Attorney at Law

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Estate Planning | Wills & Trusts

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## Naming Guardians and Leaving Assets for Your Children

The thought of your children having to grow up without their parents is, of course, a grim and terrifying notion, but proper planning can provide great peace of mind as well as efficient personal and financial care for your loved ones. Below, you will find a brief explanation of the options that are available to the parents of minor children for creating a support system to care for the minor child and his or her estate if neither parent is able to do so.

### ***Naming a Guardian in a Will***

A Will allows the parents of a minor child (under age 18 in Illinois) to name the Guardian of the child and his or her estate as well successors in case the initial Guardian is unable or unwilling to act. The Guardian is the individual or individuals selected by the parents, or by the court if the parents fail to leave a Will, to look after the child and any assets that he or she owns outside of a trust (see below) in the event that neither parent is able to do so.

Generally, a court will favor a surviving parent's right to custody. However, if the surviving parent is unfit to care for the child or if both parents are deceased, then a court will recognize a Guardian (or successor) named in the parent's Will. Unfortunately, unlike the passing of assets, there is no statute that provides a standard system for the court to appoint a Guardian in the event that the parents fail to do so. If the parents die without leaving a Will and appointing a Guardian, a court must fill the vacant position, which can lead to infighting amongst the relatives and friends of the deceased parents.

Similar to Powers of Attorney for Health Care and Property, a Will can be a fairly simple document, but the common failure to have these documents prepared usually leads to significant court costs and lengthy disputes.

## ***Setting Withdrawal Terms with a Trust***

In Illinois, the assets of a beneficiary under the age of 18 must be held by a Guardian. During this time, distributions from the account must be approved by the court. At age 18, the Guardianship is terminated and the remaining assets are paid out in full to the beneficiary. However, most parents would agree that children are not responsible enough at the age of 18 to manage a large sum of money, maintain real estate or handle investment assets. Even parents whose children have surpassed age 18 usually determine that rather than permitting a large withdrawal by the beneficiary at the time of the second parent's death, withdrawals of the inheritance should be staggered until later ages, often age 40 or 50. The best remedy for this issue is to utilize a Trust for the benefit of the child along with your Will.

A Trust allows you, the parent, to determine (1) who will act as Trustee for your child's benefit, (2) the purposes for which distributions may be made and (3) the ages at which the beneficiary may withdraw specified amounts. Additionally, distributions from the Trust can be made without court supervision and withdrawals can be delayed if the trustee determines that it is not in the best interest of the beneficiary to make a withdrawal at that time—for example, if the beneficiary is having creditor or addiction problems. By utilizing a Will and a Revocable Living Trust together, a parent can not only ensure that the individuals of their choice will be designated Guardians of their children but also that the children will be provided for until they are responsible enough to manage the assets on their own.

Of course, everyone involved hopes that such Guardianship provisions never come into play, but if they do, it is far easier and more efficient to prepare in advance than for your loved ones to have to clean up the mess after the fact. For parents with minor children, combining a Will with a Revocable Living Trust provides the maximum peace of mind in terms of protecting their children, personally and financially, until they can handle themselves and their assets on their own.

## Illinois Civil Union Act Signed into Law

On January 31, Governor Pat Quinn signed into law the Illinois Religious Freedom Protection and Civil Union Act (the "Act"), effective June 1, 2011, which

recognizes the members of a civil union in Illinois as having the same rights as the members of a "spousal relationship" under the law.

Specifically, the Act states that "a party to a civil union is entitled to the same legal obligations, responsibilities, protections, and benefits as are afforded or recognized by the law of Illinois to spouses." Additionally, the Act provides the procedures for application, license and certification for a civil union as well as recognition of civil unions or same sex marriages entered into in another state by providing that a "marriage between persons of the same sex, a civil union, or a substantially similar legal relationship other than common law marriage, legally entered into in another jurisdiction" will be recognized as a valid civil union.

For Estate Planning and inheritance purposes, the Act provides automatic inheritance for the surviving member of a civil union in which the deceased member failed to leave a Will. When an Illinois resident dies without a Will, the surviving **spouse** is generally entitled to all of the decedent's assets if he or she did not leave any descendants or ½ of the decedent's assets if he or she did leave descendants. Thus, prior to the Act, the survivor of an unmarried couple would not have been entitled to any portion of the decedent's assets. However, beginning June 1st, the surviving member of an Illinois civil union will be entitled to these same automatic inheritance rights as well.

The Act also provides equal Estate Tax treatment for members of a civil union, which means that the survivor will benefit from the unlimited marital deduction for transfers of property at death from one spouse to another. However, while the Act provides for beneficial treatment under Illinois law, the Federal government has yet to recognize civil unions and, therefore, the same unlimited marital deduction would not be available to the survivor for Federal Estate Tax purposes. Additionally, the Act provides mutual guardianship priority and hospital visitation rights for members of a civil union.

As is the case with any new legislation, it remains to be seen how the legislature and judiciary will treat certain provisions in the Act. While the Act is a significant step towards equal rights for members of a civil union, due to the limitations imposed by Federal law and the laws of other states, a proper Estate Plan remains the best way to ensure that the individuals of your choice (1) will be the ones to make decisions on your behalf if you are unable to do so, (2) will have the rights to medical records and visitation and (3) will be entitled to inherit your estate as you provide.

## Definition of the Month: *Codicil*

A "Codicil" is a document that amends one or provisions of a Will. A Codicil can be used to make minor changes, such as changing the names or order of Executors or Guardians. For larger revisions, the existing Will is usually revoked by a new Will.

The requirements for executing a Codicil are the same as those for executing a Will. In Illinois, the execution of the Will and Codicil must be witnessed by two competent adults.

Upon death, both the Will and any Codicils to it must be filed with the county of the decedent's residence within 30 days of death.

Manish C. Bhatia is an Illinois attorney focusing his practice in the area of Estate Planning. Manish has focused his education and practice on Tax Planning, Estate Planning and Business Succession Planning since the first year of law school. He has also added Asset Protection, Elder Law and Nonprofit Organizations/Charitable Giving to his fields of practice. Manish is also a member of the Chicago Bar Association, the Asian American Bar Association of Chicago and the Indian American Bar Association.


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