

Have You Named a Legal Guardian for Your Kids?

No one likes estate planning, but it could mean the difference between stability and chaos for bereaved children.

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I keep meaning to update my will to change my children's guardian, or the person my kids would live with if my husband and I were to die unexpectedly. When we first made the decision, we chose my cousin, who at the time had two kids of her own. Now she has four. Giving her two additional kids to look after? I can't do that to her. But somehow actually making the call to our estate planner to start the process keeps slipping down my to-do list. When I asked some parent friends about their own estate planning, I was surprised at how many said they, too, wanted to change their original decisions. I was even more surprised at how many said they had never made a will in the first place. "Death isn't an option for us," one mother told me.

But bad things do happen, and though it's impossible to prepare for many of them, making plans for your child's care in the event of your untimely death is a concrete step you can take to help ensure his or her future well-being. I've spoken with four estate lawyers, a matrimonial and family lawyer, a social worker and two families who were affected when young children lost parents unexpectedly. Here's what you need to know to make a decision that could save your family time and additional trauma after a tragic loss.

What to Do

- Don't wait.
- Choose well.
- Ask permission before you appoint someone.
- You can change your mind.
- Revisit after a family transition.
- Write it up.

Don't wait.

It's time to get over any superstition or fear of discussing death. "I get how it can be a thing," said Kryss Shane, a social worker who has counseled children whose parents died unexpectedly. "It's why people don't step on cracks." But failing to select a guardian for your child could mean chaos after your death, she said, including the possibility that your child could be put in a foster home. If you and your partner die without having made a directive, the court jumps in to evaluate the child's best interests. If the child is too young to have a say, multiple parties might put in a petition to serve as guardian, resulting in a possible court hearing.

Older children (14 and up in most states) get some say in where they end up. "It's really important for parents to weigh in," Ted Froum, an estate lawyer based in Evanston, Ill., said. "It could be a bit of a fracas where multiple people are trying to take over." There's no deadline by which to name your child's legal guardian, he said. "But if you don't weigh in on it, you risk the fact that the court might make the decision without any input from you."

While you can draft a will online, when making plans that involve the well-being of your child, it's best to enlist the help of an estate lawyer who can better foresee potential complications or blind spots. Free legal services are available for those who can't afford to hire a lawyer via local law schools, the American Bar Association, or pro bono organizations like Public Counsel.

Choose well.

The exact legal requirements prospective guardians must meet vary by state (another reason to consult a lawyer), but, in general, a guardian can be anyone who is at least 18, not currently incarcerated, and of sound mind.

A thoughtful lawyer should also encourage you to consider the following when selecting your child's guardians:

- Religious preference. If parents have specific wishes about their child's spiritual practices, this is a conversation to be had with the guardians they appoint. "Good communication is key," Froum said. "You can't say in your will, 'I'm naming so-and-so, and that means she needs to make sure my children observe the Sabbath every week.'"
- Physical ability — now and later. "A lot of new parents in their 30s come to me and say, 'I'm going to name my folks!' and I say, 'That's great. How old are they? Your baby's just a sleeping little bean right now, but they get active real quick,'" Froum said. This is especially the case with children with special needs who may require more continuing care as they get older.
- Emotional stability. Your 22-year-old artist brother who sleeps in a lot may not be ready for this.
- Location: If your sister in California is going to get the kids but you live in New York, is she supposed to come live in your house, or would the kids go to her? Does she live in a good school district? If your chosen guardian's location would mean uprooting the children, don't leave these questions to surviving family members to figure out on their own. If your appointed guardian lives outside the United States, or even a time zone away, it's especially critical to consult a lawyer, as different states have different laws about moving minors out of state. Jillian Brevorka, an estates and trusts lawyer who is licensed in several states, said most of her wills include language that authorizes the children to move to wherever the guardians live. "If the guardians can move into the familial home, I put the residence into the trust. The guardians can move into the residence," she said, noting that such wishes are not legally binding, and ultimately up to the court.
- A deep bench. "I don't like to see someone say, 'I want my one brother, just one parent,'" Froum said. If the person is unable to care for your child, he said, who is the backup choice? "A best practice is to list a guardian and then at

least one alternate,” he said. There is no limit to the number of potential guardians you can list but Froum said no more than three people are typically listed, in successive order. Sometimes, Froum said, a couple will list another couple as guardians, which is prohibited in some states. “I say, ‘What happens if they get a divorce? Do you want to name just your brother?’” If the person you chose to care for your child is unable or unwilling to become a guardian, and you haven’t named an alternate, the court will select a guardian.

- **Financial responsibility.** There are two types of guardians of a child: the legal guardian — who has physical custody of a child, kisses boo-boos and signs permission slips — and a fiduciary, who manages the deceased parent’s finances set aside for the child. The fiduciary role may be played by a conservator (sometimes used by courts in lieu of a guardian), personal representative, attorney-in-fact, or custodian if there is not a trust and a trustee if there is, according to Brevorka. It’s not necessary to divide the two roles, but it’s an option if you have concerns about your legal guardian’s money management skills or your fiduciary’s care-taking skills, or if you want to ensure a larger team of people is responsible for your child’s well-being after your death. If you do name a fiduciary, make sure it’s someone familiar with your child’s needs and lifestyle so that there won’t be tensions over whether horseback-riding lessons are a luxury or an important source of comfort and consistency for a bereaved child. If you are financially secure, Cheryl Borland, the chairwoman of Griesing Law’s trusts and estates practice group, recommended setting up a trust for your children that disperses funds to them gradually. “Otherwise they come into their inheritance at the age of 18 with no holds barred,” she said. “They pick up their check from the family attorney and the first stop that they make is at the car dealer.”
- **Teamwork:** Will your physical guardian and fiduciary work well together? Lori Arneson, a 60-year-old aesthetician in Wilsonville, Ore., was widowed with two stepdaughters and one biological daughter when she was 35 when

her husband, whose former wife was already dead, passed away. She said the other trustee her husband had named, an old school friend who didn't know Arneson well, was sympathetic to her husband's first wife's family, who felt that one of the three children should live with them. The disagreement over guardianship led to that child moving out of Arneson's house and in with another relative, causing family turmoil. "If my co-trustee had been on my side, he would have been able to handle the outside influences a little bit better," Arneson said. If you do divide the roles between financial custody and guardianship, Froum said, it's important to consider whether the two parties will get along and work together for the sake of your child.

Ask permission before you appoint someone.

Some parents wish to keep their choice for a guardian a secret in order to avoid drama, which Shane thinks is a mistake. She said she's encountered situations in which someone writes down a selection without discussing it with the person, "and all of a sudden they're the guardians of a child and it's not the right fit. There's no time for them to prepare at all, which isn't fair." When you've chosen your guardian, you should check that the person is willing to do it and is at least vaguely familiar with what it takes to raise your child.

You can change your mind.

Froum said that about a third of his clients end up changing their original choice of guardian, particularly those who originally selected the child's grandparents. Borland reassures parents that changing the legal guardian is not a terribly onerous process, particularly if you already have a will drawn up with a lawyer. She said it's as simple as an email. "You don't need court approval other than to go back to your attorney," she said. "If it's a new attorney, you might have an hour to review the plans you have in place. If it's your existing attorney, it's a very inexpensive change to fix. It's just a one-page codicil."

There is no legal requirement to alert your prior guardians to any changes, although it might be worth doing if you think the former guardians might dispute your new plans in the event of your death. But otherwise, “It just comes out in the wash,” Borland said. “They’ll find out. You acted in the best interest of your children, and you’re dead, so who cares?”

Revisit after a family transition.

It’s smart to revisit your choice of guardian every five or 10 years when you have a young child (annually if your child has special needs), but there are times when it’s especially important to consider updating your will:

- **Divorce and remarriage.** Taryn Zimmerman, a family and matrimonial lawyer, had a case involving two parents who had been divorced for several years and the father was no longer a presence in his child’s life. “He’s moved on, had two more kids and very rarely sees his son,” Zimmerman said. “He’s out of touch with what’s going on in school,” she said, adding that the son “has some special needs” that the father is “not up-to-date on. In the event that the mom dies, who will take care of this child? If he goes to Dad, he will be a virtual stranger.” Consider, if necessary, including a provision in your will that states that your child’s guardian will foster the bond between your child and your parents, as state laws vary regarding the rights of grandparents to maintain a relationship with a child. In New Jersey, for example, where Zimmerman practices, grandparents bear the burden of proving that visitation is in the best interests of the grandchild. “If I were to predecease my husband, if we were to get a divorce,” Zimmerman said, “there was no way I would sign off without a provision that he would agree to foster the bond between my children and my parents and extended family.”

These wishes, along with a named guardian who is not the living parent, won't necessarily have legal weight in court, but if there is a disagreement over guardianship and visitation, a judge will at least take these wishes into consideration.

- **Drug, alcohol or physical abuse:** Sometimes, particularly when there is a history of violence or substance abuse, you may not want your children to go to their other parent if you die. You can put a provision in your will, said Jillyn Hess-Verdon, an estate planning lawyer in Newport Beach, Calif., making these wishes clear: "I'm the mother. I don't want the father to be the guardian," she said, suggesting what one might write. "I'm authorizing my trustee to use my life insurance and resources to oppose him." While the state will typically defer to a child's surviving parent, the court will at least take such wishes into consideration, especially if the children are old enough to confirm that they'd be better off with someone else. Sometimes, Hess-Verdon said, an unsuitable parent will pursue guardianship in order to gain access to the estate. If that's a concern, she said, "The best approach is to divide up the guardian of the estate. Sometimes if you cut off the money, the bad person doesn't want the job," she said.
- **A child comes out as L.G.B.T.:** Shane, who specializes in working with L.G.B.T. youth, said this particularly applied to parents from religious, conservative communities in which a guardian might reject a child's identity and even try to change it. If there is a risk of that happening to your child, she said, "There has to be recognition that my priority is for my child to be raised by someone who won't hate them."

Write it up.

If you have other wishes relating to your child's upbringing, put them in writing and keep them with your important documents. Whether you want your kid to go to a Catholic school or to a trade school, Borland said, a "how-to-raise-my-child handbook" is helpful so that your child's guardian isn't left to guess at what you would have wanted.

Arneson wishes this had been the case before her husband died. "Just to be able to allow life to move forward as smoothly as possible, have everything very clean cut and laid out." When disagreeing family members get involved, she said, "It just gets very messy and everybody thinks their opinion is better than the other person's. If it's written out and everybody understands, it's very hard to interfere with that."

So what are you waiting for? Get your plans ready now. Because, as Arneson said, "When you're young and you're a reasonably healthy person, you never think this is going to happen. But it does."

Claire Zulkey is a journalist based in Evanston, Ill., and creator of the parenting newsletter "Evil Witches."