

Should I Name a Guardian For My Young Children in My Will?

What will happen to your minor children if you pass away is always a difficult subject to think about. Unfortunately, not having proper systems in place if that tragedy occurs can make a period of extreme emotional trauma even more difficult.

Where parents remain in a relationship, it is common practice for them to appoint a Guardian (or Guardians) in their respective Wills. A Guardianship clause specifies with whom the children are to live if both parents should pass away,

It is a very good idea to discuss with a potential Guardian your intentions, expectations and other practical considerations such as financial assistance or living arrangements.

However, this situation becomes more complex where parents have separated or divorced. While it is often assumed a surviving parent takes up sole care of any minor children, the reality is not quite so simple.

Who is a person "with sufficient interest"?

The *Family Law Act 1975 (Cth)* allows for a person with "sufficient interest" to apply for guardianship of a child.

A person with sufficient interest is usually a person who has a strong, pre-existing relationship with a child, such as a grandparent, aunt or uncle, or even step-parent.

If a non-parent applies for guardianship, a surviving parent or any person with parental responsibility is entitled to take part in the proceedings and be heard on the matter.

When assessing an application regarding children, the Family Court must consider the best interests of the child.

Best Interests Test

At all times, the Court has to assess the best interests of the child. The primary considerations are the benefit to the child of having a meaningful relationship with both parents and the need to protect the child from hardship or abuse.

Additional considerations are also listed. While not exhaustive, some important factors include:

- Any views expressed by the child (dependant on a child's maturity);
- The nature of a child's relationship with interested persons;
- The practical considerations of living or time spending arrangements;
- The capacity to provide for the emotional or intellectual needs of the child; and
- Any issues regarding family violence.

What about the terms of my Will?

If you have included a guardianship clause in your Will that names another person as your child's Guardian, if the other parent survives you and meets the considerations listed above, they will likely become the child's Guardian.

Further, if there are Parenting Orders from the Family Court which specify where a child will live in the event a parent dies, those Orders will likely overrule the terms of your Will.

That being said, if an interested person does apply for guardianship, the terms of your Will are likely to constitute strong evidence of your intentions and lend support to their application.

While it is still a good idea to name a Guardian of your minor children in your Will, it is important to be aware that such an appointment can become somewhat limited in the event of separation between parents. However, even in those circumstances, your appointment can have significant value in demonstrating your intentions should the question of an appropriate guardian arise.

To make a Will dealing with your children's guardianship, or to discuss making an application for guardianship of a child, please contact our experienced Wills team at Andersons Solicitors.

Discuss with potential Guardians your intentions, expectations and other practical

considerations such as financial assistance or living arrangements.