GUARDIANS FOR MINOR CHILDREN

The information provided in this document is meant for the sole use of Active Duty service members, retirees, their families, and those individuals eligible for legal assistance. The information is general in nature and meant only to provide a brief overview of various legal matters. Rights and responsibilities vary widely according to the particular set of circumstances in each case. Laws can vary across states, services, and civilian jurisdictions and laws are changed from time to time. Do not rely upon the general restatements of background information presented here without discussing your specific situation with a legal professional.

Planning for minor children can present some of the most interesting and challenging issues to be found in estate planning. The challenges originate from the legal restrictions on ownership of property by a minor and by the client's desire to give assets to a minor but defer the minor's actual possession until at least the age of majority. Additionally, planning for minors also involves planning for custody of the minor in the event both of the minor's parents die before the minor reaches the legal age of majority.

You can nominate a guardian of your minor children in your will. The court does not have to abide by your wishes but absent a compelling reason not to, will usually appoint the individual you have nominated. Once appointed, the guardian is responsible for the basic life-sustaining needs of the child and also has a significant impact on the value system developed by the child, the religious beliefs of the child, the child's educational progress and, in general, the development of the child to adulthood. Especially for children who have lost both of their parents at a young age, such guidance is critical. Consequently, you must give careful consideration to the choice of guardian and must discuss the prospect of the guardianship with those individuals you nominate.

In addition to naming a guardian responsible for the children's physical well-being, you can also nominate a guardian for the property of your minor children. Children under the age of 18 cannot own property (without supervision). The law requires appointment of an adult who is responsible for managing the property for the child's benefit. Frequently, the same person you name to be the child's personal guardian is also the property guardian. You may, however, name different people to manage the child's money and personal affairs. You might name different individuals because the personal guardian lacks financial expertise or inclination to manage money or because you are divorced from the child's other parent who will likely be the personal guardian of the child. There are other ways to manage assets that will pass to the child that might be more practical. You may decide to leave assets to your child in trust or through the use of the Uniform Transfers to Minors Act (UTMA) or the Uniform Gifts to Minors Act (UGMA). Consult an attorney to discuss these options.

Q: WHO WILL BE THE GUARDIAN IF I DON'T NAME ANYONE?
A: Most state laws create a presumption that the natural parents of every legitimate unmarried minor child are the joint natural guardians of the person of such child. Generally, on the death of one of the parents, the surviving parent is the sole natural guardian of the person of the child. In divorce situations, death of the parent that was awarded custody of the minor child results in a transfer of custody to the surviving parent, unless the surviving parent is unsuitable.

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Q: YOU MEAN I HAVE TO NAME THE CHILD'S FATHER AS GUARDIAN AND HE CAN CONTROL THE CHILD'S ASSETS EVEN THOUGH HE ABANDONED US?
A: No, you can nominate anyone to be the guardian of your children, but the natural parent will be presumed to be the guardian until evidence of unsuitability is brought before the court. Additionally, even though the natural parent may be the guardian of the person of your children, you can leave any assets to the children in a trust or other method to prevent your former spouse from controlling the property of your children.

Q: I WANT MY BROTHER AND SISTER-IN-LAW TO RAISE MY CHILDREN. CAN I NAME CO-GUARDIANS?
A: Yes, although it is generally better to nominate an individual as personal guardian in case the couple you name divorce. You should also name alternative guardians in case your first choice should have a change of heart or die before the child is grown.

Q: WHAT TYPES OF THINGS SHOULD I CONSIDER WHEN DECIDING WHO TO NOMINATE AS A GUARDIAN?
A: You should consider who will raise your children with the value system that you would and who would provide the best care and loving environment for your children. Additionally, you should consider practical issues such as: Is the home you choose large enough for your children and your guardian's family? Will the guardians have enough money to provide for your children with the kind of education and environment you prefer? What sort of financial provisions should you make for the children? Should the personal guardian also be the property guardian? Does your child have special needs or abilities, is the guardian aware of them, and can he/she handle them?

Q: SHOULD THE PERSONAL GUARDIAN ALSO BE THE PROPERTY GUARDIAN?
A: It will generally be less expensive and may produce fewer conflicts if you nominate the same person to be both the property and personal guardian of your children, but there may be instances when you want to name different individuals or you want to provide for the transfer of assets in another manner. State law generally requires a property guardian to put up a bond, file numerous legal documents, account for finances, and negotiate other legal requirements. In addition, some states do not allow you to waive the bond requirement in your will.

Q: HOW CAN I LEAVE PROPERTY TO MY CHILDREN WITHOUT APPOINTING A GUARDIAN OF THE PROPERTY?
A: You could set up a trust to hold the property passing to your children under your will or by beneficiary designation. The trust could be funded by life insurance policies, investment accounts, or with other assets. If you set up a trust, you name someone (a trustee) to manage the assets you leave to your children, set forth the conditions under which money would be paid to them, and give the trustee authority to spend, sell, or invest the assets for the children's benefit. Typically, the trust would provide for the children's care and education and make money available to them as they reach certain ages indicative of maturity – 18, 21, 25, 30, 35 or any other age you specify. Trusts are far more flexible than guardianships, which require court

approval of actions by the guardian of the property. A trust may not be the right vehicle if your estate is modest.

Q: ARE THERE ANY OTHER METHODS I CAN USE TO AVOID A PROPERTY GUARDIANSHIP?
A: Yes, you can use either the Uniform Transfers to Minors Act (UTMA) or the Uniform Gifts to Minors Act (UGMA). If your estate is modest and you don't feel a trust is warranted, almost all states have enacted either the UTMA or UGMA, which allow for custodial accounts to be created for the benefit of minors. UTMA or UGMA accounts can be set up in a child's name and you can deposit money or property in them while you are still alive. You can be the custodian of the account, and set up a successor custodian in case you die while the child is under 18 (or up to 21 or 25 in some states). These accounts are set up using the child's social security number. Both UTMA and UGMA give the custodian broad powers, but the powers under UTMA are somewhat broader.

When your children are over age 13, the income in these accounts is taxed for federal income tax purposes at the child's rate, which will almost certainly be lower than yours. For younger children, the income on the account is taxed at your tax rate.

Q: ARE THERE ANY DRAWBACKS TO USING UGMA OR UTMA?
A: For most people, the biggest drawback to using UGMA or UTMA for these custodianships is that the custodial property must be distributed outright to the beneficiary when the beneficiary reaches 18 (or the age specified by state law) without anyone having control over how the child uses the asset. Additionally, if you have multiple children, you must have multiple custodianship accounts.

Q: WHAT ARE THE ADVANTAGES OF USING A TRUST FOR BEQUESTS TO MINOR CHILDREN?
A: A trust arrangement avoids the problems associated with outright transfers of assets to minors and is more flexible than either a guardianship or a UTMA/UGMA custodianship. With a trust, the parents can treat each one of their children differently if they so choose, can leave property in trust for the duration of the child's lifetime (and longer), can restrict distributions of income and principal for specific purposes, and in general, can effectively control the administration of the property for the benefit of their children long after their own deaths. When estate tax planning is not an issue, there are essentially two kinds of trusts for minor children, a "pot" trust in which all of the parents' assets remain in one trust fund for the benefit of all their children and a "separate share" trust in which the assets of the parents are divided into separate shares, one share for each child.

Q: WHY WOULD YOU USE A POT TRUST?
A: The primary advantage of a "pot" trust is ease of administration. If annual accounts are required, the trustee need only prepare one accounting each year and only one fiduciary income tax return is required. Additionally, many clients want to place all of the assets in one trust on the

theory that all of their assets would be available for all of their children if they were still alive. This means, of course, that if the needs of one child are much greater than the needs of the other children, there will be more assets available to assist the neediest child than if that child only had a fractional share of the trust assets. This can also be a disadvantage because the assets of the trust may be used to satisfy the needs of one child and there may be inadequate assets available for the other children. Additionally, the assets in a "pot" trust cannot be distributed outright to any of the children until the youngest child reaches the age of distribution specified in your will. This would mean that if one child is 15 and another is 3, and all of the assets are to remain in one trust fund until the youngest child reaches 25, the older child cannot receive an outright distribution of his or her share of the trust until age 37. A "pot" trust is probably not appropriate where there is a wide divergence in the ages of your children.

Q: WHY WOULD YOU USE A "SEPARATE SHARE" TRUST?
A: A trust in which one share is established for each child can make it easier for the parents to account for the differences in the needs and propensities of each child. If it is known that one child will have special medical or education needs, or if there is a wide divergence in the ages of the children, the parents can establish the relative sizes of the shares, and can establish the terms of the distribution from each share accordingly.

One disadvantage to using "separate share" trusts with multiple children is the difficulty in administration. Depending on the provisions of the trust agreement, the trustee may have to account to each beneficiary separately and may have to maintain records of the distributable net income attributable to each beneficiary for income tax purposes. The trustee may also find it difficult to invest the assets of each share in a manner that generates an adequate long-term rate of return while diversifying the assets of each share.

Q: WHAT IF MY ESTATE MAY BE SUBJECT TO THE ESTATE TAX?
A: There are other types of trusts that offer estate tax planning and other estate planning techniques that your attorney can recommend if you are likely to be subject to the federal estate tax.