When the Parents Die, What Happens to the Minor Children?

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Every parent has the important responsibility of planning for his or her children's future, including the unfortunate contingency of how the children should be cared for in the event of a parent's death. As with many aspects of life, the earlier parents develop a plan, the more options there are available. The purpose of this article is to address certain practical aspects for parents of minor children[1] to consider in planning for the contingency of their deaths. This article will first focus on the care and custody of the children. The article will then turn its focus to the care and management of assets descending to minors upon the death of a parent.

Upon the death of the first parent, the surviving parent remains the minor children's natural guardian[2]. The surviving guardian will possess, without the involvement of the court or any person, all powers, rights, and obligations of a guardian of the minor's person,[3] such as the authority to establish the children's living arrangements, enroll them in school, make medical decisions, and generally address their day-to-day needs for growth and development. The surviving parent, as natural guardian, may also manage up to $15,000 in assets received via settlement, insurance proceeds, distribution from an estate or trust, or certain other statutory specified occurrences.[4] Therefore, if no or nominal assets are expected to be inherited by the minor children, no further court involvement or other procedures are necessary to allow the surviving parent to provide for the ongoing care and custody of the minor children.

The death of both parents presents a more complicated circumstance. Parents can plan for the ongoing care and custody of their children by executing a statutorily established Declaration Naming Preneed Guardian,[5] which is often completed as part of the estate planning process, where parents put in place their wills, trusts, and other estate planning documents. A Florida Statute allows parents to establish a preneed guardian for their minor children by executing a written declaration complying with specified requirements and filing it with the clerk of court. Production of the declaration ". . . constitutes a rebuttable presumption that the designated preneed guardian is entitled to serve as guardian."[6] Upon the parents' death, such person shall be appointed, unless the court determines that such person's service as guardian is not in the minor children's best interest.[7] Under Florida law, the best practice for parents is to execute a declaration clearly establishing who shall serve as guardian upon the death of the parents. Although practitioners often draft guardianship provisions in a client's will, and such provisions may provide evidence to the court of the parent's intent regarding who should care for the minor children, the better and more reliable approach is the use of the foregoing statutorily approved designation.

If the court must select a guardian, it will first consider blood relatives (including by marriage) and then others who possess the skills and ability to serve as guardians.[8] Although blood relatives are considered first under the statute, courts have held that non-family members should be appointed when such persons have special skills applicable to the guardianship, or where such appointment is in the best interest of the minor children.[9]

Guardians are subject to court supervision. Upon their initial appointment, guardians must submit for the court's approval an annual care plan specifying the manner in which the guardian plans to care for the minor over the upcoming year, as well as an inventory listing all assets of the guardianship.[10] Annually, guardians must submit for the court's approval an updated plan for the care of the minor covering the upcoming year, as well as an annual accounting specifying the use of all guardianship assets over the preceding year.[11] Simplified accounting procedures are available in certain cases.[12]

Minors may inherit assets upon the deaths of their parents. Parents, with the aid of qualified counsel experienced in estate planning matters, should carefully draft their wills, trusts, and other estate planning documents to ensure that their intentions are accomplished. Death is typically the only time when a person transfers all of his or her assets. Therefore, specifying the recipients of such assets, and the terms governing such transfers, is critically important to ensure that the assets are appropriately used for the children's benefit.

If a parent has not executed a valid will during his or her lifetime, Florida's intestacy statutes will control the disposition of that parent's assets upon his or her death. If the parents are married and they have no children outside of their relationship, then the surviving spouse inherits all of the deceased parent's assets.[13] However, if either spouse has one or more children from a different relationship, the surviving spouse will receive only half of the intestate estate (which includes all assets titled in the predeceasing spouse's name alone and are without a valid beneficiary designation).[14] The remaining assets will then descend to his or her children.[15] This could lead to a cumbersome situation where the surviving spouse shares title to certain

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assets with the predeceasing spouse's children. Further, if significant assets pass to minor children, then one or more guardianships must be established to manage the assets for the benefit of the children. Consider a situation where a married business owner holds shares of a closely held corporation, has a child from a prior relationship, has children with his or her spouse, and does not execute a valid Will. The shares will descend ½ to the surviving spouse and ½ in equal shares to the children. Separate guardianships must be established for each minor child (to the extent his or her interest exceeds $15,000), and the surviving spouse and guardians must work together to manage and perhaps sell the shares. Such situations can be largely avoided by way of estate planning, where asset titles are reviewed, wills are put into place, and perhaps one or more trusts are established to hold title to the assets for the benefit of the children.

Although an in-depth discussion of Florida's homestead laws is beyond the scope of this article, it should be noted that where homestead property is titled in the name of one spouse (and not as husband and wife in a tenancy by the entirety or as joint tenants with rights of survivorship), and such spouse is survived by one or more minor children, then the homestead property descends by operation of law to the surviving spouse and the descendant's children.[16] Recently, Florida's legislature allowed the surviving spouse the option of electing between a life-estate and a one-half undivided interest as a tenant in common with the minor children.[17]

Perhaps one of the most troubling aspects of guardianship and the other default provisions under Florida law is that a minor child attains unrestricted and absolute access to inherited assets upon his or her eighteenth birthday. Consider an unmarried parent with a life insurance policy naming a minor as the beneficiary. The child will receive the insurance proceeds upon the parent's death. Since the child is a minor, however, a guardianship will be established to manage the assets for the child's benefit until his or her eighteenth birthday, at which time the child will attain unrestricted and absolute access to the insurance proceeds. While one would hope that the child could manage the assets in a mature manner, practically, eighteen years of age is quite young to assume such a financial responsibility.

The life insurance scenario set forth above, and various other situations, can be significantly improved by the implementation of one or more trusts for the benefit of a client's minor children. There is a wide spectrum of trusts that can be implemented. Relatively simple testamentary trusts can be established within a client's will. Such trusts are often limited to a trustee holding title to the trust assets until the child attains a certain age (often 25 or older). While the trustee holds the assets, however, he, she, or it is often authorized to use the assets to pay expenses related to the health, education, maintenance, or support of the child. Essentially, the trustee protects the assets and the child by preventing him or her from wasting the assets while the child continues to mature. More complex and stand-alone trusts are often created to accomplish various purposes, including tax planning, establishing a marital trust, or holding title to certain assets such as property located outside Florida or business interests.

Any parent with significant assets (including life insurance), should carefully consider the use of a trust in his or her estate plan. Although there will be transaction costs associated with establishing a trust, the costs of establishing and maintaining a guardianship in the event that a parent dies leaving minor children will likely far exceed those costs. Further, even in the event that a guardianship is still necessary to care for the minor child's person, such proceedings will be limited to the personal aspects of the child' care, because his or her assets will be managed privately by the trustee.

It is my hope that this article serves to aid family law practitioners in understanding some of the key issues associated with advising clients with minor children. Although no one likes to consider his or her own death, especially where minor children are involved, it is an important responsibility of every parent to establish a plan for the care and custody of his or her minor children, as well as for the assets they shall inherit. Although default provisions such as those related to guardianship and intestacy attempt to remedy many potential issues, I have found the result of these processes is often unacceptable to parents. A sound plan incorporating an analysis of asset titles and estate planning tools such as wills, trusts, and declarations naming preneed guardians should be considered in an effort to ensure that the parents' intentions are accomplished.

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Endnotes:

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1 Generally, under Florida law the disability of nonage is removed for persons 18 years of age or older. Fla. Stat. §743.07 (2013). Discussion of emancipated persons under the age of 18 is beyond the scope of this article.

2 Fla. Stat. § 744.301(1) (2013).

3 Very generally, Florida guardianship law is divided into two broad categories, guardianship of the "person" addresses the day-to-day aspect of a person's care and custody, while guardianship of the "property" deals with the assets included in the guardianship estate.

4 Fla. Stat. § 744.301(2) (2013)

5 Fla. Stat. § 744.3046 (2013).

6 Fla. Stat. § 744.3046(4) (2013).

7 Fla. Stat. § 744.312(4) (2013).

8 Fla. Stat. § 744.312(2) (2013).

9 *See, Morris v. Knight*, 1 So. 3d 1236, 1239 (Fla. 4th DCA 2009) (holding that non-relative former neighbor was better suited to be appointed guardian than cousins who also petitioned the court, because neighbor was fit to serve as guardian and ward wished to have neighbor serve as guardian); *In re Guardianship of Sallie B. Stephens*, 965 So. 2d 847 (Fla. 2d DCA 2007) (affirming appointment of professional guardian over ward instead of relatives).

10 Fla. Stat. § 744.362(1) (2013).

11 Fla. Stat. §§ 744.3675, 744.3678 (2013).

12 Fla. Stat. § 744.3679 (2013).

13 Fla. Stat. § 732.102(2) (2013).

14 Fla. Stat. § 732.102(3), (4) (2013).

15 Fla. Stat. § 732.103(1) (2013).

16 Fla. Stat. § 732.401(1) (2013).

17 Fla. Stat. § 732.401(2) (2013).