ESTATE PLANNING FOR FAMILIES WITH CHILDREN

ESTATE PLANNING BASICS

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BY:

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ESTATE PLANNING FOR FAMILIES WITH CHILDREN

• Why This Topic?

• In 2008 the world changed . . .
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ESTATE PLANNING FOR FAMILIES WITH CHILDREN

• Minor As Direct Beneficiary
• Guardianship Planning
Simple?
Minor As Direct Beneficiary
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Will is Silent

• Distribution to Parent/Guardian
  • $10,000 Limitation
• Distribution to Court Appointed Conservator
  • Existing Conservatorship - Mandatory
  • Petition for new Conservatorship
Minor As Direct Beneficiary
Will is Silent

- Distribution to Custodian under UTMA
- Requires Court Approval (if over $10,000)
- Mandatory Age 18 Distribution
- No Guidelines to Custodian/Conservator
DRAFTING OPTION

• Nominate UTMA Custodian
  • Age 21 Distribution
  • Use Uniform Custodial Trust Act
  • Framework for basic Testamentary Trust
  • Extend trust management to set age
DRAFTING OPTION

- Draft Detailed Testamentary Trust
- Revocable Living Trust
- Letter of Instruction from Client
NON-PROBATE TRANSFERS

• Same Options as Testamentary Planning
• Name Parent’s Estate as Beneficiary
• Uniform Custodial Trust Act - $20,000
• Single Transaction Protective Arrangements
Guardianship Planning

I WANT MY MOMMY AND DADDY
Pregnant mom says sandwich arrest was 'horrifying'

By JENNIFER SINCO KELLEHER - Associated Press | AP – Tue, Nov 1, 2011

HONOLULU (AP) — Nicole Leszczynski couldn't imagine that two chicken salad sandwiches would land her and her husband in jail and her 2-year-old daughter in state custody. But it happened five days ago, when the 30-weeks-pregnant woman forgot to pay for her snack while grocery shopping.
Guardianship Planning

Who Should Be Nominated?
Choosing the right guardians can be as easy as 1-2-3

1. List up to 5 couples or individuals in no particular order who you would be willing to have raise your kids if you couldn't. If you can't come up with anyone, think of the one person you would never want raising your kids and name at least 3 people better than that person. Still no one? Name 3 people who would be better than the foster care system.
2. Completely put the people you've listed out of your mind and list the 3 most important factors to consider for anyone who would raise your kids. Factors could include: location, age, marital status, parenting philosophy, spiritual practice, religion, relationship with your kids, relationship with you, values ... and anything else important to you. Decide what that is and list 3.
Choosing the right guardians can be as easy as 1-2-3

3. Now match up your first list with your second list and when you have, rank the people on your first list in order from 1-3 based on who you would want to take care of your kids from first choice to last choice and write down the list.
Choosing the right guardians can be as easy as 1-2-3

- The financial status of the guardian should not be a factor
- Life Insurance!
Choosing the right guardians can be as easy as 1-2-3

Individual vs. Couple

Backup Nomination
Type of Guardian

- Testamentary Guardian
- *Inter Vivos* Guardian
- Temporary Guardian
- Health Care Agent
Documents

- Nomination in Last Will and Testament
- Separate Form Nomination
- Temporary Custody Authorization
- Letter of Instruction
Documents

- Wallet Identification Card
- Exclusion of Guardian Form
- Medical Power of Attorney
- Parental Power of Attorney
Does your planning stand out?
Thank You!
Estate Planning for Families with Children

Kimmer W. Callahan
Callahan & Associates, Chtd.

"I just need a simple will." From cocktail party to conference room, the claim is made. "My situation is so simple and straightforward, a basic will is all I need, right?" Even attorneys are sometimes lured into a false sense of security when a case seems simple. Reality is often far different from perception, however. Many factors complicate a seemingly simple estate plan. This is especially true of parents with minor children. The mere involvement of a minor increases the level of complexity to the planning process and estate administration. There is no such thing as a simple will when consideration must be given to planning for minors and administering the estate left to a minor.

A Minor Named as Beneficiary under a Will

Sure, a will may be very simple - "I give all of my real and personal property to my spouse. If my spouse does not survive me, to my children in equal shares." This type of simplicity creates significant complexities for the personal representative. Who should the personal representative pay the funds over to? To the child? The child's parent or legal guardian? Should the personal representative keep the funds and make distributions at his or her own discretion? Ideally, the will (or other testamentary document) will provide that guidance, but often does not. If the will is silent on these matters, the question is dictated by the value of the assets or the available funds.

Small Estates:

If the value of the share for a minor child does not exceed $10,000, the personal representative has two options: (1) pay the funds over to a conservator, if there is one; or (2) seek court approval to transfer the funds under the Idaho Uniform Transfer to Minors Act ("UTMA") or the Idaho Uniform Custodial Trust Act ("UCTA"). The UTMA is only an option if the personal representative considers the transfer to be in the child's best interest, the transfer is not inconsistent with the provisions of the will, and the court approves the transfer.6

Options for Dealing with the UTMA:

There are a number of drawbacks to relying on UTMA provisions for managing the child's share of an estate. First and foremost, the custodian has no guidance or instructions as to what the parent's wishes or desires were. There is no direction as to who the custodian should be. There is no guidance as to how the custodian should use, manage, and invest the funds. There is no instruction on when to make distributions to or for the benefit of the child. Further, the custodian is required to deliver the funds to the child at the age of 18.7 Very few parents would want their child to have complete control of their inheritance at such a young age.

The establishment of a conservatorship does little, if anything, to address the drawbacks of the UTMA approach. As with the UTMA, a conservatorship will terminate when the child obtains the age of 18.8 With court approval, a conservatorship may be extended to age 21.9 The conservatorship comes with the added baggage and expense, however, of complying with the mandatory reports and accounting that must be prepared and filed annually.10

The good news is that there are several options to address the vast majority of the concerns raised by the issue of a minor beneficiary - some without requiring complex drafting.

Large Estates:

If the value of the share exceeds $10,000, the personal representative has two options: (1) pay the funds over to a conservator, if there is one; or (2) seek court approval to transfer the funds under the Idaho Uniform Transfer to Minors Act ("UTMA") or the Idaho Uniform Custodial Trust Act ("UCTA"). The UTMA is only an option if the personal representative considers the transfer to be in the child's best interest, the transfer is not inconsistent with the provisions of the will, and the court approves the transfer.6

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Option A - Within the will add a paragraph that provides an account of how the funds and make distributions at his or her own discretion? Ideally, the will (or other testamentary document) will provide that guidance, but often does not.

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There are a number of viable options to this non-probate transfer problem, many of which are similar to those discussed above relating to wills.

Option A – First and foremost, the solution is education. By helping clients think through the various issues involved, by providing them with the necessary knowledge to make informed decisions, and by equipping them with an understanding of the flexibility of beneficiary designations, attorneys may help clients avoid the complications caused by naming a minor as a direct beneficiary of a non-probate asset. Not only do attorneys need to help clients consider these issues for their own accounts, but also attorneys should encourage clients to discuss these issues with grandparents and others who may name their children as beneficiaries of non-probate assets.

Option B – All of the planning options discussed above relating to wills may also be used with non-probate transfers. Rather than naming the child as beneficiary, the beneficiary designation may look something like “John Smith as custodian for Billy Smith under the Idaho Uniform Transfer to Minors Act;” or, “John Smith as Trustee under the Billy Smith Trust, under agreement dated June 12, 2012.” An additional planning option is to name the parent’s estate as the beneficiary, relying on the planning provisions drafted within the will. This provides a centralized planning document and removes the need to make sure that each account has the necessary beneficiary designation provisions.

Option C – The UCTA may provide an alternative to filing a conservatorship proceeding. The UCTA allows for transfers under $20,000.00 (as opposed to the $10,000.00 limitation under the UTMA) to a custodial trustee without court approval.14

Option D – Seek court approval of a single-transaction protective arrangement.15 Upon a showing that the basis for a protective proceeding exist, the court, without appointing a conservator, may approve and ratify a deposit contract or trust. As such, it should be possible to obtain a court order authorizing the establishment of a UTMA account, UCTA account, or other trust arrangement allowing for the management of the funds without incurring the ongoing costs, complications, and obligations of a full conservatorship.

Nomination of guardian

Even more difficult than the issue of transfers to minors is the issue of identifying who will look after a minor in the event both parents pass away. The apparent simplicity of the process of nominating a guardian for a minor child belies the complexities that lurk below the surface. The actual process of nominating a guardian for a minor child is by will.16 The role of an attorney in the process of nominating a guardian is not to simply draft a document that complies with the request of a client, but to help counsel and educate the client to confirm that the client clearly understands the choice being made. This involves counseling with clients on three important issues related to guardian nomination.

Issue 1 – Who should be Named Guardian:

This question may be a huge stumbling block to parents — often causing parents putting off estate planning for years. As a result, parents continue in the absolute worst position possible of having not nominated a guardian at all for their minor children. Absent a valid nomination, the court is left with little to guide its decision as to who to appoint as guardian. In all cases, the court must consider the best interests of the child as the primary factor in determining whether to appoint, and who to appoint, as a guardian for a child.17 Unfortunately, judges are usually forced to make this decision with very little information about the family dynamics, religious beliefs, and lifestyle preferences of the parents.
**Issue 2 – Inter Vivos Guardianship:**

Other than via a testamentary appointment within a valid will, there is no other apparent statutory or other legally binding provision for the nomination of a guardian under Idaho law. However, the need for an inter vivos appointment of a guardian may arise for any number of reasons, such as the permanent incapacity of the parent, the incarceration of the parent, or the disappearance of the parent. A nomination of a guardian under a will does not become operative until the death of the testator.14 As such, a testamentary nomination within a will is not an affective inter vivos nomination of a guardian.

A court may appoint a guardian for a minor if parental rights have been terminated, upon a finding that the child was neglected, abused, abandoned, or when a parent is unable to provide a stable, home environment.19 Just as a court is required to give deference to the decisions of a parent in custody actions,20 deference should be given to the decisions of a parent in guardianship actions. Although a court may consider the testamentary nomination within a Last Will and Testament as indicative of the parent’s choice, it is not an enforceable nomination.21 Best practice is to execute a stand alone inter vivos nomination.

**Issue 3 – Temporary Protective Need:**

As with an inter vivos nomination, state law does not address the question of care for a minor on a temporary basis. The need for temporary care may arise from countless situations, ranging from care of the child pending the arrival and appointment of the nominated testamentary guardian, to providing care while a parent is hospitalized due to an accident. Not only is it important that someone have the means to take custody of the child, that person needs the legal authority to make decisions regarding the child’s care, including making necessary health care decisions.

**Possible solutions**

The solutions to these guardian issues include a combination of education, counseling, and comprehensive planning. Simply naming a guardian within the will is insufficient and leaves parents with a false confidence that they have adequately provided for their children’s care. Following is an outline of a more complete approach to guardianship planning.

First, who should be nominated? In helping clients make this decision, a simple three-step process is recommended.

**Step One:** the client should write a list of the names of potential guardians in no particular priority. If the client is unable to decide on any names, have the client think of a person that they would absolutely not want to be their child’s guardian. Now have the client name 3 people who would be a better choice than that person. If the client is still unable to list any names, have the client list the names of 3 people that would do a better job than the foster care system.

**Step Two:** have the clients list the factors that are most important to them in regards to whom they would want as a guardian. Factors may include the age of the guardian, marital status, religious beliefs, existing relationship with the kids, parenting styles, etc. One factor that should not be considered is finances. The parents should provide through life insurance or other means the necessary finances for the care of their children.

**Step Three:** the final step is to rank the people listed in step one based on the factors listed in step two. An important issue to consider if a couple is named as guardian is the possibility of the death of one of the persons, or the divorce or separation of the couple. Does the couple serve as guardian only as a couple, or does one or the other members of the couple serve alone? In addition to naming a guardian, backup guardians should be nominated as well.

Second, the nomination of the guardian should be properly documented. Preparing three distinct nomination documents is recommended. First, nominate a testamentary guardian within a last will and testament. Second, prepare an inter vivos guardian nomination, following the formality requirements of wills. Third, prepare an appointment of temporary guardian, again following the formality requirements of a will.22 The purpose of the inter vivos guardian nomination is to provide a means of documenting the parent’s desires of who the guardian should be in the event a court appointed guardian is necessary. The purpose of the Appointment of Temporary Guardian is to provide documentation that may be used to help avoid the need of the involvement of Child Protective Services in an emergency situation. A copy of the Appointment is provided to the named guardian, along with instructions on what to do in case of an emergency. The client is also provided with an ID Card identifying who should be contacted in case of an emergency to take custody of the minor children. Further, the client is provided with an Exclusion of Guardian Form that documents and identifies who should not be appointed as guardian, along with an explanation as to why. Additional documents include a medical power of attorney for each child and a Parental Power of Attorney.23

Third, appropriate instruction and guidance should be provided. One of the greatest gifts a parent can leave a minor child is a record of the parent’s thoughts, wishes and desires. This may be accomplished by providing an outline that helps parents write a letter of instruction to express their thoughts and wishes regarding any issue of importance to them, including how finances should be used, how to teach the child about financial management, personal and spiritual values, educational goals and desires, etc. This will also provide invaluable guidance to the guardians in making decisions regarding the child’s care.

**Conclusion**

This article is not a complete analysis of all the issues that should be considered by both parents and attorneys when planning for the care and support of children. Hopefully, the issues addressed here will prompt those who practice in the area of estate planning to take a closer look at the planning process to confirm clients are receiving comprehensive planning and for those who do not practice in the area of estate planning, to question if drafting that “simple” will is as straightforward as it appears at first glance.

**About the Author**

Kimmer W. Callahan, is the principal attorney at Callahan & Associates, Chd., in Coeur d’Alene. Mr. Callahan practices in the areas of estate planning, probate, trusts, and elder law. He received his J.D. from Gonzaga University School of Law and an LL.M. (Taxation) from the University of Denver. Mr. Callahan is a member of the National Academy of Elder Law Attorneys, The Elder Care Matter Alliance, and serves on the governing council for the Taxation, Probate & Trust Section of the Idaho State Bar.

**Endnotes**

1 Idaho Code §68-807(3)
2 Idaho Code §68-807(1)
3 Idaho Code §68-807(3)
4 Idaho Code §68-806(1)
5 Idaho Code §68-806(1)
6 Idaho Code §68-806(1)
7 Idaho Code §68-806(3)
8 Idaho Code §68-802(2)
9 Idaho Code §15-5-104
10 Idaho Code §§68-1301(1), (8), 68-1302(5); 68-1307(2)
11 Idaho Code §68-807(3)
12 Idaho Code §68-806(1)
13 Idaho Code §68-806(3)
14 Idaho Code §15-5-433
15 Idaho Code §15-5-419
16 Idaho Code §68-820(1)
17 Idaho Code §§68-1301(1), (8), 68-1302(5); 68-1307(2)
18 Idaho Code §68-806(1)
19 Idaho Code §68-806(3)
20 Idaho Code §15-5-409
21 Idaho Code §15-5-201
22 Idaho Code §15-5-204
23 Restatement Third, Property (Wills and Other Donative Transfers) §3.1, Comment a. (1996)
24 Idaho Code §32-1702
25 Restatement Third, Property (Wills and Other Donative Transfers) §3.1, Comment a.
26 Idaho Code §15-5-202
27 Idaho Code §15-5-104