



THE KIRWAN LAW FIRM

Planning for Your Children's Future If You Cannot Be a Part of It

As you begin the process of creating your individual estate and asset protection plan, the single most important aspect of that plan will be creating the environment in which your children will develop if they are faced with growing up in a world that does not include you in it. Of course, we always hope for the best, however, if you do not take steps to plan for the worst, your children are the ones that will pay the price. Below is a questionnaire that will help guide you through many of the important issues that will affect your children's future in the unfortunate event you were to die prematurely.

Nominating Guardians for you Minor Children.

In the event you are not around to care for your minor children (i.e., children under the age of eighteen (18)), the first class of individuals you will have to nominate is the guardian. The guardian is the person who will serve as the "surrogate parent" for your children. This is the person who your children will live with, the person who will love them, encourage them, decide what religion they grow up practicing, and decide whether they will attend public or private schools. In short, they will make all the important decisions concerning your children that you would have made if you were there to make them. Before naming the people you wish to serve in this important role, consider the following:

1. **Naming Co-Guardians.** You may want to name more than one person to serve as the guardian of your children but careful consideration must be given to the following before you do so. First, if you decide to name two guardians that do not live under the same roof, it is unlikely that the court will appoint both of them for practical reasons. Second, if you name a family member and their spouse (e.g., your sister and her husband, Joe), consider whether you would want Joe to serve as guardian if your sister died or if there were a divorce. If the answer to these questions is no, you should simply name your sister or, in the alternative, name Joe as a co-guardian so long as he and your sister remain happily married.
2. **Ask First.** Before naming someone as the guardian of your children, I strongly recommend asking them first (and preferably in person). The reason for this is at least threefold. First, there may be reasons why they cannot serve as guardian and it is best to know from the beginning so you can incorporate this fact into your planning. Second, it is important to see their reaction to the news. If their response is a lackluster "Well, uhh sure we can do it" spoken while looking at their shoes, you would probably be better off naming someone else who would have their whole heart in the job of caring for your children. Finally, if someone does agree to be the

guardian for your children, you should begin the education process detailed below. If it is important to you to have your children raised in a particular religion (or not raised in a particular religion) it is again important to see how they react to that request. In short, by asking first you are much more likely to end up with a guardian who truly loves your children and will take the responsibility of raising them seriously, which we parents all know is no small task.

3. Who Can and Cannot Serve as a Guardian. So long as at least one parent of a child is living, that parent will normally be the guardian of his or her children. When both parents have passed on, any person who is fit and proper and qualified to act as guardian, whether related to the child or not, can serve as guardian of your minor children. Therefore, a guardian does not have to be a family member. It is important to understand that when you appoint a guardian, you are making a recommendation to the court as to who you think would be best suited to raise your children, however, the court ultimately has authority to appoint the guardian they feel will be in “the best interest of the child.” That being said, because it is generally believed that the children’s parents are in the best position to determine what is best for their own children and that they will make that choice out of a deep sense of love for their children, the court will typically appoint as guardian the person nominated by the parents unless that person is unfit or “disqualified” (which will be explained below). If no one has been nominated, the court will have to pick a guardian it feels will be in the “best interest of the child.” Since it is generally believed that someone related to the child by blood or marriage will be more likely to be interested in the welfare of the child, the next class of people given preference to serve as guardian if the parents failed to nominate a guardian are family members. Again, the court is charged with the responsibility of choosing the person they feel will be in the “best interest of the children” given all the relevant facts and circumstances that exist at that time. Finally, if no family members are able or willing to serve as guardian, the court will choose from any non-family members it feels are interested in the welfare of your children.

As mentioned above, certain individuals are “disqualified” or not able to serve as a guardian. These people include the following:

- a. Anyone who has been judicially determined to have committed abuse, abandonment, or neglect against a child;
- b. Anyone convicted of a felony or anyone who has been found guilty of, or who has entered a plea of nolo contendere or guilty to, any of a laundry list of crimes involving moral turpitude;
- c. Anyone suffering from any incapacity or illness that would render them incapable of discharging the duties of a guardian; and/or
- d. Anyone who the court determines is otherwise unsuitable to perform the duties of a guardian.

4. Consider Naming a Nominator. One option that you have that you may not be aware of is to ask the court in the guardian nomination document to accept the guardian nomination made by a family member or close friend. Say, for example, you name your brother, David, as your first choice for guardian of your minor children. If David could not serve as guardian (say he died the day after you did), you would like to name your mother as the successor guardian but are afraid that she may be too old to handle raising your three kids. She is sharp as a tack mentally and you know she loves the children; she simply does not have the energy to keep up and/or you do not want to burden her. You may want to say in your guardian nomination document that if David cannot serve as the guardian of your minor children, that you would ask the court to substitute your mother's choice of guardian as your own because you know that she loves your children and is the best person able to determine what is in the best interest of your children. This way you can benefit from your mother's input with respect to who would be best to serve as the guardian of your children without burdening her with having to actually be the guardian herself. You could also limit the class of people your mother could choose from which may or may not include herself.
5. How Many Successors is Appropriate / The Litmus Test. Sometimes I am asked "How many successor guardians should I name?" In the event you only named one guardian, for example, and that person was unwilling or unable to serve in that capacity, then a court of law will make that choice for you. Therefore, in going through your choices the true litmus test would be "Is the next successor I have in mind better or worse than a court appointed guardian?" If you come from a large family or close knit group of friends and happen to have 27 successors who you feel would be better than a court appointed guardian, name them all. Do not limit your selection out of some preconceived notion that three choices are "good enough." Remember, these are your children.
6. The Important Role of Education. While nominating the people who will serve as guardian for your minor children is an important step, it is equally important to educate your guardians with respect to anything you would want them to know to help them raise your children. I recommend picturing yourself dead looking down (hopefully) at your children. God says to you, "I will allow you to return to earth for one hour for the limited purpose of telling your guardian anything you feel might be helpful to them in raising your children." If you could turn to God and say "Thanks for the offer, but I've got it covered. Let's get this show on the road," then you are doing great. If you would take advantage of the that hour, you may want to take steps to educate your guardians now (since you may not get that hour later). Now go back and think about all the topics you might cover in your one hour talk with your guardian:
 - a. Does your guardian already know your children's (i) blood type, (ii) medical history, (iii) family medical history, (iv) allergies, (v) regular medications, if any, etc?

- b. What religion do you want your children raised in?
- c. What religion don't you want your children raised in?
- d. Do you want your children educated in public or private schools? Do you feel strongly one way or the other?
- e. What geographic location do you want your children raised in?
- f. What family members do you want your children to visit? How often?
- g. What are each child's strengths or frailties?
- h. What are each of your children's likes and dislikes?
- i. Have your children expressed anything to you about their inner most feelings that they may not tell a guardian but would be important for them to know?
- j. What is the best way to motivate and communicate with each child?

This list is obviously limited and only you as your children's parents truly know your children well enough to create a comprehensive and meaningful set of information tailored to help create the best environment possible for each of your children as they grow up in a world that does not include you in it.

It is also a good idea to write all this information down in a letter to the guardian. First, remember that your first choice may not end up being the guardian and you may not wish to educate all of your successor guardians at this point in time. Second, if you have a Nominator or a court ends up appointing the guardian, you may not know who the guardian will actually turn out to be. Finally, even those with the best of memories will appreciate having your wishes memorialized in a letter they can refer back to. This letter can be kept with your guardian nomination document and other estate planning documents.

Below list the names of the people you want to nominate to serve as a guardian for your minor children. Order the list placing your first choice at the top and then your subsequent choices in the order you want them to serve thereafter. If you want to include a Nominator to the list, indicate their Nominator status by circling their name.

First Choice:

Name: _____

Address: _____

Phone #s: _____(H), _____(W), _____(C)

First Successor:

Name: _____

Address: _____

Phone #s: _____(H), _____(W), _____(C)

Second Successor:

Name: _____

Address: _____

Phone #s: _____(H), _____(W), _____(C)

Third Successor:

Name: _____

Address: _____

Phone #s: _____(H), _____(W), _____(C)

Excluded Person List.

As mentioned above, in the event you do not nominate a guardian for your minor children or in the event everyone that you have named are unwilling or unable to serve as the guardian, then a court of law will make that choice for you. Since the court will typically give preference to family members, in the event there are any family members that you do not want to have serve as the guardian of your children, it is best to indicate this on the guardian nomination document. Let's face it, we do not pick the people who comprise our family. Some family members may be wonderful people but have very different ideas on how to properly raise children. Others may just be less than caring, loving folks. In either case, note that you do not have to insult these people but can say something like "While I have a great deal of love and respect for Uncle Tony, I would ask the court not to nominate him as the guardian of our minor children."

Below, list the names of the people you do not want to serve as a guardian for your minor children.

Name: _____

Address: _____

Relationship: _____

Name: _____

Address: _____

Relationship: _____

Name: _____

Address: _____

Relationship: _____

Name: _____
Address: _____
Relationship: _____

Your Children's Trusts.

Before moving on to discuss the role of the trustee (another important class of people who will help to shape your children's lives if you are not able to be there due to death or disability), I felt it would be helpful to first discuss some of the options parents have with respect to leaving assets to their children after their death. If you had died without any planning in place, the person who is ultimately appointed by the court to serve as the guardian will typically be in charge of the assets that you have left or the court may appoint a different individual to be responsible for those assets. As the child grows up, the inherited assets are used to pay for the cost of raising the child; including paying for their education and medical expenses, if any. The guardian will have significant discretion to determine what expenses are reasonable and appropriate given the child's individual situation. When the child reaches age eighteen (18), the child is entitled to receive all the inherited assets that were not used for his or her care as a minor. The majority of people I have worked with over the years (and myself as well) do not feel that giving an eighteen year old a large sum of money is necessarily in their best interest.

Now enter the trust. An alternative to having a guardian care for the assets passed on to a child is to provide for a trust to be created for the benefit of each child upon the death of the last surviving parent (i.e., both mom and dad have passed on). Trusts have numerous benefits most of which can be summed up in a single word "FLEXIBILITY." Trusts can give you, the parents, significant control over (i) who will be in charge of the trust assets (this will be discussed in greater detail below when we discuss trustees), (ii) how the assets will be invested, (iii) when and for what purposes money can distributed to your children, (iv) whether creditors of your child (including a divorcing spouse) can reach the trust assets (which most people want to avoid), (v) who will receive the assets in the trust if a child dies or fails to meet a requirement you felt was important (such as graduating from college), and (vi) the extent to which the trust assets will be taxed upon the death of your child. In short, the options offered by trusts are as limitless as the parents' imagination. Philosophically, some parents are opposed to the idea of "parenting from the grave," while others see customized trust planning as providing important incentives and important tangible and intangible benefits above and beyond the mere inherited assets. Where you fall on the continuum should be a personal choice that takes into account the individual characteristics of your children and your family and personal moral values.

Below I have given you a few examples of some of the things my clients have requested with respect to the provisions of their children's trusts over the years. Remember as you read through them that they are intended to be food for thought and that you always have the option of making modifications or personal improvements given your individual goals, objectives, and insights. First, I address some issues that will affect your children while they are still minors. Then I will move on to trust planning that will affect your children during the adult stages of their life.

Planning For Minors.

When a child is a minor, I feel it is often best to give considerable discretion to the trustee to make decisions with respect to which expenses make the most sense for the well-being of your children. This gives the trustee the flexibility to adjust to the changing needs of your children as they go through the many stages of young life. That being said, it is oftentimes preferable to state your specific intent with respect to any number of topics to guide the trustee in their decision making. Some of the issues that you may wish to address in planning the specifics of your children's trusts are:

1. **Guardians.** To what extent do you want the guardians of your children compensated for serving in that capacity. For example, do you want to specify that above and beyond compensating them for their out-of-pocket expenses, they should receive payments to compensate them for their contribution of time, hard work, and patience in raising your children? Would you want the trust to pay for a larger home for the guardian and their family (which now includes your children) to live in while your children are minors? Should the trustee be permitted to pay for the addition of a room or wing to be added to their existing home? If you answered yes to any of the above questions, do you wish to place a cap on the amounts that could be paid out of the trust for these purposes? The answer to all these questions will depend in part on how much money is likely to end up in the trust were you to die unexpectedly and what you estimate the cost of raising your children will be until they reach an age where they will leave the guardian's home (which may be older than age 18). In making these decisions, a comprehensive financial plan that crunches these numbers based on your input can be invaluable.
2. **Education.** If you have a strong preference that your children attend public or private schools as they grow up, or that they attend a school that emphasizes a particular religious perspective, letting the trustee know will aide them in making decisions as how money should be allocated given your preferences.
3. **Miscellaneous.** There are numerous other topics you may want to cover including whether the trustee should pay for travel to visit family members that live in other states or countries, whether being involved in extra-curricular activities that may involve additional expenses are desired, whether you want them to have a car at age 16 or upon graduating from high school, or whether there are any limitations on how the trust assets are invested while the child is a minor, just to name a few. In short, take the time to think through any expenses or thought processes that the trustee may not think of (or understand the importance of) if you do not point them out.

Planning for Young Adulthood and Beyond.

After your child has reached a certain age or achieved a specified goal, you may want to start turning control over the trust assets to him or her. This desire has to be weighed against the fact that giving a child a large sum of money can sometimes do more harm than good given the child's maturity

level and general ability to manage the inherited assets. In fact, if the child is addicted to drugs or some other destructive behavior, a large sum of money placed directly in their control can even be deadly. Trust planning, however, goes far beyond simply determining what ages your children will receive their assets. It is amazing to me how many trusts I have reviewed over the years that simply required trust assets to be distributed to the child outright and free of trust at certain ages. The most common scenario is for trust assets to be distributed one-third at age 25, one-half of the balance at age 30, and the balance at age 35. As I have outlined below, careful consideration should be given to numerous topics in planning the specifics of your children's trusts. Think through what you want for your children and what would serve their best interest.

1. **Asset Protection.** One of the most valuable gifts you can give your children is an asset protection trust to house their inheritance throughout their lifetime. Rather than providing for the trustee to distribute say one-third of the trust assets directly to the child at age 25 (where they would be subject to the claims of his or her creditors), you can instead provide for those assets to be transferred to a special trust over which the child has considerable control (i.e., the child can even serve as trustee), but that has provisions that can serve to protect the inherited assets from the child's creditors, including a divorcing spouse (I'll call this type of trust a "Beneficiary Controlled Trust"). If a child inherited \$1,000,000 at age 25 outright and free of trust and used the money to start a business or purchase a home, a creditor or a divorcing spouse could end up taking your child's home and his or her livelihood. If instead, the \$1,000,000 were held in an asset protected Beneficiary Controlled Trust, the child's home and business could be owned by that trust. The child could be the president and CEO of the business, earn a large salary, and control when the company is sold without directly owning the business and without subjecting it to the claims of his or her creditors or the divorcing spouse. Likewise, if the home is owned by the Beneficiary Controlled Trust and a divorce ensues, the child's spouse, not the child, will be the one moving out. This can also provide a child with a means to protect their home even if they live in a state that does not have Florida's generous homestead exemption. John D. Rockefeller once said: "Own Nothing, Control Everything." This was excellent advice back in his day and is even better advice today. In a world where asset protection planning has become a necessity, you can give your child the advantage of an asset protection trust that will protect their inheritance and provide them with a tool to ameliorate their own planning as well.
2. **Estate Planning.** In addition to the asset protection benefits of creating a Beneficiary Controlled Trust to hold the child's inheritance, there are additional benefits from an estate tax perspective. All Americans are given something called a generation skipping tax exemption which presently gives each parent the ability to fund trusts for children (and/or others) with up to \$2,000,000 (i.e. \$4,000,000 collectively) the assets of which will not be included in the estate of the child for estate tax purposes. Building on the example started in the last paragraph, suppose your child inherits the same \$1,000,000 outright and free of trust. The assets will be included in his or her estate and will all be potentially taxable on the child's death at a rate as high as 50% to 60%. If the assets grew at the rate of 6% per year for 25

years, the inheritance would be worth roughly \$3,600,000 (i.e., \$1,800,000 in estate taxes at a 50% tax rate), and after 50 years, the inheritance would be worth roughly \$18,500,000 (i.e., \$9,250,000 in estate taxes at a 50% tax rate). If instead the \$1,000,000 were left to the child in a trust, the entire \$1,000,000 and all future growth could be excluded from estate taxation on the death of the child passing the entire amount to the next generation undiminished. Again, if the child had started a business within the trust and the business grew to be successful, the entire business could pass to the next generation without being subject to estate taxation. This solves a huge problem for someone who wants to pass on the family business to their children without leaving them a huge estate tax bill to contend with. Think if Bill Gates, who started Microsoft on roughly \$100,000, had grown his company inside a trust like this. All of his billions could pass to the next generation free of estate taxation and his children would be billions of dollars richer. These Beneficiary Controlled Trusts can go on forever, with wealth passing from generation to generation estate tax free. You can also give your child (and future generations) the ability to name who will receive the trust assets when they die and how they will receive them (i.e., in a customized asset protected trust, etc), thereby giving them more control over how assets pass to their prodigy. When you combine the estate tax advantages of leaving assets to your children in trust with asset protection benefits discussed above, it is surprising to me why anyone would choose to make outright distributions. In the examples and discussions that follow, when I state that a child could receive a certain amount from their trust at a certain age, life event, or accomplishment, understand that they could receive this amount in a Beneficiary Controlled Trust that provides them with the asset protection and estate tax benefits described above.

3. Incentive Provisions. Another benefit of leaving assets to your children in trust is the ability to tailor how the children will receive their money in a way that provides them with incentives to do any number of things. Again your choices are as limitless as your imagination. Below are a few popular options that will serve as food for thought as you plan for your own children.

a. Education Incentive. One popular option is to provide a child an incentive to better themselves through education. For example, you could provide for the child to receive one-third of their inheritance at age 25 (through an asset protected trust), however, in the event the child has not graduated from college by that age, they only receive ten percent (10%). You could even tie the percentage to their academic performance. If a child graduates with a 3.9 grade point average ("GPA") or better, they would receive 50% of the trust assets. If they graduate with a GPA between 3.0 and 3.9, they would receive 33% of the trust assets. If they graduate with a GPA between 2.5 and 3.0, they would receive 20% of the trust assets and if they graduate with a GPA of less than 2.5, they receive 10%. Instead of percentages, you could also provide for set sums of money to be distributed to the child upon the same

milestones. Provisions such as these provide the child with an incentive to not only go to college, but also to perform academically.

- b. Incentive to be Self Sufficient.** A concern of many parents is not that the child will not receive enough but that the child will receive too much. As stated above, you need to ask yourself whether giving a child a full one-third of the trust assets at age 25, for instance, will help them or provide them with an incentive to not work and instead sit around the pool with friends drinking beer all day. Many parents assume that this is not a concern because they are not wealthy enough, however, consider the following. A family has two young children (ages 3 and 5). They own their own home worth \$350,000, have savings of \$500,000, and a \$2,000,000 term life insurance policy. The total assets available for the children were both parents to die would be \$2,850,000. If the trust earns just 5% per year it will produce an annual income of \$142,000 per year. Many children will not come close to needing a full \$71,000 each to meet their annual needs so the trust assets will continue to grow. If each child actually needed \$30,000 per year (i.e., \$60,000 between the two of them), by the time the three year old reaches age 25, his or her trust will be worth almost \$3,150,000 (i.e., \$6,300,000 collectively for both children). One-third of this amount, therefore, would be \$1,050,000. Remember that at age 30 they will receive the next installment of \$1,250,000 each and at age 35 each child will receive almost \$1,450,000. Even if the trust did not grow at all, each child would still receive almost a full \$500,000 at each milestone age. You need to ask yourself is this really going to be good for your children or does a 25 year old receiving something between \$500,000 and \$1,050,000 scare you a little. If it does you may want to consider the following type of incentive trust.

When your child reaches age 25, the trust will start paying him or her the sum of \$25,000 per year (or some other sum that would allow them to live a decent but not opulent life). You could also decide to provide them with no annual payment (remember that the trustee can always use the trust assets to provide for the health care needs of your children), or have the annual payment disappear after age 30 or 35. In addition to each annual payment, if any, the child could receive an amount equal to what they report on their own income tax return. Therefore, if they are a professional, business owner, or otherwise earning a good salary, they have the opportunity to double their income. If they work at the local fast food joint, they will earn double minimum wage. Therefore, they will have an incentive to work hard and be productive, otherwise they will receive very little from their trust. Remember that since the purpose of this type of trust is to provide an incentive to be a self-sufficient person, you could provide that the restrictions will be removed and the child can receive all of the trust money if they earn in excess of some amount (say \$80,000) each year for five consecutive years. In this manner,

even if the child did lose the money in their trust, at least they have proven their ability to be productive.

I also want to point out that a well drafted incentive trust will provide for various “exceptions to the rule.” For example, what if a child decides to become a full time homemaker and devote their life to raising their children? We all know that this is one of the most difficult and important jobs a person can have, however, they simply do not receive a paycheck. In this scenario, the trust could provide that the homemaker will be deemed to earn a salary equal to that of their spouse or you could define a set amount they would receive each year (e.g., \$125,000 per year). Another consideration is what if a child is passionate about pursuing a job as a teacher, a minister, a peace corps worker, or some other full-time job that just does not pay very well. In this circumstance, the trustee could be given the authority to increase the multiplier (e.g., perhaps an annual payout of 4 times income rather than a 1 to 1 income match) so that the child is not penalized for choosing a career that they love but is not lucrative. There are obviously numerous variations to the themes I have pointed out above and many that I did not mention. You need to consider what is important to you and whether an incentive trust makes sense given your personal facts and circumstances.

- c. **Incentive to be Charitably Inclined.** One of my clients was a true philanthropist and wanted to pass a desire to give back to the community on to his children. He created a trust that set aside a sum of money that was controlled by a group of five people in the charitable world he had worked with and trusted. After he died, the five individuals were to work with the children to continue the work their father had begun. Every four years the five trustees would meet and determine which of the children had been most active in their philanthropic endeavors. The winner received a plaque and a check for \$250,000. There were also gifts to children who had made an earnest effort. This is just one example of the type of personalized planning you may want to consider.
- d. **Incentive to Stop Abusing Drugs or Alcohol.** In the event a child is ever addicted to drugs or alcohol, the child’s trust can give the Trustee broad discretion to withhold making distributions to the child until and unless the child submits to drug testing and/or undergoes treatment and ongoing counseling. The trust can even provide harsher penalties if the child refuses to go along. For example, the child could suffer the permanent loss of all or a portion of the trust assets which would thereafter only be available for his or her medical expenses. Obviously giving an addicted child a large sum of money could not only be unwise, but also deadly.

Whether or not an incentive trust is right for your children is a personal decision that should be given careful consideration. I encourage you to take the time to visualize

your children's future and craft a trust that truly serves their personal best interest, whatever that may be.

4. **Forced Retirement Savings.** Another option you may want to consider is setting aside a portion of the trust assets after a child has reached age 21, for example, to be invested for the child's retirement. If 20% of a trust holding \$1,000,000 was set aside for the child and invested to produce a 5% return until the child reached age 60, the child would have retirement assets of a little over \$1,400,000. If the assets produced a 7% rate of return, the amount waiting for the child at age 60 would be just over \$2,300,000. This is obviously a huge benefit to provide for a child, especially one that may be less disciplined in saving money than you would have hoped.
5. **Providing for Health Care.** In all trusts created for your children, especially those that have restrictive provisions, you always want to make sure that the trustee can pay for the health care needs of your children from the trust assets. Obviously, if a child has a serious medical condition or is in a life threatening accident, your first consideration is maintaining their health and safety and the other trust provisions will take a back seat to this concern. You may also want a trust provision that requires the trustee to pay for a child's health insurance regardless of whether they are acting responsible or not.
6. **Providing for Your Child's Children.** Once your children have children, you may want to have a provision in your child's trust that would permit for distributions directly to your grandchildren, especially for their health care and education. You could also establish separate trusts for grandchildren rather than leaving everything directly to children, especially if your children are already adults and doing well. All the things you would consider relevant in planning for your children's trusts would be things to consider in planning for your grandchildren's trusts.
7. **The Importance of Crunching the Numbers.** As you have seen in many of the above examples, having a clear understanding of exactly how much money would pass to the next generation is practically a necessity when it comes to making intelligent decisions with respect to your children's trusts. If you can estimate how much it will cost to provide for your children's needs as they grow up (which of course requires you to quantify what those needs are), you can make sure there are sufficient assets through life insurance, if necessary. If you already have enough assets to provide for your children's needs after taking into account estate taxes and other related costs, then you have more options in how and to whom the excess assets will be distributed. I strongly recommend working with your financial advisor to create a financial plan that crunches the numbers so that you know what number you need to have to accomplish your objectives. When going through your children's needs think about (i) where will they be living and will there be a need to help pay for their living quarters, (ii) who will their guardians be and did you want them to be compensated from the children's trusts, (iii) do your children have any

special health care needs that could be costly to treat, (iv) how much will their health insurance cost (and how much will co-pays and deductibles cost in a worse case scenario), (v) do you want them to attend private grade, middle, and high schools or at least have the option to do so, (vi) do you want to provide your children with the ability to participate in any extra-curricular activities such as participating in sports, attending camps, etc., (vii) do you want them to have a car at age 16, (viii) what will be the cost of your children's college educations, (ix) do you want to provide them with enough extra money to make a down payment on a home or to serve as seed capital to start their own business, (x) do you want to provide your children with enough money to fund a retirement trust as discussed above, and (xi) do you want to leave enough to provide any benefits to future grandchildren, including money to assist with their health care and education? This list is obviously not inclusive but should provide you with a good beginning point. Remember to think about YOUR children, YOUR family values, and the people and places where your children will be growing up if you are not there.

The Trustee.

The next important person involved in ensuring that your children are given every opportunity to succeed despite the fact that you are not around to help them is the trustee of your children's trusts. The trustee will be the person in charge of managing the assets in your children's trusts and making decisions about when distributions should be made from the trust and for what purpose. As the term trustee implies, it is important that you have a significant degree of trust in that person or entity to not only prudently manage the trust assets, but also to keep in close enough contact with your children to enable them to make intelligent decisions about their financial needs. Below are a few points to consider before naming the trustee of your children's trusts.

1. **Interplay Between the Trustee and the Guardian.** The person you name as your guardian can be the same person to name to serve as the trustee of your child's trust. For example, assume your sister, Sally, is a loving person who you know will take wonderful care of your children were you to die so you have named her as your guardian. Further assume that she is organized and has a keen understanding of money matters. She could also be the perfect choice to serve as the trustee of your children's trusts. If, on the other hand, she has a hard time balancing her checkbook despite the fact that her mothering skill are extraordinary, she would probably not be the best choice as trustee. In such a case you may want to have another family member or a corporate trustee serve in that capacity. Another advantage to naming a trustee who is different from the guardian is that it establishes a system of checks and balances. When large sums of money are involved and the proverbial fox is guarding the hen house, the guardian may be more apt to spend the money in a way that benefits him or her if she knows that no one is overseeing the account. When these two people are different, the guardian can demand to see the financial statements and receive accountings of the trust assets on behalf of the children, and the trustee can require receipts for expenditures to make sure that the money is being

properly spent on behalf of the children. You may also consider naming the guardian as a co-trustee (i.e., one of two or three trustees) to give the guardian some input as a trustee but not sole control over trust assets. The decision is obviously a personal one that will be based in large part on trust. If you are skeptical as to a person's ability to resist being in charge of a large sum of money without supervision (and let's face it, money can change people), consider naming a separate trustee.

2. **Corporate Trustee vs. Individual Trustee.** Many clients have asked me whether it is better to use a corporate trustee or an individual family member to serve as the trustee of their children's trusts. Each has their upsides and downsides. But the core of your decision will come down to how much faith you have in the individuals you have named.

From a cost perspective, an individual trustee will still need to hire a financial advisor to manage the trust assets, an accountant to provide tax advice and file trust tax returns, and an attorney to provide legal advice and help with providing notices and accountings to beneficiaries. A corporate trustee will be able to provide all the required services as part of its trustee's fee. That being the case, if the corporate trustee's fee is higher than the combined costs an individual trustee would need to incur to properly perform their job, it's typically not higher by very much.

A principal downside to using an individual as trustee is that if they were to mismanage or pilfer trust assets and a law suit were brought against them, the law suit may not be worth much to the child if the trustee is broke. Again, you must have a high degree of trust in the individuals you choose to name as trustees. The primary upsides of using a family member to serve as trustee is that (i) they are more likely to be maintaining a close relationship with the children and can, therefore, make good decisions as to how the trust assets should be spent to best benefit the children, and (ii) they can typically act faster than a corporate trustee in case an emergency distribution is necessary. If the family member is (i) skilled at managing money and maintaining the necessary records for the trust, or (ii) can hire good financial advisors and accountants and properly supervise them, they may be a good candidate to serve as trustee.

The upsides of a corporate trustee are (i) they have experience in managing assets, (ii) they are set up to maintain the proper accounting, bookkeeping, and tax accounting records and can prepare the tax filings for the trust, (iii) they do not die, and (iv) they are deep pockets in case they are ever sued for mismanagement or pilfering of trust assets. One principal downside of using a corporate trustee is that they may not be as able to maintain a close relationship with the children as an individual family member. This will make it harder for them to make distribution decisions based on the personal needs of the children as they will need to rely on the guardian for that information. In addition, if an emergency distribution is necessary, they typically don't act as fast as an individual.

Oftentimes, the best solution is for a family member to serve as a co-trustee with a corporate trustee. The family member can help make distribution decisions based on his or her close relationship with the beneficiary and the corporate trustee can manage the trust assets, take care of the administrative and record keeping duties, and safeguard the trust assets from being squandered or mismanaged by an individual trustee. And if the assets are squandered or mismanaged by a corporate trustee, at least the corporate trustee has deep pockets (unlike broke uncle Joe, for example). If a corporate trustee is used, the individual Co- trustee has the right to remove the corporate trustee and choose another corporate trustee. They cannot replace a corporate trustee with an individual, however, in the event a particular corporate trustee was ever to act inappropriately, the individual trustee (and even the beneficiary) has the ability to get rid that trustee and name another corporate trustee willing to be more reasonable.

3. **Co-Trustees.** You can always name more than one trustee of a trust (called “co-trustees”). When you do so, you need to take several things into consideration. Understand that if there are two trustees, they typically must agree on decisions regarding the trust otherwise there is a stalemate which sometimes requires a legal action to settle. This being said, it is important to choose co-trustees wisely. Sometimes people choose a person from the husband’s side of the family to be co-trustee with someone from the wife’s side of the family. If these two can be reasonably anticipated to get along, the pairing of these two co-trustees may make perfect sense. On the other hand, if these two have a history of not getting along or simply have opposing points of view on important topics (e.g., one is a miser and the other thinks you should enjoy money) you may not want to have them serve together as co-trustees. It is sometimes helpful to name a third co-trustee who could break a stalemate or name a third party who is not a full fledged trustee but who is given the power to vote when the other two trustees cannot agree. In short, be pragmatic and make sure the co-trustees you are choosing are the right fit, otherwise, your children may be the ones who suffer.
4. **Successor Trustees.** As with guardians, you need to plan for the contingency that your first choice for trustee of your children’s trusts, may not be willing or able to serve in that capacity when the time comes or may die while serving. Therefore, it is equally important to choose as many alternate trustees as possible. In the event you were to run out of trustees, a court would most likely need to appoint a successor trustee unless you provided for another method in the trust. For example, you could allow the child to choose a successor trustee if he or she were at least 18 years old (or some older age if you so choose). If the child were still a minor, the guardian might be given that right. You could also name one or more nominators who could be given the power to choose the successor trustee.
5. **The Importance of Education.** Since I covered much of the specific information you would want to cover in educating your guardian above, I will just say that the trustee should also be educated in the same manner. Knowing more about who your

children are, your personal input as to how to improve their well-being, and your family moral values, will only make the trustee(s) better able to make good decisions about how the trust assets should be spent for your children's benefit. Again, putting this information in the form of a letter that could be delivered to who ever is serving as trustee (including future successor trustees) makes perfect sense.

Below list the names of the people you want to serve as the trustee of your children's trusts. Order the list placing your first choice at the top and then your subsequent choices in the order you want them to serve thereafter. If you want to include a Nominator to the list, indicate their Nominator status by circling their name. If you want to name co-trustees, please write the information of the first trustee in the space provided with the information of the co-trustee(s) to the right.

First Choice:

Name: _____

Address: _____

Phone #s: _____(H), _____(W), _____(C)

First Successor:

Name: _____

Address: _____

Phone #s: _____(H), _____(W), _____(C)

Second Successor:

Name: _____

Address: _____

Phone #s: _____(H), _____(W), _____(C)

Third Successor:

Name: _____

Address: _____

Phone #s: _____(H), _____(W), _____(C)

Excluded Person List.

As with guardians, there may be some people you wish to exclude all together from ever being able to be the trustee of your children's trusts. If this is the case, you can simple have language added to the trust document that states "While I have a great deal of love and respect for Uncle Tony, he shall be considered to have predeceased me for all purposes under this trust agreement and shall not be able to serve as a trustee hereunder for any reason."

Below, list the names of the people you do not want to serve as a trustee of your children's trusts.

Name: _____

Address: _____

Relationship: _____

Name: _____

Address: _____

Relationship: _____

Name: _____

Address: _____

Relationship: _____

Name: _____

Address: _____

Relationship: _____

Your Children's Emotional Legacy.

The final issue I want to address is the single most overlooked aspect of planning for your children's future if you cannot be there for them; planning for your children's emotional well-being. I think we all know that the most important things you give your children are not cash, gameboys, toys, and the numerous other material benefits you bestow upon them on a regular basis. The real treasures we give our children are things like:

1. The feeling that they are deeply loved by you simply because they are your children;
2. The knowledge that you are proud of them and the self-confidence and inner-strength that accompanies that feeling;
3. The comfort of knowing they have a soft place to land when their world treats them harshly;
4. The often not-so-welcome push to do something that you know will make them grow when they are scared to take that first step (or maybe not just very motivated);
5. A work ethic and moral foundation that comes from you and the example that you set;

6. A deep understanding that they absolutely have what it takes to be happy, fulfilled, successful individuals in a world filled with obstacles and where the only constant is change.

This list is obviously not all inclusive but is representative of some of the things you as parents have given your children. Several years ago I was approached by a client (I'll refer to her as Betty) to represent her interest as a beneficiary under her mother's will. Her mother died with a considerable estate that left Betty and her siblings all millionaires several times over. I later learned that prior to her mother's passing, Betty never had much of a relationship with her mother and had felt that she never quite lived up to her mother's expectations. Her mother was very stoic in nature and there had always been distance between them regardless of their physical proximity. I learned all this after Betty received a series of letters that were written to her by her mother. Betty's mother had provided in her will that certain letters be given to Betty at certain ages in the event she had passed on. Some of the letters were old and some had been penned relatively recently. It was impossible to explain the emotional reaction Betty had as she first started to read the letters. The letters expressed how proud her mother was of her and how much she loved her. Her mother went on to detail much of her own past that explained her stoic nature and how alone she felt in the world. Everything Betty had thought and felt about her mother dramatically changed in a matter of hours as she read through the letters. Afterwards, Betty told me that she had the letters framed and that they were hung in a special room in her home. Betty also explained how much better her life had become since she was no longer burdened with the feelings of inadequacy that stemmed from her perception that her mother had been disappointed in her. These letters changed her life.

I tell you this story in hopes that it affects you the way it affected me. Take a few minutes and just think about your children; who they are and what they mean to you. Now think about the prospect of them first losing you (the most important people in their life) and then growing up in a world without you in it. As great and warm and loving as the guardian you have chosen to raise them if you are gone, they can never replace you and your love. Think how special it would be for your children to receive a letter, tape recording, or video tape (or nowadays a high definition quality DVD) from you even if the only message communicated was that you loved them and were proud of them. Regardless of the medium used, if the message gets through it will most likely change their lives for the better.

Although it is not a legally necessary part of your estate or asset protection plan, you may wish to create letters (or tapes, etc) to be given to each child at specified ages or life events. For example, you may want them to receive a letter just after you have passed on to help console them in their time of loss. If they are very young, you may want them to receive a letter at the age you feel they can first understand who you are. You may want them to receive a letter upon starting grade school, or high school, or college. These letters could prepare them for what they will face and encourage them to do well. You may want them to receive a letter at their wedding to let them know more about their parent's relationship, what marriage means, and just give them your words of congratulations and how happy you are for them. If a particular holiday was especially meaningful in your family, perhaps you could write each child a letter to be given to them on that holiday. Children's birthdays, graduations, confirmations or bar mitzvahs; the list goes on and on. You could explain your family heritage and pass on wisdom that you learned from your grandparents. You

may even want to pick an age well into adulthood after they have had a chance to grow and mature into an adult. Obviously, the dates, ages, or life events that you choose have to be personal to you and your children. Again, picture yourself looking down at them overtime after you have passed. If given the chance to come back down for brief moments, what moments would you choose and what would you say? Once these letters are written, they can be incorporated into your estate planning documents so that they are safeguarded by the trustee of their trust or by some other trusted person.

One final reason for writing these letters that many people do not think about stems from the fact that we do not always conduct ourselves with the emotional control we would want. Everyone has seen the movie or television scene where a parent and a child get into a terrible fight, the parent screams something hurtful to the child and later dies without the opportunity to say they are sorry and that they did not mean what they said. A less dramatic example is simply knowing that you could die without letting them know everything that is in your heart which you may not feel comfortable expressing or which your child may not be able to understand. If you have sat down and placed those words in the letters I have described above, those words will instead be the last words they hear (or read) and the last thoughts that are communicated to them. Think of it as “Last Words Insurance.”

Conclusion.

In summary, there is much to think about when planning for the possibility (hopefully, a very remote possibility), that your children may be faced with growing up in a world that does not include you in it. I highly recommend spending some time visualizing what would happen if you were suddenly and unexpectedly to die. Who would the players be? What would they be doing? What would they be thinking? Who would be strong and make good decisions? Who would not? If you could come back just long enough to give guidance, express any last thoughts, or simply say good bye, what would you say and to whom?

As the old adage goes, hope for the best and plan for the worst. Hoping for the best is easy, planning for the worst is more difficult but could make all the difference in the world to the people you love the deepest, your children.