



Provisioning for Children and their Guardians

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Parents should appoint guardians to take the care and responsibility of their children should both parents die, prior to the children turning 18.

Furthermore consideration should be given to guiding appointed guardians how to maintain, educate and provide for the advancement of children under their care.

The right guardian and the care that may be required of children of deceased's parents may also require a review of the adequacy of funds to meet such objectives.

What follows is an overview of the needs of minor children and their guardians in respect to structuring a Will and the provisioning of the Will to ensure that there are adequate funds for the maintenance, education and advancement of the children as well as adequate provisioning given to the guardian's expenses.

Guardians of Minor Children

If Clients have young children or may have them in the future provisioning for the children's maintenance, education and advancement needs to be made. As well Client's in their Wills should appoint guardians to take the care and responsibility of the children should both parents die prior to the children turning 18.

The appointment of a guardian is usually included in the Will as a safeguard in the event that both parents die before the children are 18 years old. The appointment of a guardian may also avoid the possibility of disputes between family members. However the court has an overriding discretion to appoint or remove a guardian.

The appointment of a guardian is potentially complex. There are a range of personal, financial and legal issues that need to be addressed. The fact that the appointment of a guardian is brought about by death places an additional stress on those involved.

In selecting a guardian or guardians, Clients should attempt to appoint one or more people who:

- Are prepared to accept the responsibility. They should meet with the proposed guardians and discuss with them the nature and extent of the role and the parents' wishes should the guardians be called upon to act;
- Are of a similar age to the Clients and are young enough to assume responsibility for the children should they be required to act in the future. The ages of children at the time of making the Will are relevant to this decision; and



- Hold similar social, religious and cultural views to the Client.

It is the guardian's responsibility to make the important 'life decisions' on behalf of the children. The guardian must ensure that the children are provided with the necessities of life. That is feed, house and clothe the children. Furthermore it will be the guardian's responsibility to provide for the education and advancement in life. This may mean that the children reside with the nominated guardian but this may not always necessarily be the case.

Advancement, Maintenance and Education of Children

Where the guardian is not also the appointed Executor or Trustee, the guardian will be required to liaise with the Executor or Trustee in making decisions about the expenditure of the estate on behalf of the minor beneficiaries.

Provisioning for maintenance, education and advancements involves the following:

Maintenance - means provisioning for the necessities in life including food, clothing and housing for children or dependants. Inadequate maintenance provisioning may involve a claim under Family Provision legislation.

Education -provisioning has been interpreted quite widely by the Courts to mean a balanced and systematic process of instruction, training or practice, containing spiritual, moral, mental and physical elements. Provisioning for education therefore extends not only to primary and secondary

schooling but also to tertiary education as well as apprenticeships or vocational training.

Advancement - means provisioning for a gift to establish a child in life as opposed to a more casual payment. As an example this could include a sum of money to start a business or profession.

Guardianship Clauses

The following example of a guardianship clause may assist in planning for both children and their guardians:

Appointment of guardians

In the event that I die leaving children under eighteen (18) years, I appoint [names] of [address] to be their guardian/s. It is my wish that my Trustee exercises their powers so as to ensure that any person caring for any of those children (whether as guardian or otherwise) does not suffer, in the course of such care, a financial burden or loss.

In drafting the Will the Client should include instructions to the guardians as to how the children are to be raised including:

- Where the children should live;
- Where and what schooling should the children have;
- What contact the children should have with other family members;
- Ongoing occupation of the family home by the guardians, including the terms of this occupation and the provisioning need for the guardian; and



- Utilisation of Estate Funds for the purposes of accommodation of the guardian's family home.

For information in respect to the next ili workshop covering Family Provision Planning visit the ili website www.ili.com.au.

Court orders may take up considerable time and expense. Consideration would therefore need to be given to ensure that there are adequate funds available for the appropriate guardian.



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