

Placement of Minor Children in case of Death



For many single parents, the question of who will take care of their children if something happens to them is a difficult one. Obviously, the first question is who could be trusted to raise the children. Once that question is answered, the parents are often confused as to how to make legal arrangements to make sure their wishes are carried out. This memo attempts to guide single parents through the possible legal processes. It is highly recommended to consult a qualified attorney regarding which options would best apply to an individual situation.

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I. TESTAMENTARY GUARDIANSHIP

In the State of Washington, parents can appoint a guardian for their minor children in their will. This is called "testamentary guardianship."¹ Testamentary guardianship goes into effect when *the sole remaining* parent dies. *The named guardian will need to have the appointment confirmed by the court* and will have certain statutory responsibilities including making reports to the court and posting a bond, unless the bond has been waived.

A parent can change a testamentary guardian at any time by amending his/her will.

In the case of a single parent who dies leaving minor children, the courts will look to the other (non-custodial) parent to take the children first. If that parent is also deceased, a testamentary guardian will probably be approved. If the other parent is alive, there is no way of ensuring the court will accept the appointment of a testamentary guardian.

A. When the Single Custodial Parent is Ill/Dying and the Other Parent is Alive

A natural parent has parental rights that cannot be legally relinquished except by court order. The simple awarding of custody in a divorce decree to one parent, and assignment of a testamentary guardian by that parent, will not abolish the other parent's natural parental rights. Thus, the surviving parent will be entitled to custody of the minor children unless she/he is so completely unfit that the children's welfare demands another disposition. If the surviving parent is abusive, or otherwise unfit, see Section I. B. below.

¹ See RCW 11.88.080.

Although there is no case law about unknown or missing surviving parents, a court would likely take the choice of guardian by the ill/dying parent seriously if the other parent is unknown or cannot be located (for instance in a situation where the surviving parent had never been with a child, and his/her whereabouts were unknown for a long time). However, in the event that the other parent is indeed found or somehow notified and appears, there is no guarantee that the testamentary guardianship appointment will be upheld. A testamentary guardian may be appointed only by will of the *last* surviving parent.

B. When the Other Parent is Abusive or Otherwise Unfit

In cases where the other parent is abusive or otherwise unfit to care for the child, the custodial parent should take all steps necessary to document the unfitness of that parent – while being careful to avoid making defamatory statements in the will or in other documents that are to be filed with the court and made public records.

1. The single parent should prepare a legally valid will. Wills must be properly written and witnessed. Holographic (hand-written) wills are valid in Washington if attested to and all other requirements are met. Legal advice in drafting a will, and having it properly witnessed, would be best for the single parent.
2. In the will, the parent should appoint a testamentary guardian in the event of his/her death and state that he/she wants the child to go to the guardian even though the other parent may be alive. The parent should describe any pre-existing relationship/contact between the child and the prospective custodian/guardian.
3. The parent should provide statements to the effect that he/she wants the children to be raised in a home free of crime, violence, substance abuse, etc. However, a single parent must be cautious not to name the other parent, speak badly of him/her, or make allegations of his/her physical abuse, etc. in her will – a will is a public document and such statements may be considered defamatory to the other parent, and he/she may have a legal cause of action against the estate.
4. Since the single parent will not be present to testify in court about the other parent's abuse and history, the testamentary guardian must be prepared to do so in his/her absence. Thus, any documentation of violence, court orders, and other evidence against the allegedly unfit parent should be preserved and placed with the guardian, or with a person who can be accessed by the guardian (such as a lawyer with whom the parent has worked in the past).
5. The will should also state that the parent wishes to waive any attorney/client privilege to the extent needed to enable custody of the child to go to the guardian. For example, a former divorce attorney may have confidential information about

an abusive relationship that could not be accessed unless the confidentiality privilege was waived.

6. There should be authorization in the will for the personal representative (the person who administers the will) to use every last dime of the estate, or allocate assets to the prospective guardian, for legal fees to fight for the child to be placed with the guardian, because it is in the child's best interest. Moreover, any non-probated resource, such as insurance money, should be payable to the prospective guardian or the estate so that it can also be used in the custody battle. Again, an attorney should be consulted regarding drafting the will.

II. MINOR GUARDIANSHIP

A testamentary guardianship goes into effect only when the parent is deceased. However, it is possible to have a guardian appointed for children during the parent's lifetime. This may be an option for parents who are seriously ill and not able to make decisions for the child. A guardian would step in to meet the needs of the child, including making medical decisions, financial decisions, and personal care decisions, depending upon the scope of the guardianship. A parent may petition the court for a guardian to be appointed, or any other interested person may petition to have a guardian appointed for a child (for example, the proposed guardian). A guardianship does not terminate the parent's parental rights, as an adoption would.

III. THIRD PARTY CUSTODY

If the children are not living with their parents, or if the parents are unfit to care for the children, a third party may bring a petition asking for custody of the children. This situation may arise when a parent has died and asked a friend or relative to take care of the children. That friend or relative may then bring a third-party custody action asking the court to award custody to him or her. This situation may also arise when a parent is too ill to care for the children. This action would grant the petitioner physical custody of the children, but not guardianship. As with a guardianship, third-party custody would not terminate a parent's rights.

IV. ADOPTION

A person may be willing to adopt a child, even while the ill parent is still alive. A parent can give up his/her parental rights through adoption. However, this relinquishes all control of the parent over the children. As with any court action regarding a child, the other parent must be notified of the court proceeding and can contest the adoption. A court can terminate the parental rights of a parent in the event that he/she has failed to perform parental duties, is unfit, has abandoned the children, or is a danger to the children. However, the court may deny adoption and retain the parental rights of either or both parties. As in guardianship or third-party custody matters, it is wise to hire or consult an attorney if possible.

V. POWER OF ATTORNEY

A document called a power of attorney can be used in situations where a parent is too ill to care for him/herself and the children. The parent does not give up parental rights, and the person with power of attorney can make important decisions, such as medical and financial decisions, on behalf of the parent. However, these appointments are generally temporary.

VI. SPECIAL CONSIDERATIONS FOR PARENTS WHO HAVE A LONG-TERM, LIFE-THREATENING ILLNESS

Some single parents with minor children are at risk of losing them because a long-term illness takes all or most of the financial resources, and in the end stages of the illness the parent cannot physically and mentally care for the children. If there is an allegation of abuse or neglect at this point, and the situation is reported to the State, Child Protective Services (CPS) will usually get involved.

The State, via CPS, will not normally intervene with the disposition of children unless there are conditions where a child is in danger of abuse or neglect. The State is not normally involved unless the matter is called to their attention by a third party, such as a neighbor, relative, physician, or teacher. If the children are at risk, the State may remove the children and do a relative search to get a relative to step forward to take the children. The other parent's rights are still viable, and he/she would be notified in such a situation.

When a parent dies, the emotional well-being of the children is very fragile. Therefore, if possible, it is important for a single parent to make custody, guardianship, or adoption arrangements while he/she is healthy enough to make the decisions and to attend court proceedings.

If the parent has not done this and the State has control of the children before the parent's death and has placed the children in foster care, there is still a possibility that the testamentary guardianship will be considered in court at the time of death. Therefore, a testamentary guardian should be prepared to provide evidence and testimony to convince CPS and the court that the placement of the children with the guardian, rather than foster care, is in the best interests of the children. The testamentary guardian can submit evidence and testimony of his/her relationship with the children, and if the children are old enough, they may be able to express their preferences.

Washington does not officially have "standby guardianship," where a guardian chosen by the sick parent is given guardianship in the event that the parent is alive but becomes too ill to care for the children. Informal arrangements between the sick parent and a caretaker may provide some assistance with the family, and may help establish a proper home environment. However, a caretaker in this situation has no legal rights or authority in Washington State.

VII. INDIAN CHILD WELFARE ACT

The Indian Child Welfare Act (ICWA) is a federal law that governs state court proceedings involving the custody of an “Indian child.” An Indian child means any unmarried person who is under age 18 and is either (a) a member of an Indian tribe or (b) eligible for membership in an Indian tribe and is the biological child of a tribal member. If a minor child is an Indian child under ICWA, then any guardianship or adoption action will be subject to ICWA guidelines. For additional information about the ICWA and its potential effect on placement of minor children, go to www.washingtonlawhelp.org.