APPOINTING A GUARDIAN IN YOUR WILL

Imagine the following scenario: John and Jane Williams have gone out for the evening leaving their children with a baby-sitter. On their way home, both John and Jane are killed in a traffic accident. For one reason or another, neither John nor Jane has made a Will and both of them have a variety of relatives, each of whom thinks him or herself the best choice as guardian for the children. Now what?

Since guardianship has not been formally addressed, upon their deaths only a Court can determine who will have custody and control over John and Jane's children – a difficult and trying situation at best. In the worst-case scenario, a Court will award custody to The Children's Aid Society (or a similar organization) on an interim basis. The threat of this uncertainty could easily have been avoided had John and Jane taken the time to make a Will in which a simple guardianship designation is made. Although an appointment in a Will is not necessarily conclusive, the legislation in most jurisdictions supports the wishes of the deceased.

Another consequence of not drafting a Will is the effect this will have on the inheritances of the children. The liquidated amounts of John and Jane's combined estates will have to be paid into Court. When each child reaches the legal age of majority, the Court will pay out his or her share, no matter how large an amount that may be. Most parents would not want this to occur. Lost are the opportunities to set up trusts for educational purposes or other special concerns as well as the opportunity to preserve certain assets, such as a family cottage, or any other items of family property that may have special meaning to family members. All of these concerns and more can be dealt with in even the simplest of Wills.

Managing the Children's Property

In the case of John and Jane's children, once a person is appointed by the Court as their guardian, an Application must be made if that guardian also wishes to become guardian of the children's property. Since there are no testamentary instructions to be guided by (or protected under), the guardian must tread a very fine line in deciding how much to spend on the children and how much to retain for distribution at their majority – a position of obvious conflict of interest.

In even the simplest of Wills, most trust provisions provide for staged distributions of capital, for example, one-third at age 21, one-third at age 25, and the remainder at age 30.

There are usually generic provisions that provide the executor (who is also the trustee of your will) discretion to encroach on capital for the "care, maintenance, education, advancement in life or other benefit of the children." In a Will, the executor also may be given discretion regarding the sale, distribution or retention of any personal assets.

Most importantly, the role of "trustee" can be given to one individual while the guardianship of children can fall to another (although this does not necessarily have to be the case). By splitting these offices between two people, not only does the conflict disappear but so too does the uncertainty regarding administration of the trust assets (which falls to the trustee) since much of this will be covered under the various boilerplate provisions of a Will. The guardian then becomes free of these administration concerns.

In practice, parents are usually advised to select different individuals (where possible) for taking on these two roles. Avoiding the problems associated with conflicts of interest, as well as the possibility of a guardian unfairly depleting the children's inheritance if given too much monetary control, are concerns normally raised by parents considering guardianship. At the same time, parents often are concerned over the potential burden of saddling a guardian with their children. Many are having their Wills drafted to *encourage* guardians to spend estate money and not their own, fearing that guardians may somehow feel duty-bound to raise the children at their own expense. In these cases, a non-guardian trustee is essential for assuaging the consciences of guardians and encouraging them to put aside their otherwise well-meaning intentions.

Although it cannot diminish the tragedy of losing parents, a well drafted Will can ensure that family members and others who want to care properly for children left as orphans will have the best legal tools for doing so.