Testamentary Guardianship: Safeguarding Your Child's Future Through Estate Planning

By Victoria M. Craft

April 24, 2024 | **TRUSTS AND ESTATES**

Guardians are a type of fiduciary appointed for a minor child or individual determined incapacitated by the courts. When appointed by a Last Will and Testament ("Will"), they are commonly known as testamentary guardians. Testamentary guardians generally have authority over the "person" and "property" of a minor. In other words, they can take custody of the minor child and manage their personal estate, any income, or profits related to both real and personal property (but not any assets held in trust – that is the trustee's job). Often times, individuals choose to appoint a trusted individual in their Will to serve in this capacity in the event they should predecease their minor child. If a parent were to pass without designating a guardian in their Will, New York State law provides for a hierarchy of who may serve, which is generally the child's closest blood relative.

In most instances, the appointment of one parent as guardian by the Will of the other parent is unnecessary because the surviving parent inherently becomes the guardian of the child (so long as they are not incompetent or incapacitated). As such, parents appoint a guardian for their children (or a child likely to be born) in their Will to ensure that the trusted adult has the requisite authority upon their passing.

A testamentary guardian may not exercise their power or authority as guardian unless the Will is admitted to probate and letters of guardianship have been issued by the court. In order to obtain letters of guardianship, the proposed guardian must sign and submit a bond (unless waived) and an “Oath and Designation” outlining that they will faithfully and honestly discharge their duties and designating the clerk of the court to receive service on their behalf. This must be filed with the court within three months of the date of probate (which can be extended upon good cause shown).

In order to qualify as a testamentary guardian, an individual must be domiciled within the United States, over the age of 18, of sound mind (not adjudicated incapacitated), and “one who does not possess the qualifications required of a fiduciary by reason of substance abuse, dishonesty, improvidence, want of understanding, or who is otherwise unfit for the execution of the office” (SCPA § 707). A person who is not a US resident can be appointed as guardian; however, they’ll need a New York resident to act as their co-fiduciary. Notably, a recent change in New York law permits a convicted felon to serve as a fiduciary within the court’s discretion, so long as their conviction does not relate to a breach of fiduciary duty or crimes against children. A person unable to read and write the English language may also be eligible, according to statute. After appointment, the guardian must annually account to the court, as well as when the child reaches the age of majority and the guardianship terminates.

Providing for a testamentary guardian in one’s Will is especially important in instances where the extended family relationship is strained or the child has no close blood relatives with the capacity to care for them. Appointment of a testamentary guardian via Will provides for an avoidance of doubt, ensuring that parents have a say in who is to care for their minor children in the event of their passing.

If you have questions pertaining to testamentary guardians, please contact one of our qualified Trust & Estates team members at Lippes Mathias: Victoria M. Craft (vcraft@lippes.com) or David E. Siegfeld (dsiegfeld@lippes.com) to learn more about how we can help.

Related Team

Victoria M. Craft
Associate

David E. Siegfeld
Partner | Team Leader - Trusts & Estates

Disclaimer: *The information in this post is provided for general informational purposes only, and may not reflect the current law in your jurisdiction. No information contained in this post should be construed as legal advice from our firm or the individual author, nor is it intended to be a substitute for legal counsel on any subject matter. No reader of this post should act or refrain from acting on the basis of any information included in, or accessible through, this post without seeking the appropriate legal or other professional advice on the particular facts and circumstances at issue from a lawyer licensed in the recipient's state, country or other appropriate licensing jurisdiction.*