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.

Frequently Asked Questions

Q: WHAT IS A GUARDIAN?

A. A guardian is the person or corporation who has the duty to care for a minor—or an individual that has been declared "incompetent," i.e. someone who cannot take care of themselves—in the event of their parent's or parents' deaths (and some other situations). There are three types of guardians: (1) ***Guardians of the Estate*** who take care of property, estate, and business affairs, (2) ***Guardians of the Person***, who perform duties related to the minor's care, custody, and control, and (3) ***General Guardians***, who have a duty to both the estate and the minor's care.

Q: HOW DO I CHOOSE A GUARDIAN FOR MY CHILD?

A. 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.

Q. WHAT FACTORS SHOULD I CONSIDER IN CHOOSING A GUARDIAN?

A. Once appointed, a ***Guardian of the Person*** 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 consider whether the person you want to by your child's guardian would be someone you feel confident would perform this role well. Similarly, since a ***Guardian of the Estate*** will handle your child's property, you should consider whether the person you are choosing has financial experience. Parents often choose the same person for both positions (making them a ***General Guardian***), but you may determine that different people would be ideal for each position after considering their respective skills.

Q: WHO WILL BE THE GUARDIAN IF I DON'T NAME ANYONE?

A. In North Carolina, parents are considered the "natural guardians" of their children. 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. If both parents are deceased, then the Clerk of the North Carolina will appoint a guardian.

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. Not necessarily, 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. North Carolina law specifically states that while a testamentary recommendation cannot affect the rights of a surviving parent, this does not apply to a surviving parent who has "willfully abandoned" the minor. Thus, this will be one of the factors considered by the Clerk in appointing a guardian. 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, while co-guardians are not specifically authorized under North Carolina law, in practice the Clerk sometimes appoints two or more people as co-guardians. Practically, however, it is probably better to nominate an *individual* as personal guardian in this scenario, as the couple you name could divorce later on. 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. 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 at an age you specific. Trusts are far more flexible than guardianships, which require court approval of actions by the guardian of the property. 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. However, trust may not be the right vehicle if your estate is modest. There are several types of trusts, and some offer estate tax planning and other estate planning techniques. If your estate is large enough to be subject to an estate tax, be sure to discuss this with an attorney to make sure you are picking the best type of trust for your situation.

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 do not feel a trust is warranted, 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). Both UTMA and UGMA give the custodian broad powers, but the powers under UTMA are somewhat broader. There may be significant tax savings for having a UTMA or UGMA, depending on your financial situation.

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—unlike a trust—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.