



LAW OFFICES OF CANDICE N. AISTON
HELPING FAMILIES TO PLAN FOR PROSPERITY

Choosing Your Village: A Guide to Selecting a Guardian for Your Kids

By Candice N. Aiston

Most of my clients are the parents of young children. They usually do not come to me asking about how to save taxes or how to handle assets (not that they don't think that's important, too!).

They have one important issue in mind when they contact me: choosing a guardian for their children. Choosing a guardian for your children is the most important (and most difficult) task that you must (must!) undertake as a parent planning your estate. It can be extremely emotional to consider the degree of care that each friend or relative would give to your child.

I remember the first time I sat with clients at their kitchen table and discussed guardianship issues. The Mom started crying and I realized that this might be the hardest decision she'd ever have to make. I wanted to make it as easy for her as possible.

-Candice

The truth that you should recognize right now is that no one can replace you.

I have sat with many parents as they struggled with this and were brought to tears. I tell them that it is good to cry to get out the emotion surrounding these issues, but then **it is time to take action** and set up a plan that protects their kids.

Choosing a guardian can bring up so many painful thoughts. It is almost like grieving your own death. Parents cannot bear the thought of their children growing up without their love and guidance. Some parents, in considering whom they do *not* want raising their children, are forced to relive painful memories from their own childhood.

The good news is that you probably will never have to actually use your Guardianship Plan. The chance of both you and your partner dying before your kids are adults is very slim.

But wait – there’s more good news. **You have the power to create the best alternative situation possible for your kids, should the unthinkable happen.** Gone are the days of Little Orphan Annie and Oliver Twist! You get to pick your best choice to raise your kids in your place. That’s great news.

A. INTESTATE LAWS

Let’s look at what would happen if you die without any sort of estate plan in place. This is called dying “intestate.” If either you or your spouse (who is your child’s legal parent biologically or by adoption) were to die, the survivor of the two of you would automatically be the sole legal guardian.ⁱ It is when both parents die that matters get more complicated. Most parents have some idea of who they want raising their children, if something happened to them. You probably at least have an idea about who you do not want to raise your children!

However, if you do not appoint a guardian for your child, the court will appoint one for you.

The court will use a best-interests-of-the-child test, usually appointing the “next of kin” (close relative) who is willing to raise your kids.ⁱⁱ

This can be a problem for you if:

- 1) There are any potential “next-of-kin” who you do not want raising your children;
- 2) There are potential “next-of-kin” who may pursue a legal battle over guardianship;
- 3) There are no “next-of-kin”;
- 4) You want your child to remain with his or her step-parent;

- 5) You have a “non-traditional” family; or
- 6) Your choice of guardian lives far away.

Here is a personal account of how intestate laws can work. When I was two-and-a-half years old, my mother was killed in a car accident. We had just moved away from all of our friends and family in California to Hawaii, to get away from my father. My father had lost his custody rights, so he was out of the picture by the time my mother died. My mother did not leave a will. The court awarded guardianship to her next-of-kin, her half-brother, who was the only family in the state, besides my great-grandparents, who were too old to take care of me. My uncle was sort of a self-proclaimed bachelor, so he gave me up for adoption. Several family members in California came forward and wanted to adopt me, but my uncle decided that I should start fresh with a new family in Hawaii.

While I grew up in a perfectly happy home and don't regret a thing, I can't help but wonder: What did my mother want? Did she have some friends that she totally clicked with that she would have wanted me to live with? Would she have preferred that I stay with family? Would she have selected her half-brother to handle my care and her estate?

We will never know, because she didn't have a will.

Think about how a court might handle the situation if it is you that dies unexpectedly, and without a will. Is there a family member who you would not want to raise your kids? Are there family members who would pursue a legal battle over custody of your kids? Do you not have any family that would be considered “next-of-kin”? Do you have a blended family, in which your spouse wouldn't automatically be your kids' guardian? Do you have a non-traditional family, where one spouse might not be the legal parent? Does your choice of guardian live far away, perhaps in another state or country?

If there are family members that you do not want raising your kids, you need to put that in writing. You also need to write down *why* you do not want them raising your kids. (But there are ways to do this privately, so that the person never has to find out unless they challenge your guardian appointment!) This helps a court to uphold your wishes, should someone contest your will. I have had clients who do not want an abusive parent around their own children. I have had clients who differ in religious beliefs with other family members. I have had clients who want to protect their kids from a family member's drug abuse problems and mental problems.

If you have family members who you could imagine pursuing a legal battle over custody of your children, it is important to get in writing what your wishes are. **Legal battles can last for years, and your kids could be stuck in foster care or in a bad situation for all that time if you do not make your wishes clear.** Those cases that I cited earlier are cases that went through trial and through one or more appeals. We are talking about a few years before a final decision was made. **What happens to the kids in the meantime?**

Success story!
One client wanted her daughter from a previous marriage to stay with her step-dad and siblings in the event of her death. We were able to negotiate with the biological father to get him to agree to a Step-Parent Adoption, even though the client thought it would never happen.

If you do not have any “next-of-kin,” at all, or in state, it is practically guaranteed that your kids will be put into foster care while the court decides what their fate will be. It is very important that you name a guardian if you have no “next-of-kin.”

If you have a blended family, and you want your kids to remain with your spouse (your kids' step-parent) if something happens to you, you will have to put that in writing as well. Step-parents do not get automatic custody rights. Your child could be separated from the family he or she has grown to know and love and placed with strangers if you do not name your spouse as guardian. Depending on the situation, you may need to have a lawyer help you to take additional steps (such as a Step-Parent Adoption) to protect your child.

If you have a non-traditional family, in which one spouse may not be the kids' legal parent, you need to name that person as guardian if you want that family relationship to continue after your death. This type of situation is especially susceptible to legal battle by family members who may not approve of the family's lifestyle.

If the guardian you have in mind lives out of state, you need to take special steps to protect your child. You should establish a plan for short-term guardianship, so that your child does not have to spend any time in foster care while the long-term situation gets sorted out.

Now you know what will happen if you do not name a guardian for your children. But don't panic! **You can prevent all of those "what-ifs"** by creating a Guardianship Plan that names a Short-Term Guardian, a first-choice Long-Term Guardian, and second- and third-choice Long-Term Guardians.

I'll show you how!

B. NAMING A LONG-TERM GUARDIAN

1. The Things to Consider

The hardest part of setting up a Guardianship is choosing a guardian. There are several factors to consider when choosing. You should sit down with your spouse or partner (or, if you are a single parent, with a trusted friend or family member) and discuss all of the following points:

a. Does the person like your kids?

Ideally, your kids have had a chance to interact with the person or people that you are considering. (If not, you should probably try to build a relationship between them soon!) Do you have any doubt that they like your kids? I know. You're thinking, "Why wouldn't they like my kids? My kids are the coolest,

most amazing and adorable angels ever to walk the face of the Earth!” I’m sure that they are, but you should make sure that a potential guardian really, really likes your kids. This is the person who is may be wiping away your child’s tears and answering his or her questions about why Mommy and Daddy are gone. This is the person who may have to endure the confusing tween years and the challenging teenage years. Try to really pay attention when you see your kids interact with this person. Make sure that the person seems at ease spending time with your kids and seems to enjoy them.

b. Do your kids like the person?

Perhaps even more important, do your kids like the person that you are considering? This one should be easy enough to find out, since we all know how honest kids are! Just ask, “What do you think of Aunt Susie?” If they say, “She’s mean! She always tells me I’m a bad girl when I forget to wipe my feet!” then you may have a problem. If they say, “She’s nice! She sends me a card for every holiday, even Arbor Day!” then you probably have picked a winner. Again, pay attention to interactions between them. Can you imagine your child being comforted by this person?

c. Do you have similar parenting styles?

Most of my clients agonize over a possible choice for guardian if the person has a different parenting style to their own. I struggle with this as well. While you should consider a person’s parenting style very seriously, you might still end up picking someone that you differ from in this area. You should consider whether other factors outweigh this concern and whether your pick will respect your beliefs and parent the way that you want (to the best of their ability).

d. Do you have similar values?

Another important issue to consider is your values. This can be especially important if you have strong religious beliefs or non-beliefs. If you are

religious, is it important to you that your kids be raised by someone of your same faith? Sometimes you can work this out by arranging with the guardian that the kids be able to keep attending the same church. If you are not religious, is it important to you that your children not be raised by a family that is religious? This is an important factor to consider.

Beyond religious values, what other values guide you in life? Do you feel strongly about social justice, environmental issues, education, or cultural awareness? Does your guardian feel the same way?

- e. Does the person have sufficient financial resources?



A very important part of estate planning is obtaining life insurance! Be sure to get it when you are young and healthy! The older you get, the more expensive it will be, if you even qualify for it!

Finances should not be a major factor in your decision-making process. Whether a potential guardian has sufficient resources is an issue that can be easily resolved by obtaining life insurance, and naming the kids (or more preferably, the trustee of their trust) as beneficiaries. If you cannot obtain life insurance and your estate will not be sufficient to sustain your children until they are adults, consider whether the guardian will have enough resources to care for your kids through adulthood.

- f. Is the person financially responsible?

This question of financial responsibility should be considered, but is not determinative of whether you should choose someone as guardian. You may have a sister who is great with your kids, but not that great with money. You can always name a separate trustee to handle your kids' money if you find yourself in a situation like this. It is better to choose someone who loves your kids, if you have to choose between love and money.

g. Is the person's location satisfactory?

In my opinion, location is a huge factor to consider in choosing a guardian.

Will your child have to move across the country, away from everything he knows? This could add to the trauma of losing his parents. Or, is it important to you that your child be raised in a particular type of setting, such as in the fresh air of the country or the multiculturalism of the city? Does your child participate in any clubs or activities that are specific to your area, such as surfing or skiing?

Success story!

Some of our clients were able to name guardians who agreed to move to the clients' home to raise the kids in the event of the clients' deaths. It was really important to the clients that their kids not be moved away from everything they know, and they were able to come up with a creative way to solve this issue.

h. Is the person in good health?

One of the biggest issues people struggle with in choosing a guardian is that the grandparents, who are oftentimes closest with the children, may be aging. Health is a big factor, but you can name alternate guardians to serve, in the event that your first choice of guardian is unable to serve due to health issues.

2. The Selection

I learned the following guardian selection process in a training with Alexis Martin Neely.ⁱⁱⁱ It is a simple way to take action on all the possible choices running through your head. **Use the attached guardian selection worksheet to help you with this process.**

a. Short List

This is where you list five possible choices whom you wouldn't *mind* raising your kids, or rather, whom you wouldn't *hate* raising your kids. This can be done in any order.

b. Rank Choices

Next, you should rank your choices to put them in order. Refer back to the things you should consider if you need help ranking your choices.

c. Clarify Couple Choices

If you chose any couples, imagine if only one of them were around when they are needed for guardianship. Would you have a problem with any one person of each couple having guardianship of your kids? If so, mark those choices. You might consider either naming the couple as “only jointly” or jointly with one of the people allowed to serve alone.

d. Consider the Short-Term

Your guardian choices may live out-of-state or have responsibilities that would prevent them from getting to your child right away, if need be. Name three people who you can count on to be able to pick up your child within twenty minutes.

e. Consider Finances

Do you trust each guardian to handle your children’s finances? If not, consider naming another person to serve as trustee of your kids’ money.

f. Consider People Who May Challenge

Can you think of anyone who might want to challenge any of your guardian appointments? Write down who would challenge the appointment and why. Also write down why you didn’t select that person as guardian. Remember, there are ways to keep this information private if you want to exclude someone as guardian, but don’t want to hurt their feelings unless it is truly necessary.

g. See your attorney

You are now ready to have your attorney draft the legal documents that will protect your kids, should something happen to you. Make sure that you work with an attorney who understands how to protect your kids in the short and long term, and who will keep in touch with you for life, to make sure that your estate plan will work for your family.

3. The Conversation

Once you have chosen a guardian, or guardians, you should meet with them to discuss your decision. You should make it a meeting that is for the specific purpose of discussing the issue of guardianship. You don't want to come across as just casually mentioning it. Make it clear that you have made a decision, and that you would like to know whether or not your guardian will accept. A great way to do this is to invite your guardian over "for dinner and to discuss an important matter." During or after dinner, say something like, "[Guardian], we plan to be around to see our kids grow up and to play with our grandchildren, but if something were to happen to us before our kids are grown, we would like you to serve as guardian for our kids." Say that you don't expect an immediate answer, and discuss things like life insurance and who would handle the children's finances.

Try not to discuss this in front of your children. They really shouldn't know that you are discussing the possibility of your death until after everything is finalized. Then, if you feel they are mature enough to handle the information, it might be a good idea to let them know what would happen to them in the event of your death. Older children have likely already thought about the possibility, and they may be comforted to know that there is a plan in place.

4. Getting it written down

You should have a provision in your will (or have a “Nomination of Guardian” document) that that appoints a guardian. A sample provision reads:

If my partner does not survive me, or for any reason fails to qualify or ceases to act as guardian of the person of any of my children who are minors at the time, I appoint NAME OF GUARDIAN as guardian of the person and estate of each such minor child. If he/she/they fail(s) to qualify or cease to act as such guardian at any time during the minority of any of my children, I appoint my NAME OF ALTERNATE GUARDIAN as guardian of the person and estate of such minor children. [Five guardian choices!] I direct that no bond be required of the guardian for any purpose. I expressly authorize the guardian to change the place of residence of any minor child of mine from time to time to any place within or without the state in which the child resides at the time of my death or later.

You should also include a provision stating why you have chosen that guardian, such as:

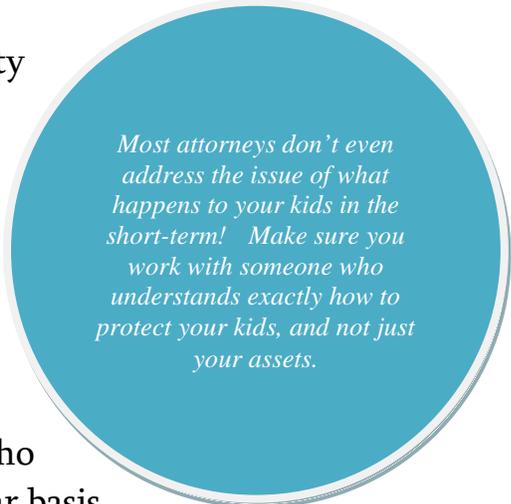
I chose this guardian because he/she/they has/have an existing relationship and bond with my child. He/she/they love(s) her, and I trust him/her/them to take care of her and to always do what is in her best interest.

This helps to persuade a court, should there be any controversy over your choice.

You should also have a “Guardianship Plan.” This is a written plan that you keep in your Estate Planning Binder. It basically outlines step-by-step what is to happen in the event of your death or incapacitating sudden illness or injury. You will start with your Short-Term Guardian then discuss your Long-Term Guardian and alternates. Include phone numbers and addresses for all of the people involved. You should sign it, in case it is ever used to persuade a court of your intentions. It is also a good idea to have each person involved sign it as well.

C. NAMING A SHORT-TERM GUARDIAN

Even if your long-term guardian lives less than thirty minutes away, you should still name a short-term guardian.^{iv} This does not need to be put in your will, for two reasons. First, your will does not give a police officer or other official the authority to release your child into anyone's care. In most states, there are legal steps that must be taken after your death to make guardianship official. Second, your short-term guardian is likely to be someone who lives close to you and who sees your kids on a regular basis.



Most attorneys don't even address the issue of what happens to your kids in the short-term! Make sure you work with someone who understands exactly how to protect your kids, and not just your assets.

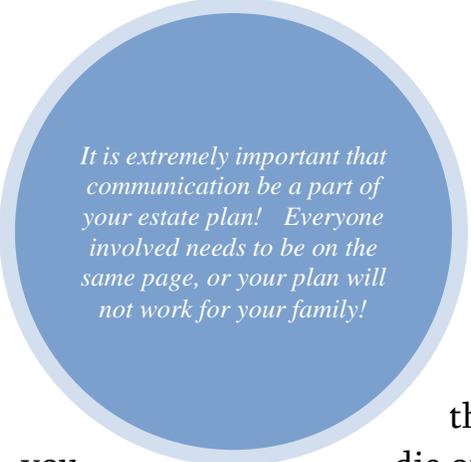
This situation is much more likely to change often than your choice for long-term guardian. You don't want to have to go through the formalities of executing a new will every time your short-term guardian selection changes.

Name a short-term guardian in your Guardianship Plan, which was discussed earlier. It is also helpful to prepare an Emergency Card for your wallet, which identifies, in order, who to call in the event of an emergency, and specifies that these people are authorized to take physical custody of your children. You should make this known to all daycare providers, teachers, school administrators, babysitters, coaches, and just about anyone who provides any type of care for your kids.

Your attorney can also prepare a "Power of Attorney for Minor," that your Short-Term Guardian can use to show legal authority to take custody of your child, but these typically have a time limit, such as six months. Your attorney should keep you current with this document as part of your estate plan at no extra charge.

D. MORE COMMUNICATION

Now that you have chosen short- and long-term guardians and put it in writing, all you need to do is communicate formally to all of the parties involved that the plan is set.



It is extremely important that communication be a part of your estate plan! Everyone involved needs to be on the same page, or your plan will not work for your family!

1. The Guardians

I recommend having your attorney send a letter to each of the guardians, because this makes things feel more official for the guardians. They are likely to keep the letter and refer to it later, should the need arise. Your attorney should let the guardians know exactly what should happen if you die or are suddenly incapacitated with illness or injury. It is helpful to include a copy of the Guardianship Plan, and the Short-Term Guardian should have a Power of Attorney for Minor for each child. It is important for you to let your guardians know where you plan to keep your Estate Planning Binder, so that they can have immediate access to the documents they need to make the long-term guardianship legal.

2. The Kids

As I mentioned earlier, I recommend that you let older kids know what the plan will be if something happens to you. They already wonder what would happen (trust me!), and reassuring them will only help. For some reason, a lot of the movies that kids watch involve children who are orphaned. Just about every Disney movie has a wicked step-mother or other mean person raising the main character. Reassure your kids that they will not have to do chores day and night or hunt for their own food.

3. Meaningful Rituals

Some families partake in guardian-naming rituals to commemorate the occasion. This can really go anywhere your imagination can take you. You can have a meal together, and then make a toast and a speech. Here is an example of what you could say:

May we all live long and prosper. If we have to leave this earth, we ask that you, Devon Aiston, be the guardian of our children, Tania and Talula. We ask that you love them as if they were your own children. Care for them, hug them, and laugh with them. Educate them, feed them, and guard them. Devon Aiston, will you be the guardian of our children?

And the guardian could respond:

I will be the guardian for Tania and Talula. I promise to love them and take care of them as if they were my own children.

This is mostly for the benefit of the children. They feel very secure when they are involved in a guardian-naming ceremony. They know that no matter what happens, they will always have someone to take care of them.

E. LEGAL SIGNIFICANCE OF NAMING A GUARDIAN

Naming a guardian in your will or other estate planning document does not automatically make them the legal guardian. The effect is to give a temporary guardianship and custody arrangement, but the person must still petition to have that arrangement become long-term. It is almost never denied by a family court judge unless someone challenges it and provides compelling reasons why the appointment must not be honored.

Once the Guardianship has been granted by the court, the Guardian has most of the legal rights of a parent. He or she can retain custody, claim the child as a

dependent for tax purposes, direct the child's education, control any money and assets that belong to the child, and seek medical care for the child.

F. CONCLUSION

Now you should have a basic understanding of how to name guardians for your kids and why it is so necessary. I recommend that you use the assistance of an attorney in taking these important legal steps to protect your kids. If you do it yourself, you will never find out whether your plan is effective. Find an attorney you trust to help you with this matter. Your kids may thank you for it one day.



ⁱ CARMINA Y. D'AVERSA, TAX, ESTATE, AND LIFETIME PLANNING FOR MINORS 126 (American Bar Association 2006).

ⁱⁱ CARMINA Y. D'AVERSA, TAX, ESTATE, AND LIFETIME PLANNING FOR MINORS 125 (American Bar Association 2006) (citing *Huval v. Jacobs*, 548 S.E.2d 437 (Ga. Ct. App. 2001) (statutory preference for appointing "next of kin" is not absolute where next of kin is "not 'objectionable'"; *Jefferson v. Dixon*, 573 So. 2d 769 (Miss. 1990) (construing statute calling for appointment of guardian among next of kin unless that person is unsuitable)).

ⁱⁱⁱ Alexis Martin Neely founded the Family Wealth Planning Institute and the Personal Family Lawyer program. She wrote the book *WEAR CLEAN UNDERWEAR*.

^{iv} ALEXIS MARTIN NEELY, *WEAR CLEAN UNDERWEAR* 6-12 (Morgan James 2008).