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Testamentary Guardianship in Ontario

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Typically, when one thinks of wills and estate planning, the focus is on the distribution of property. However, for the parents of minor children, estate planning has broader implications. A particularly salient question that ought to be considered is who will be trusted to take care of a child after his or her parent or parents have passed away. This article explores how a parent can appoint a testamentary guardian, factors to consider when making the appointment, and the role of the courts after a parent has passed away.

The Appointment of a Testamentary Guardian

In Ontario, a person can be appointed through a will to take care of a child before that child reaches the age of majority under subsection 61(1) of the *Children's Law Reform Act* (the "***CLRA***").[1] In the absence of such a statutory provision, the nomination of a testamentary guardian will have no legal effect.[2]

While the *CLRA* does not use the term "testamentary guardian", this phrase has been adopted in the case law and is used in this article for ease of reference.[3] Guardianship includes decision-making responsibility for the minor, but may involve broader powers. In the case law, guardianship has been described as "the full scope of a parent's rights and non-financial responsibilities with respect to a child".[4] In comparison, the *CLRA* defines "decision-making responsibility" as "responsibility for making significant decisions about a child's well-being" on matters related to health, education, culture, language, religion and spirituality, and significant extracurricular activities.[5] Decision-making responsibility does not extend to property rights.[6] Testamentary guardianship, as reviewed in this article, is a separate matter from the guardianship of the property of a minor pursuant to the *CLRA* or of an adult who is incapable of managing property pursuant to the *Substitute Decisions Act, 1992*.

Who May Appoint a Testamentary Guardian

Only a person who has decision-making authority with respect to a child can appoint a testamentary guardian. This limitation makes sense, as it would be incongruous for a party who does not have parental authority during his or her lifetime to be entitled to name a guardian to act on death.[7]

For single parents, a will clause appointing a testamentary guardian will only be effective if that parent has sole decision-making responsibility at the time of death.[8] The parent who does not have decision-

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[1] *Children's Law Reform Act*, R.S.O. 1990, c C.12, s. 61(1) [*CLRA*].

[2] See the Alberta Law Reform Institute, *Family Law Project – Child Guardianship, Custody and Access*, Report for Discussion No. 18.4 (October 1998), online: 1998 CanLIIDocs 73 <https://canlii.ca/t/2dr2> [ALRI] at 99, citing *Scott v. Scott*, 1970 CanLII 1266, 15 D.L.R. (3d) 374 (N.B. C.A.).

[3] See, for example, *McBennett v Danis*, 2021 ONSC 3610 at paras. 65 and 188.

[4] *L.(V.) v. L.(D.)*, 2001 ABCA 241 [*L.(V.)*] at para. 28. The court also cites *Hewer* v. *Bryant,* [1969] 3 All E.R. 578 (C.A.), where the court held that guardianship was "a bundle of powers", including the "power to control education, the choice of religion, and the administration of the infant's property ... entitlement to veto the issue of a passport ... [and] the right to apply to the courts to exercise the powers of the Crown as *parens patriae*".

[5] *CLRA*, *supra* note 1, s. 18(1).

[6] England's current legislation is similar to Ontario's; testamentary guardianship only confers powers, responsibilities and rights with respect to a child's person, whereas the child's estate is dealt with separately. See the *Children Act, 1989*, ss. 5(6), 5(11).

[7] ALRI, *supra* note 2 at 101.

[8] *CLRA*, *supra* note 1, s. 61(4)(a).

making authority regarding the child will not be able to automatically resume caring for the child on the death of the parent who does have decision-making authority.

If both parents have decision-making authority, there will be no need to appoint a testamentary guardian if only one of the parents passes away, as one parent authorized to continue making decisions for the child will remain. As such, the child's parents may wish to include declarations in their wills that any appointment of decision-making authority is only intended to take effect if he or she is predeceased by the other parent.[9]

If more than one person has decision-making authority regarding a child, but both die at the same time or in circumstances that make it unclear which survived the other, then only consistent appointments made by both individuals will be effective.[10] For example, if a child's mother appoints both her brother and sister to act as testamentary guardians, but the child's father only appoints one of the two, then only the appointment made by both parents will be effective. With this in mind, it is advisable for all persons with decision-making responsibility for a child to try to reach a consensus as to who will be appointed as testamentary guardian(s) during the estate planning process.

Who Ought to be Appointed as a Testamentary Guardian

When selecting a testamentary guardian, there are a number of practical points to consider, including:

- whether the person the parent wishes to appoint will have the time and ability to care for the child, in addition to caring for his or her own family;
- whether the child will have to relocate to reside with that person and the impact that moving may have on the child. If a parent is concerned about the person moving after the will is executed, the parent could make the appointment conditional on the person residing in a particular jurisdiction;[11]
- the person's values, recognizing that a "child's cultural, linguistic, religious and spiritual upbringing and heritage, including Indigenous upbringing and heritage" may be relevant to the child's best interests;[12]
- the nature of the child's relationship with the person; and
- the child's views and preferences. This consideration is relevant under the *CLRA* when determining the best interests of a child, giving weight to the child's age and maturity.[13]

The person appointed as testamentary guardian must also consent to the appointment.[14]

To prevent complications, it may be preferable to appoint individuals to act as testamentary guardian, rather than couples. If decision-making responsibility is bestowed upon a married couple, for example, a custody battle could ensue if the couple's relationship breaks down.[15]

The Duration of the Appointment of a Testamentary Guardian Under a Will

The appointment of a testamentary guardian under a will is only effective for a period of 90 days. After 90 days, the appointment will expire unless an application for permanent responsibility for the child has

[9] Lindsay Ann Histrop, *Estate Planning Precedents: A Solicitor's Manual* (Toronto: Thomson Reuters, 1995) (loose-leaf updated 2023, release 1), Appendix A:14. app. 12 – Will Drafting Checklist at 20. Guardians [Histrop].

[10] *CLRA*, *supra* note 1, s. 61(5).

[11] Histrop, *supra* note 9, Appendix A:14. app. 12 – Will Drafting Checklist at 20. Guardians.

[12] *CLRA*, *supra* note 1, s. 24(3)(f).

[13] *Ibid.*, s. 24(3)(e).

[14] *Ibid.*, s. 61(6).

[15] Histrop, *supra* note 9, Appendix A:14. app. 12 – Will Drafting Checklist at 20. Guardians.

been submitted to the court, in which case the testamentary guardian may continue to act until the application is determined.[16] To ensure that an application for permanent decision-making responsibility is submitted in time, a parent could include a direction in the will for the testamentary guardian to submit such an application within 90 days of the parent's death.[17]

After a parent dies, other individuals who do not have decision-making authority regarding the child may also apply, notwithstanding the appointment of a testamentary guardian in the will.[18] For example, a surviving parent or grandparent may apply under section 21 of the *CLRA*,[19] and depending on the circumstances, the court may choose to allocate decision-making responsibility to the surviving parent or a grandparent rather than the testamentary guardian selected by the deceased parent.[20] This power is in keeping with the court's longstanding *parens patriae* jurisdiction, which enables the court to make an appointment for the benefit of an infant "even where testamentary guardians have been appointed".[21]

When determining who should have permanent decision-making authority with respect to a child, the court must focus on the child's best interests, as set out in the *CLRA*,[22] and consider "all factors related to the circumstances of the child", giving "primary consideration to the child's physical, emotional and psychological safety, security and well-being".[23]

If a parent is concerned that decision-making responsibility will be contested posthumously, a document (such as a letter) can be prepared to explain why the testamentary guardian was selected and why the parent felt that other candidates were less suitable. Such a letter could then be admitted into evidence to bolster an application for permanent decision-making authority.[24]

Estate Planning for Parents

Appointing a testamentary guardian is a very important part of the estate planning process for parents, or anyone who is responsible for making decisions regarding a child. In some cases, the opportunity to appoint a testamentary guardian will motivate a couple to see a lawyer for assistance with estate planning for the first time. While a parent cannot control who is given decision-making responsibility for his or her child long-term, a parent's interim appointment under section 61 of the *CLRA* can give some peace of mind, particularly knowing that the court may extend that appointment if it reflects the best interests of the child.

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[16] *CLRA*, *supra* note 1, s. 61(7).

[17] Histrop, *supra* note 9, Appendix A:14. app. 12 – Will Drafting Checklist at 20. Guardians. See also *Children's Aid Society of Halton (Region) v. R. (C.J.)*, 2005 ONCJ 514 at para. 57.

[18] *CLRA*, *supra* note 1, s. 61(8).

[19] *Ibid.*, s. 21.

[20] See, for example, *D.S. v. L.F.*, 2011 BCSC 1534. In this case, the children's maternal grandparents were awarded sole interim guardianship over the guardian acting pursuant to the deceased mother's testamentary appointment.

[21] *Johnstone v. Beattie* (1843), 8 E.R. 657 (H.L.) at 687, cited in *L.(V.)*, *supra* note 3 at para. 33.

[22] *CLRA*, *supra* note 1, ss. 24(3), (4).

[23] *Ibid.*, ss. 24(1), (2), (7).

[24] Histrop, *supra* note 9, Appendix A:14. app. 12 – Will Drafting Checklist at 20. Guardians.