

Estate Alert – Planning for Custody and Financial Support After Death

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By

Planning for Custody and Financial Support After Death

Parents with minor children have specific estate planning concerns. One such concern is how to provide financially for the children if one or both parents die. Another concern is who will care for and raise the children should both parents die at the same time.

In Ontario, the *Children's Law Reform Act* (the "CLRA") deals with testamentary custody and guardianship of minor children.[1]

Testamentary Custody

Parents (or any other person entitled to custody of a child) may appoint by will one or more persons to have custody of the child immediately following their death.[2] The chosen individual(s) must consent to the appointment. Such appointment(s) by will, or testamentary custody, is only effective for a maximum of 90 days after the appointment becomes effective (i.e. 90 days from date of death).

The ultimate determination of custody is reserved for the Court, on application by the person(s) appointed in the will. Other individuals (usually family members) may commence their own (competing) applications for permanent custody. A testator's wishes will provide guidance to the Court in making a determination. However, it is the best interests of the child that will govern, and the CLRA provides that a child's views and preferences shall be taken into consideration to the extent that a child is able to express them.

It is important for parents and other persons with custody of minor children to consider choosing a person(s) who shares the same values and parenting style. Once the choice is made, parents should discuss the matter with the chosen individual(s) to ensure that the individual will accept the important responsibility of raising their children, and then tell other family members of their choice. Changes to the personal situation of the parents or the chosen individual may require a re-evaluation to ensure the right person is appointed with testamentary custody of minor children.

Guardianship of a Minor Child's Property

The CLRA distinguishes between a person with custody of a child, and a guardian of the property of the child. Parents, or other persons with custody of a child, do not have the right or authority to deal with a child's property. That is, a parent who has custody of a minor child is not automatically the "guardian of property" of his or her minor child's property.

A parent may appoint an individual with testamentary custody of their minor child, and provide that their named estate trustee manage the child's assets until the child reaches 18 (or some other age).

In cases where parents with minor children die without a will, or leave a will that does not provide for the management of property inherited by their minor children, the CLRA provides for the appointment of a guardian of property on application by a surviving parent or by any other person (family members or friends).[3]

A surviving parents has priority to be appointed as guardian of a child's property, and more than one guardian of property may be appointed. Guardianship applications must be made on notice to the Children's Lawyer. The Office of the Children's Lawyer is a law office in the Ministry of the Attorney General. The Children's Lawyer represents the interests of children before the court in custody and access matters, child welfare proceedings, and civil litigation and estate matters.

Guardianship applications must also be supported by affidavit evidence which addresses, among other things, the ability of the applicant to manage the property of the child (i.e. qualifications and experience of the applicant), and the views and preferences of the child, where such can be reasonably ascertained. A management plan for the child's property must also be included in the application. The proposed management plan should address, at minimum, where the child will live, the child's share of living expenses, discretionary expenses for the child (e.g. music lessons, sports fees and equipment, camps), the investment plan for any liquid assets, and the financial education of the minor child. The latter is important as a guardian of property is required to transfer all property to the child at age of majority, which is 18 years old.

[1] See Sections 61 through 75 of the Children's Law Reform Act.

[2] If only one parent (or other person) has custody, there will be no need for matching provisions

[3] See sections 47 through 58 of the CLRA.

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