



And the Nominees Are . . .

By Stephanie Fierro

Stephanie Fierro is an associate attorney with The Frutkin Law Firm, PLC. Her practice focuses on estate planning and general counsel business law. Stephanie enjoys helping clients plan for the future. For more information please call 602.606.9300 or visit www.frutkinlaw.com.

Last month my children, Mackenzie and Ava, asked me when I was going to write a story about them - they *definitely* don't understand what I write about. But then a thought occurred to me; I haven't written about guardianship yet!

For parents of minor children, the guardianship provision of a will is perhaps the most important clause. It is certainly the most difficult clause to discuss with clients. No one wants to seriously consider what will happen to his or her children if something happens to them. Unfortunately it is the responsibility of every parent to do just that, especially when you have the right to nominate that person(s).

As with most things, guardianship provisions are governed by state statutes. Some states, "court appointed" states, require court appointment and approval regardless of the parental nomination by will. Others, "parent appointed" states, allow the parental nomination to control, though not necessarily without caveat. Arizona is a "parent appointed" state.

So how does a person go about choosing a guardian to care, support and educate their child? Arguably no one is better suited to raise your children than you. Just the thought of anyone else doing so is incredibly disconcerting and may be one of the reasons so many people put off the estate planning process. After all, the guardian will have the same powers and responsibilities for the minor child that you do. It is, therefore, extremely comforting for clients to know that their input will, in most cases, control the guardianship appointment.

Unfortunately it is not unusual for parents to disagree as to whom they should nominate. In those cases, as in all cases, the attorney's role is to counsel clients regarding the practical considerations of such a decision.

The Child. The younger the child the more critical the guardianship will be. As children age, the role of the guardian - while still crucial - is usually less worrisome since the parents have had a longer period of time to instill their morals, values and philosophies. Although it depends heavily upon the age and maturity of the child, I recommend allowing older children to have some input in the nomination when appropriate. And that's especially true since Arizona grants children 14 years of age and older the legal right to object to or substitute a guardian.

The Guardian. Parents must consider whether the person(s) they nominate will be able and willing to serve. The age of the guardian is just as significant as the age of the child. While an older individual who may be retired and whose own children may be grown generally has more free time, the nominee may not be physically capable of rearing a young child. But, if the nominee is too young he or she may not be mature enough to take on the parental role or may be in the thick of raising his or her own young children.

Even if a guardian is physically capable, can he or she weather the economic impact? Clients must consider how that guardian will provide for the child and work to ensure that sufficient funds will be available. Life insurance is one such option to be explored while thinking about the guardianship.

Most importantly, clients need to recognize that this is a nomination and the nominee cannot be forced to serve if the time comes. Client should be advised to consult their candidates to discern whether they would even be willing to serve if called upon to do so.

Over Your Dead Body . . .

It is a seemingly human condition to be critical of other people's child-rearing. That is why one's child-rearing philosophy is a key consideration. If you believe that one nominee will raise your child as you would - that belief can make all the difference. Although otherwise physically and economically suitable, a candidate who doesn't share your morals, philosophies, or even something like eating habits may not make the cut.

A related consideration is religion. For some it is of paramount importance and most prefer that their nominee share the same religious views. Everything from your views on education to your own personal morals will influence your decision and should rightly be considered.

As If It Wasn't Hard Enough Already. Although we never want to overwhelm clients, there are many other things to consider.

Divorce. First, parents need to understand that the guardianship nomination in the will of the last parent to die will control. If the parents are divorced, the surviving ex-spouse's will may ultimately control. This is particularly troubling for a single parent with sole custody. That parent's will cannot per se override a surviving parent's rights. Second, parents often want to nominate a married couple as their child's guardian. When they do, it is important to discuss what happens if the guardians end up divorced.

Visitation. If a member of one side of the family is serving as the guardian clients may wish to provide instructions regarding visitation in an effort to ensure that their children will get to spend time with both sides of the family.

Being a parent is a tremendous responsibility - one that requires that your children top your list of priorities every single day. The law allows you to nominate someone you know and trust to provide for your child when you are not able to. Why would you not take the opportunity to do so?