

How can you appoint a guardian for your children?

If you have young children, you have probably thought about who you would like to take care of them if you and your spouse (or partner) die before your children turn 18.

Did you know that you are able to use your Will to nominate a person to be the guardian of your children?

Why should you appoint a guardian?

Although appointing a guardian in your Will may help avoid disputes between your family members by making your intentions clear, it is not binding. The Family Court has an overriding discretion to appoint a different guardian or remove a guardian of your child where it considers this to be in your child's best interests.

What are the powers and responsibilities of a guardian?

A guardian is responsible for the daily and long term care and welfare of your child and for making important lifestyle decisions on their behalf. The guardian must ensure that the child is adequately housed, clothed and educated. The guardianship of minor children is an important and often onerous task and the appointment should be thought through carefully.

Before you make any change to your Will, you should discuss the appointment with your intended guardian and consider carefully whether they:

- are prepared to accept the responsibility
- are of a similar age to you, and
- understand your views on how you wish your children to be raised.

You may include in your Will (or in a separate Memorandum of Wishes) an outline of any specific factors you want your guardians to consider in the raising of your children.

In the event that your first choice of guardian is unwilling or unable to act, you may also wish to nominate a substitute guardian in your Will.

A guardian does not have any control over, or power regarding, the assets of your estate or trust funds established for your children under your Will – the trustee you nominate in your Will has this responsibility. While this separation of duties may act as an effective 'check and balance', it is important that the trustee and guardian are able to communicate easily and work together in the best interests of your children.

How does a guardian access funds for your child's welfare?

There is generally a standard clause in your Will that gives the trustee the power to advance income and capital for the maintenance, support, education and benefit of your child. Once the child has reached a certain age, the trustee may decide to pay funds directly to the child. Until this time, the trustee will usually make payments to the child's guardian, or directly to the provider of the goods or services.

You may consider it appropriate to make provision beyond that outlined above. Other financial assistance that can be provided to your guardian includes:

- a lump sum gift of money to extend their home or buy a car to help in comfortably accommodating your children
- the ability to reside with your children in your home rent-free, or
- one-off or regular payments to them personally for acting as the guardian of your children.

Are there any legal implications of being a guardian?

There may be. For example, under superannuation law, if a member dies, the superannuation death benefits are usually payable to their 'dependants'. If the member is a guardian of a child, that child may fall into the category of a 'dependant' if the child relies on the guardian for financial support and therefore be eligible to receive or make a claim against these death benefits.

In addition, where state legislation provides for certain people to be eligible to make a claim on an estate, a child who is financially dependent on a guardian may satisfy the requirements to be a claimant on the guardian's estate.

Adequate provision for the child from the estate of the parent may protect the guardian from such claims.

It is important for the guardian to obtain advice on these issues when considering whether to take on the role and also when conducting their own estate planning.

Would you like further information?

For further information please contact your AET estate planning specialist on 1800 882 218.