## Guardianship of Minors:

# What is in the Best Interests of the Children?

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Sue and Dave have one child of their marriage, a 10-year-old son named Jack. Dave's aunt died recently, naming Jack as sole beneficiary of a $20,000 insurance policy. Sue and Dave have wills, in which Sue's sister Mary is named as guardian for Jack, should Sue and Dave die before Jack reaches age 18. They want to know if Mary as guardian would have the authority to manage Jack's assets, including the $20,000 insurance policy.

In fact, even Sue and Dave have no legal authority to manage the insurance proceeds. Parents are not the guardians of their children's property. The insurance company must pay the money into court, to be held by the Accountant for the Province of Ontario until Jack reaches age 18.

While parents are not automatically the guardian of a minor child's property, they can be appointed as guardians by court order. The Children's Law Reform Act (CLRA) of Ontario provides for such applications. Sue and Dave would have to submit management and investment plans for Jack's inheritance to the Office of the Children's Lawyer, which is part of the Ministry of the Attorney General. They would likely be required to post a bond as a condition of appointment.

In some cases, parents of young children die without a Will (intestate). In this situation, their minor children's shares of their estate would also be paid into court, just like the insurance policy in the above example.

This is why estate lawyers recommend that in addition to making Wills and naming a guardian for their minor children, parents also have an estate plan with trusts for those children. In this case, the aunt could have set up a trust to hold the funds and appoint a trustee to administer the trust for Jack if she were to die before he reached age 18. A typical trust would hold the child's share of the estate and would direct another adult family member to act as trustee until the child reaches age 18 or older. Trusts can be set up to give the trustee discretion to use the trust capital or income for the child's benefit before the child attains the specified age. Set up properly, trusts protect minor children in the event that their parents die before they reach the age of majority. Advice should be sought from an experienced trusts and estates lawyer for the many planning considerations involved.

Under the Children's Law Reform Act (CLRA), parents have joint custodial rights to their children. Should one parent die, the survivor will have custody of any minor children. In the above example, Mary would not become Jack's guardian during Dave's lifetime. If Dave were to die first and Sue after him, but before Jack reached the age of majority, Mary would become Jack's guardian pursuant to Sue's Will.

Readers may be surprised to find out that the appointment of a guardian in a Will is legally effective for only 90 days after the parent has died. For the guardian named in a Will to continue as guardian for more than 90 days, that person must make a court application under the CLRA and have the appointment confirmed by court order.

The court must consider a wide variety of factors, including the child's wishes and preferences. The court must follow the governing principle: "What is in the best interests of the child?"

While the guardian appointed in the Will would usually be the guardian that the court appoints, this is not always the case. A judge may determine that the parent's choice is not appropriate and that it is not in the best interests of the child to appoint the person named in the Will as permanent guardian.

Lawrences' Wills, Estates, and Trusts Group has extensive experience in setting up trusts and advising families on guardianship. Call us for advice on estate planning: we can help you ensure that your wishes are followed.

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