfill the parental duty of supporting the child, the parent cannot for some reason be required to provide such support, or that the proposed distribution is beyond the scope of parent duty of support in the circumstances of a specific case. In addition, the deed, will or other instrument naming the guardian may authorize certain distributions.

The guardian, who is not authorized under an instrument or order to take certain actions, will have to petition the court in order to make distribution. Often a Guardian *ad litem* will be appointed to represent the ward. In Diana R. Smith v. Jessica R. Coleman, a minor¹, the mother who was the conservator of her minor child regarding the life insurance proceeds of \$230,000 received because of the death of

¹ Civil No. 46913, January 28, 2009, J. Chamblin of Loudoun County.

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the child's father. The mother made some unauthorized expenditures in the amount of \$93,626.86. The expenses were for the minor dental and medical expenses and payment of insurance for minor's vehicle. The court denied credit for the expenses finding (a) the dental and medical expenses to be a parental duty, and (b) the vehicle insurance, although beyond the scope of parental duty of support, to be unjustifiable because there was no evidence that the minor needed a vehicle. The court opined that Va. Code § 31-8.1 makes it clear that where there is a parent owing a duty of support, the parent must first provide for the support of his or her minor child before a guardian can use funds to meet the statutorily required parental support obligations. However, oral surgery expenses were approved to be paid from the conservatorship funds as they were not objected to by the Guardian *ad litem*. The guardian attorney fees (\$13,879.56) and the Guardian *ad litem* fees

(\$15,800.65) were approved as reasonable.

Under Section 31-8.2 of Virginia Code, as amended, the commissioner of accounts of the competent jurisdiction may authorize the same distributions under the same circumstances as the court, except that (1) the total distribution authorized in any one year may not exceed \$3,000, and (2) the commissioner must, in his report to the court, explain the necessity for the distributions.

It is recommended to name a trustee and create a trust for the minor. The parents will be able to add any instruction they want regarding the distribution the trustee is allowed to make from private school tuition, cosmetic orthodontia, style of life, monthly stipend at a certain age, religious activities, or charitable gifts. The trust can have provisions on education with a reward system upon graduation. The trust can provide instructions for marriage gifts, purchase and maintenance of resident, assisting with adoption

expenses, family vacations, and business opportunities. The trust may provide limitation regarding substance abuse addiction, not graduating from college etc...

It is important to note that guardians and conservators can be different persons. The trust can provide spending authorization for the guardian to transfer his/her residence to welcome the wards or be authorized to use the car of the decedent.