

WILLS AND PERSONAL PLANNING PRECEDENTS:
AN ANNOTATED GUIDE

EXCERPT FROM CHAPTER 4

Guardians—Will Clauses

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INTRODUCTION TO GUARDIANSHIP APPOINTMENTS [§4.1]

Under s. 53 of the *Family Law Act*, S.B.C. 2011, c. 25, a guardian of a child (whether or not the guardian is a parent) may appoint a person to be the child's guardian on the death of the appointing guardian. The appointment can be made in a will made in accordance with the *Wills, Estates and Succession Act*, S.B.C. 2009, c. 13 or in the form prescribed by regulation (Family Law Act Regulation, B.C. Reg. 347/2012, Appendix A, Form 2, entitled "Appointment of Standby or Testamentary Guardian" see §4.1C and §4.13). In making an appointment, the appointing guardian must consider only the best interests of the child, and may not grant greater parental responsibilities than the appointing guardian has with respect to the child (*Family Law Act*, s. 56). The appointment must be expressly or impliedly accepted by the appointed guardian to take effect (s. 57).

IF THE CUSTODY AND GUARDIANSHIP OF A CHILD ARE UNCLEAR [§4.1A]

If a client is not sure whether he or she has guardianship (sole or joint) of a particular child, you may wish to make an outright appointment of a guardian. However, caution your client that if a court determines that the other parent was a joint guardian, under the *Family Law Act*, the surviving parent will be considered a joint guardian along with the appointed guardian (s. 53).

Often a discussion of guardian appointments will result in a need for parents to define, or redefine, their respective legal relationships with their children. Because the law of guardianship in a family law context is significantly different from the law of guardianship in a testamentary context, it may be impossible to give a definitive legal opinion. If your client has specific concerns, you may find it necessary to consult (or have your client consult) a lawyer who practises family law.

At law, guardianship is intended to encompass all the rights, duties, and responsibilities of a parent. Under the former *Family Relations Act*, R.S.B.C. 1996, c. 128, there was an uncertain relationship between custody and guardianship of children. Under some family law agreements or court orders, parents are joint guardians but one parent has sole custody. In those cases, the custodial parent typically has almost all of the rights incidental to guardianship of the person of the child and has physical control over the child.

The distinction between custody and guardianship was done away with by the *Family Law Act*. The *Family Law Act* describes who can be guardians (generally the parents, or those appointed by court order). Guardians have parental responsibilities and parenting time with respect to a child. The *Family Law Act* defines "parental responsibilities", which include making day-to-day decisions affecting the child and having day-to-day care, control, and supervision of the child, as well as decision-making authority regarding, *inter alia*, living arrangements, education, cultural, spiritual, and linguistic upbringing, and health care. Parental responsibilities may be allocated between guardians by agreement or court order. See ss. 40 to 42 of the *Family Law Act*.

Pursuant to s. 176 of the *Family Law Act*, a child's guardian is not automatically a guardian of the child's property. See further the commentary at §19.4.

It is critical to determine which rights your client presently has. You must not only determine the legal structure of the rights (that is, the legal distribution of guardianship rights) but also inquire into the practice of the parents. Do they conduct their relationship so that guardianship has some meaning? You must know the details of the rights your client has before you can determine the rights he or she can give away by testamentary disposition.

If a will-maker has sole guardianship and wishes the mother or father of his or her child to become guardian on the will-maker's death, he or she must appoint that surviving parent as guardian in the will. Under the *Family Law Act*, which provides that if a guardian dies and a surviving parent is not a guardian, that surviving parent does not become a guardian unless appointed under s. 51 or s. 53 of the *Family Law Act*.

THE CONSEQUENCES OF FAILING TO APPOINT A GUARDIAN [§4.1B]

Under the *Family Law Act* (s. 53(3)), if a child's guardian dies without having made an appointment, and there are one or more surviving guardians who are also parent(s) of the child, each of the surviving guardians has parental responsibilities with respect to that child, unless an agreement or order provides otherwise.

Under the *Infants Act*, R.S.B.C. 1996, c. 223, if a child has no guardian, a director under the *Child, Family and Community Service Act*, R.S.B.C. 1996, c. 46 is the personal guardian of the child, and the Public Guardian and Trustee is the property guardian of a child (*Infants Act*, s. 51). Any other person may apply to court to appoint a different guardian under the *Family Law Act* (FLA, ss. 51 and 52). Accordingly, any “guardian” of an infant who has any incidents of guardianship in relation to that child should name a guardian in his or her will, or in the prescribed form, or risk leaving guardianship of the child to the Crown.

APPOINTING A TESTAMENTARY OR STANDBY GUARDIAN BY PRESCRIBED FORM [§4.1C]

Under the *Family Law Act*, a guardian may appoint a “testamentary guardian” by will or by the form prescribed in the regulations (Form 2 of the Family Law Act Regulation, set out at §4.13). That appointment is only effective on the death of that appointing guardian, subject to the comments below regarding standby guardians.

A guardian facing a terminal illness or permanent mental incapacity may appoint a “standby guardian” who will become an additional guardian once the conditions set out in the appointment are met (see s. 55 of the *Family Law Act*). The appointment must be in the form prescribed by regulation and meet execution and witness requirements. (also Form 2 of the Family Law Act Regulation, see §4.13). Unless the appointment is revoked, the appointment provides otherwise or the appointment is terminated by court order, the appointed guardian continues as the child’s guardian on the death of the appointing guardian, despite any other instrument made by the appointing guardian.

It is important for your client to realize that, unless the appointment provides otherwise, the appointment of a standby guardian will take precedence over any appointment of a testamentary guardian made by a will (s. 55(5)). Even if a standby guardian has already been appointed, a person may apply to the court under s. 51(1)(a) of the *Family Law Act* to be appointed guardian of the child. The applicant must demonstrate why his or her appointment (instead of the standby guardian’s appointment) is in the best interests of the child (see s. 37(1) and s. 51(2) of the *Family Law Act*).

THE VALIDITY OF APPOINTING ALTERNATE GUARDIANS [§4.1D]

Section 53 of the *Family Law Act* clarifies that a guardian of a child (whether or not the guardian is a parent) may appoint a person to be the child’s guardian on the death of the appointing guardian.

Given that s. 53 of the *Family Law Act* permits a “chain” of guardians, the first-named guardian will have to be the one to appoint a subsequent guardian in case the first-named guardian dies while the child is still a minor. Our reading of this legislation leads us to assume that only a guardian may appoint a subsequent guardian and, by inference, a will-maker may not appoint a subsequent guardian to step in if the initial guardian dies while the child is still a minor. Consequently, the will-maker may wish to express his or her hope that, in such circumstances, the first-named guardian would appoint the alternate guardian named in the will of the will-maker as the guardian of that child. Your reading of the legislation may lead you to a different conclusion. In addition, the law may develop otherwise.

Our reading suggests that the appointment of an alternate guardian will not take effect if the first-named guardian takes over the guardianship on the will-maker’s death, and then is subsequently unwilling or unable to continue to be guardian. Once again, the will-maker may wish to express his or her hope that if the first-named guardian is unwilling or unable to continue to act as guardian, the first-named guardian would take appropriate steps to have the alternate guardian named in the will-maker’s will appointed as the guardian of that child. In that case, a court order may be necessary (see s. 51 of the *Family Law Act*). We anticipate that the practice (and the associated drafting) will evolve once the *Family Law Act* has been in effect for a longer period of time.

IF THE APPOINTED GUARDIAN IS RESIDENT IN ANOTHER JURISDICTION [§4.1E]

You may also need to advise your client of any income tax consequences that arise if the guardians (and thus the children) are located in one jurisdiction and the situs of the trusts for the children is another. As well, immigration laws may be relevant if named guardians reside outside Canada.

GUARDIAN COMPENSATION [§4.1F]

We are sometimes asked about compensation for guardians. The difficulty in providing for compensation is not being able to anticipate the time and effort involved. You could provide for a monthly or annual stipend until the child is of age. Canada Revenue Agency will take the position that payments made to guardians are taxable as income from an “office”.

ONE GUARDIAN [§4.2]**Appointment of Guardian**

I appoint *[guardian name]* to be the guardian of my minor children. It is my hope that, in accordance with the provisions of the *Family Law Act* of British Columbia, *[guardian name]* will appoint a guardian in *[his/her]* will, or otherwise, to be the guardian of my minor children.

Use this clause when the sole guardian appoints a single guardian. If the will-maker was a joint guardian with another person (such as the other parent of the child), that other person and the appointed guardian will be joint guardians under the *Family Law Act*.

An alternate guardian should always be appointed, unless the will-maker is certain the named person will survive and be able to see this responsibility through; for example, if the children are almost of age. See the discussion in the introduction to this chapter concerning the desirability of the originally named guardian appointing a subsequent guardian. We have inserted “hope” in an effort to alert the guardian to this issue.

TWO GUARDIANS (JOINTLY OR SURVIVOR) [§4.3]**Appointment of Guardians**

I appoint *[first guardian name]* and *[second guardian name]* (and either of them alone, if the other is unwilling or unable) to be the guardians of my minor children. It is my hope that, in accordance with the provisions of the *Family Law Act* of British Columbia, *[first guardian name]* and *[second guardian name]* will appoint a guardian in each of their wills, or otherwise, to be the guardian of my minor children.

Use this clause when the sole guardian appoints joint guardians or the survivor of them. See also the discussion at §4.2 and in the introduction to this chapter regarding alternate or replacement guardians.

ONE GUARDIAN WITH ALTERNATE [§4.4]**Appointment of Guardian**

I appoint *[guardian name]* to be the guardian of my minor children. It is my hope that, in accordance with the provisions of the *Family Law Act* of British Columbia, *[guardian name]*:

- (a) will appoint *[alternate guardian name]* in *[guardian name]*'s will, or otherwise, to be the guardian of my minor children; and
- (b) if *[guardian name]* during *[his/her]* lifetime is unwilling or unable to continue to be the guardian, will appoint or apply to appoint *[alternate guardian name]* to be the guardian of my minor children.

If *[guardian name]* is unwilling or unable to be guardian, I appoint *[alternate guardian name]* to be the guardian of my minor children. It is my hope that, in accordance with the provisions of the *Family Law Act* of British Columbia, *[alternate guardian name]* will appoint a guardian in *[his/her]* will, or otherwise, to be the guardian of my minor children.

Use this clause when the sole guardian appoints one guardian with one alternate. See also the discussion at §4.2 and in the introduction to this chapter regarding alternate or replacement guardians.

TWO GUARDIANS (JOINTLY OR SURVIVOR) WITH ALTERNATE [§4.5]

Appointment of Guardians

- (a) I appoint *[first guardian name]* and *[second guardian name]* (and either of them alone, if the other is unwilling or unable) to be the guardians of my minor children. It is my hope that, in accordance with the provisions of the *Family Law Act* of British Columbia, *[first guardian name]* and *[second guardian name]*:
- (i) will appoint *[alternate guardian name]* in each of their wills, or otherwise, to be the guardian of my minor children; and
 - (ii) if neither *[first guardian name]* nor *[second guardian name]* during *[his/her]* lifetime is willing and able to continue to be the guardian, will appoint or apply to appoint *[alternate guardian name]* to be the guardian of my minor children.
- (b) If neither *[first guardian name]* nor *[second guardian name]* is willing and able to be guardian, I appoint *[alternate guardian name]* to be the guardian of my minor children. It is my hope that, in accordance with the provisions of the *Family Law Act* of British Columbia, *[alternate guardian name]* will appoint a guardian in *[his/her]* will, or otherwise, to be the guardian of my minor children.

Use this clause when the sole guardian appoints joint guardians, or the survivor of them, and an alternate. See also the discussion at §4.2 and in the introduction to this chapter regarding alternate or replacement guardians. The expressed “hope” in this clause is more detailed and specifies who the will-maker would like to have appointed as alternate guardian if the originally named guardian is unable to continue acting.

ONE GUARDIAN—AFTER DEATH OF BOTH GUARDIAN PARENTS [§4.6]

Appointment of Guardian

If I am the last to die of *[spouse or common-law partner/ child's other guardian parent]* and me, I appoint *[guardian name]* to be the guardian of my minor children. It is my hope that, in accordance with the provisions of the *Family Law Act* of British Columbia, *[guardian name]* will appoint a guardian in *[his/her]* will, or otherwise, to be the guardian of my minor children.

Use this clause when the surviving guardian appoints one guardian.

Note that the will-maker may not have the power to appoint, if he or she is survived by the other custodial parent. See also the discussion at §4.2, §4.5 and in the introduction to this chapter regarding alternate or replacement guardians.

TWO GUARDIANS (JOINTLY OR SURVIVOR)— AFTER DEATH OF BOTH GUARDIAN PARENTS [§4.7]

Appointment of Guardians

If I am the last to die of *[spouse or common-law partner/ child's other custodial parent]* and me, I appoint *[first guardian name]* and *[second guardian name]* (and either of them alone if the other is unwilling or unable), to be the guardians of my minor children. It is my hope that, in accordance with the provisions of the *Family*

Law Act of British Columbia, *[first guardian name]* and *[second guardian name]* will appoint a guardian in each of their wills, or otherwise, to be the guardian of my minor children.

Use this clause when the surviving guardian appoints joint guardians. Often parents will name another couple as co-guardians. Your client should carefully consider whether he or she would want to burden only one of the couple with the care and raising of the children, particularly if that individual has children of his or her own. See also the discussion at §4.2, §4.5 and in the introduction to this chapter regarding alternate or replacement guardians.

ONE GUARDIAN WITH ALTERNATE—AFTER DEATH OF BOTH GUARDIAN PARENTS [§4.8]

Appointment of Guardian

If I am the last to die of *[spouse or common-law partner/ child's other guardian parent]* and me:

- (a) I appoint *[guardian name]* to be the guardian of my minor children. It is my hope that, in accordance with the provisions of the *Family Law Act* of British Columbia, *[guardian name]*:
 - (i) will appoint *[alternate guardian name]* in *[guardian name]*'s will, or otherwise, to be the guardian of my minor children; and
 - (ii) if *[guardian name]* during *[his/ her]* lifetime is unwilling or unable to continue to be the guardian, will appoint or apply to appoint *[alternate guardian name]* to be the guardian of my minor children.
- (b) If *[guardian name]* is unwilling or unable to be guardian, I appoint *[alternate guardian name]* to be the guardian of my minor children. It is my hope that, in accordance with the provisions of the *Family Law Act* of British Columbia, *[alternate guardian name]* will appoint a guardian in *[his/ her]* will, or otherwise, to be the guardian of my minor children.

Use this clause when the surviving guardian appoints one guardian and an alternate. See also the discussion at §4.2, §4.5 and in the introduction to this chapter regarding alternate or replacement guardians.

TWO GUARDIANS (JOINTLY OR SURVIVOR) WITH ALTERNATE—AFTER DEATH OF BOTH GUARDIAN PARENTS [§4.9]

Appointment of Guardians

If I am the last to die of *[spouse or common-law partner/ child's other guardian parent]* and me:

- (a) I appoint *[first guardian name]* and *[second guardian name]* (and either of them alone if the other is unwilling or unable) to be the guardians of my minor children. It is my hope that, in accordance with the provisions of the *Family Law Act* of British Columbia, *[first guardian name]* and *[second guardian name]*:
 - (i) will appoint *[alternate guardian name]* in each of their wills, or otherwise, to be the guardian of my minor children; and
 - (ii) if neither *[first guardian name]* nor *[second guardian name]* during *[his/ her]* lifetime is willing and able to continue to be the guardian, will appoint or apply to appoint *[alternate guardian name]* to be the guardian of my minor children.
- (b) If neither *[first guardian name]* nor *[second guardian name]* is willing and able to be guardian, I appoint *[alternate guardian name]* to be the guardian of my minor children. It is my hope that, in accordance with the provisions of the *Family Law Act* of British Columbia, *[alternate guardian*

name] will appoint a guardian in *[his/her]* will, or otherwise, to be the guardian of my minor children.

Use this clause when the surviving guardian appoints joint guardians, the survivor of them, and an alternate. Often parents will name another couple as co-guardians. Your client should carefully consider whether he or she would want to burden only one of the couple with the care and raising of the children, particularly if that individual has children of his or her own. See also the discussion at §4.2, §4.5 and in the introduction to this chapter regarding alternate or replacement guardians.

TWO GUARDIANS (JOINTLY OR SURVIVOR) WITH ALTERNATES (JOINTLY OR SURVIVOR)—AFTER DEATH OF BOTH GUARDIAN PARENTS [§4.10]

Appointment of Guardians

If I am the last to die of *[spouse or common-law partner/ child's other guardian parent]* and me:

- (a) I appoint *[first guardian name]* and *[second guardian name]* (and either of them alone if the other is unwilling or unable) to be the guardians of my minor children. It is my hope that, in accordance with the provisions of the *Family Law Act* of British Columbia, *[first guardian name]* and *[second guardian name]*:
 - (i) will appoint *[third guardian name]* and *[fourth guardian name]* (and either of them alone if the other is unwilling or unable) in each of their wills, or otherwise, to be the guardian of my minor children; and
 - (ii) if neither *[first guardian name]* nor *[second guardian name]* during *[his/her]* lifetime is willing and able to continue to be the guardian, will appoint or apply to appoint *[third guardian name]* and *[fourth guardian name]* (and either of them alone if the other is unwilling or unable) to be the guardian of my minor children.
- (b) If neither *[first guardian name]* nor *[second guardian name]* is willing and able to continue to be guardian, I appoint *[third guardian name]* and *[fourth guardian name]* (and either of them alone if the other is unwilling or unable) to be the guardians. It is my hope that, in accordance with the provisions of the *Family Law Act* of British Columbia, *[third guardian name]* and *[fourth guardian name]* will appoint a guardian in each of their wills, or otherwise, to be the guardian of my minor children.

Use this clause when the surviving parent appoints joint guardians, the survivor of them, with alternate joint guardians and the survivor of them. See also the discussion at §4.2, §4.5, §4.9 and in the introduction to this chapter regarding alternate or replacement guardians.

GUARDIAN (BUT NOT PARENTS) APPOINTING ONE GUARDIAN AFTER DEATH OF APPOINTING GUARDIAN [§4.11]

Appointment of Guardian

If I am the guardian, but not the parent, of any minor children, I appoint *[guardian name]* to be the guardian of those minor children. It is my hope that, in accordance with the provisions of the *Family Law Act* of British Columbia, *[guardian name]* will appoint a guardian in *[his/her]* will, or otherwise, to be the guardian of those minor children.

Use this clause when the will-maker was appointed guardian of a child under the terms of a person's will and the will-maker wishes to appoint a sole guardian for that child. See the discussion in the introduction to this chapter concerning appointing subsequent guardians. See also the discussion at §4.2 and in the introduction to this chapter regarding alternate or replacement guardians.

GUARDIAN (BUT NOT PARENTS) APPOINTING ONE GUARDIAN WITH ALTERNATE AFTER DEATH OF APPOINTING GUARDIAN [§4.12]

Appointment of Guardian

If I am the guardian, but not the parent, of any minor children:

- (a) I appoint *[guardian name]* to be the guardian of those minor children. It is my hope that, in accordance with the provisions of the *Family Law Act* of British Columbia, *[guardian name]*:
 - (i) will appoint *[alternate guardian name]* in *[guardian name]*'s will, or otherwise, to be the guardian of those minor children; and
 - (ii) if *[guardian name]* during *[his/her]* lifetime is unwilling or unable to continue to be the guardian, will appoint or apply to appoint *[alternate guardian name]* to be the guardian of those minor children.
- (b) If *[guardian name]* is unwilling or unable to be guardian, I appoint *[alternate guardian name]* to be the guardian of those minor children. It is my hope that, in accordance with the provisions of the *Family Law Act* of British Columbia, *[alternate guardian name]* will appoint a guardian in *[his/her]* will, or otherwise, to be the guardian of those minor children.

Use this clause when the will-maker was appointed guardian of a child under the terms of a person's will and the will-maker wishes to appoint a sole guardian for that child and an alternate guardian. See also the discussion at §4.2, §4.11 and in the introduction to this chapter regarding alternate or replacement guardians.

APPOINTMENT OF STANDBY OR TESTAMENTARY GUARDIAN—FAMILY LAW ACT REGULATION, FORM 2 [§4.13]

Form 2 (Family Law Act Regulation, section 23)

APPOINTMENT OF STANDBY OR TESTAMENTARY GUARDIAN

1. I, *[name]*, of *[address]*, am the guardian of *[name(s) of child(ren)]* born *[birthdate(s) of child(ren)]*—*mmm/dd/yyyy*.
2. After considering the best interests of the child(ren) referred to in section 1, I appoint *[name]* of *[address]* to be the guardian of the child(ren) and *[Check one or both of the following boxes as applicable and provide any required information.]*
 - this appointment takes effect on my death
 - I am facing terminal illness or permanent mental incapacity and this appointment takes effect when, as a result of that illness or incapacity, I am unable to care for the child(ren), *[add, if applicable, as certified by [name or official title]]*. The appointed guardian must consult with me to the fullest possible extent regarding the care and upbringing of the child(ren).
3. On this appointment taking effect, the appointed guardian has the same parental responsibilities that I currently have *[add, if applicable, subject to the following conditions and restrictions]* *[specify]*.

Date: *[mmm/dd/yyyy]*

Signature of appointing guardian

This appointment was signed in the presence of

WITNESSES *[The witnesses to this appointment must be at least 19 years of age and must not be the person appointed as guardian.]*

Name: _____

Signature of witness: _____

Address: _____

Occupation: _____

Name: _____

Signature of witness: _____

Address: _____

Occupation: _____

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