

Choosing Wisely

Nominating Guardians for Your Kids

By Liza Hanks

Choosing a guardian means taking a hard look at yourself, and your partner, and thinking and talking about things that most of us usually don't: death, values, hopes, dreams, fears and, hardest of all, family dynamics. It means making choices that are good enough, but not perfect, and it requires that we do what we ask our children to do nearly every day – use our words, say how we feel, be respectful of our differences, and come to an agreement that works for all involved.

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San Jose mom

In the Bay Area, the decision can become especially complicated since many parents have their most trusted friends and family members living in other states or even other countries.

San Jose parent Nia Celestin remembers the choice as an extremely difficult decision.



“It was much harder than we thought it would be,” she recalls. “We discovered that what we really wanted was to replicate ourselves, and that’s really

impossible to do. In the end, we had to pick the person with the emotional, intellectual and financial skills to manage our daughter’s money and to provide her with a loving home, even though that meant compromising in some other areas.”

What Are Guardians?

A guardian is someone appointed by a judge to take care of children until they turn 18. You should nominate two to three people to serve as guardians for your children in case your first choice can’t do it.

Nominating someone doesn’t automatically make him or her your children’s guardian, but it does tell the judge what your wishes are. Unless there’s some compelling reason not to appoint the guardians you’ve chosen (such as a felony child abuse conviction), judges will do what you’ve asked them to do.

“That’s why it is so important for parents to name guardians,” says Burlingame estate planner Matthew Wesley. “If you don’t write it down, a judge is going to make a decision without being able to consult with you. And

A Quick Look

Choosing a guardian for your children means thinking and talking about the difficult subjects: death, religion, dreams, fears, money, and family relationships. Here in the Bay Area, the decision is complicated by the fact that many parents are divorced and many have their most trusted family members and friends living faraway. But it’s important to not put off making a decision. Estate planners and other parents throughout Silicon Valley and the East Bay offer advice and encouragement.

though he or she will try to do his or her best, you're always in a position to do a better job at making such a difficult decision."

There are two kinds of legal guardians:

- **Guardian of the person** is someone who is legally responsible for the education and care of a child under the age of 18.

- **Guardian of the estate** is someone who is legally responsible for management and control of a minor's property.

These responsibilities can be fulfilled by the same person, or you can name one person as the caregiver, and another as the financial manager.

Naomi Parker, an estate planner and parent in San Jose, gives an example: "My sister can't hold two dimes together. She would be so overwhelmed with my two kids anyway that she wouldn't want to also handle their money. But she'll be a great guardian to them, though I do worry that my daughter will talk her into buying a pony."

Other parents want the same person to have both jobs. "To us," says Oakland mom Karen Callaway, "it just makes sense to have one person play both roles. After all, that's how we do it."

A guardian isn't under any legal obligation to pay for the support of the children they're raising, though many do. The money that you leave to your children can be used to support and care for them, but the guardian can't use it for his or

her own needs, unless the estate plan specifically approves such use. That's why many parents make gifts to their guardians in their estate plans, to help them get ready to take on the responsibility of caring for another's child.

If neither the guardian nor the parents provide sufficient money to raise the children, the child can apply for public benefits, such as Aid to Families with Dependent Children.

An Emotionally Difficult Choice

If you and your spouse can't figure out whom to name, you have lots of company.

"Many of my clients have a specific idea of how they want their property divided up and distributed upon their deaths," says Tish Loeb, an estate planner in Los Altos. "But they don't know whom to nominate as guardian, it's such an emotionally difficult issue."

Karen Callaway recalled that, for her, the choice had a religious significance. "I picked people for their spiritual qualities as much as for their relationship with us," she says.

Susan Raymond, a mom in San Jose, says that she "wanted to find someone who would honor our children for who they are and not for what they wished they would be."

Another San Jose mother,

Considering Guardians

Here's a brief list of things to consider when choosing a guardian:

- Who is the child most comfortable with?
- Who really loves and cares about your child?
- Where do you want your child raised?
- How old is the guardian right now? How old will he or she be when your child is a teenager?
- What kind of values will the guardian pass on to your child?
- Is it important to you that a guardian share your religion?
- Is the guardian financially stable?
- Will your child fit well into the guardian's family?
- Do you want to place any conditions on the guardian's nomination – for example, that he or she be married at the time of the guardianship?

Heidi Reichner, says she was looking for a guardian that would keep her children's lives as undisturbed as possible. "When they were little," she says. "I was more open to the idea of them moving somewhere new. But now that they're older, it's too late for that."

Naomi Parker offers this advice: First, make a list of those

cause a problem. And we'll tell them eventually. Ultimately, we want them to understand our choices and to respect them. And I think they will."

"If you're concerned about how others will view your decision," Wesley says, "you can write a letter to your family explaining your choices and put it in with your estate plan. That way, they'll

be better able to understand why you've chosen as you have." He adds that, if disclosing that type of letter (or your estate documents) to your family will ruin holidays for years to come, you can keep your estate documents and any side letter

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Estate planner, Burlingame

people you don't want to name as guardian. After that, it gets pretty clear who is left.

Parents of young children often want to name the children's grandparents because those are the people the child feels closest to. But Loeb says that they'll need to revisit that idea and revise the plan when the child is older. The grandparents might be too old by then to provide the guidance and support an older child requires.

Naming friends, rather than relatives, is an option that many families choose, though they worry that there will be hurt feelings. As one parent (who requested anonymity) described it, "By not picking family, we knew that our decision might

confidential while you are alive.

Naming married couples is also something that many families struggle with. Here's a tip: If you want to name a married couple as guardians, it is better to name one member of the couple as the primary guardian, and the other as an alternate. That way, if they get divorced, the guardianship won't become an issue in the marital settlement as it would if they were both named as co-guardians.

Talking with Your Guardians

Before you nominate anyone as a guardian for your child, discuss your decision with him or her. Be honest about why you've

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Writing It Down

Nominating guardians for your children can be as simple as writing down their names on a piece of paper that you and your partner sign and date. Most parents, though, nominate guardians at the same time that they prepare a valid will, which also states what they would like to have happen to their things and names an executor to take care of their estate after they die. A will doesn't have to be a fancy affair. If all you want to do is nominate guardians, you can pick up a will form at a stationary store, check out a book from the library and write your own, or use computer software to generate a simple will. However, not surprisingly, most attorneys recommend investing in an estate planning attorney.

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made the choice, and make sure that he or she is willing and able to accept the responsibility.

"I was worried because my husband and I decided not to nominate my sister," recalls one parent, "but when I finally got up the nerve to talk about it with her, and was honest about why we chose as we did, it turned out that she was really supportive. I'm glad we talked about it, though it was kind of awkward at first."

Heidi Reichner recounts her difficulty finding guardians, and stresses the importance of talking with them first. "The first two couples that I spoke with had already agreed to serve as guardians for other friends and didn't want to take on more responsibility."

Dealing with Divorce

Divorced parents often face a dilemma when they make an estate plan.

"My ex-husband would get custody of my daughter if I die," explains Monterey mother Annie Holdren, "but my daughter's stepfather is the one who's really been acting as her father since she was 4-1/2. I want to name him as her guardian, but unless my ex-husband is in jail or has abandoned her, I'm afraid that the judge wouldn't do it."

She is right. You can nominate a third-party as a guardian, but unless a natural parent has legally abandoned a child or is otherwise unfit as a parent, he or she is most likely to get custody of the child.

Still, nominating another person as guardian in your will allows that person to have a hearing before the judge and make the case as to why he or she would be a better guardian than the child's natural parent. You can also write a letter

stating your reasons for preferring your choice.

Tish Loeb says that it is even better if your ex-spouse will consent to your naming a third-party as guardian, though, as the natural parent he or she will have the right to change his or her mind about this before another guardian is appointed.

"Another good idea, if you can make it work," Wesley suggests, "is for divorcing parents to agree on guardians for their children and make that part of the marital settlement. That way, there's a consensus on what both parents think would be best for the kids."

Same-Sex Couples

Lesbian and gay couples face the same issues (and more) that divorced parents do. Unless the biological parent of the child consents to the nomination of the other member of the couple as guardian, a judge isn't going to grant the request, unless the biological parent has abandoned the child or is otherwise unfit, cautions East Bay attorney Nicole Berner.

As in everything else involved in raising kids, flexibility and an ability to accept change with grace and good humor is a cornerstone to good estate planning.

As of January 2002, same-sex couples who have registered for domestic partnership status in California can legally adopt the children they're raising together. The non-biological parent adopts the child as if he or she is the stepparent, although this also

Money and Minors

If you're going to leave money or other property to minor children, you'll also need to make sure that there's an adult who will manage their estate for them until they are 18, if not longer. There are three ways to do this:

- **Guardianship of the Estate** – Has the legal responsibility to manage a minor's funds until the child is 18. If you don't want your children to inherit your entire estate at 18 and have your guardian make periodic accountings to the court, consider the next two options.
- **A Trust** – You can set up a trust for your children and appoint an adult as the trustee. The trustee will have the responsibility to manage the funds as you specify and to distribute the money under the terms of the trust at any age and under any conditions that you choose. You can also give your trustee the power to withhold the money if your children are not capable

of using it responsibly. The trustee doesn't have to be the same person as the guardian (either of the person or of the estate), since the trustee's job is to manage the money prudently and well. Palo Alto estate planner Tish Loeb notes that many of her clients name a gifted money person as trustee, but keep the guardianship separate.

- **Custodianship** – You can set up a custodianship for your children, in which an adult you choose manages their property until they reach an age up to 25. The terms and conditions under which the custodian must act are dictated by state law. "Custodianship can be a good way to go for simple things, such as certain kinds of bank accounts," says Burlingame estate planner Matthew Wesley, "but it isn't as flexible as a trust, and you have to distribute all the money by the time they're 25, at the latest."

requires the consent of the biological parent. Once adopted, however, should one parent die, the other will get custody of the child.

The Distance Dilemma

Many parents living in the Bay Area have trusted friends and family living in other states or other countries, but no one here they feel comfortable nominating. Parents can nominate guardians who live outside of California, but their will should allow the guardian nominee to petition for appointment where he or she lives, and only come to California if that would be necessary or convenient.

If your chosen guardians live in another country, they should petition for guardianship where they live and use the will to show why they're doing so.

You should also make sure to get your child a passport now, Parker says. "That way, if your brother comes from India to pick up the children, they'll be able to

leave the country with him."

Another good idea for parents with family abroad, Wesley says, is to nominate a temporary guardian, such as a neighbor or a friend, to take care of the children until the foreign friend or relative can get here and gain appointment as the child's guardian.

Keeping Your Plans Current

Nothing is written in stone. You can, and should, revisit and revise your estate plan every three to five years as both your nominees and your children age and change.

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