



# FINANCE

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## Estate Planning For Parents of Minor Children

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*by Celeste Holder Kling<sup>1</sup>*

### Quick Facts...

Estate planning lets parents plan for care of their children, ensures their property will be transferred to the desired individuals, determines who should handle the business affairs of the estate, and determines who will handle the children's property.

The time to start estate planning is now.

Legal help is necessary for estate planning.

Changes in a family's estate plan are needed as the family changes, the children grow up, and the size of the estate increases.

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### Why Estate Planning?

A couple has a house with a mortgage, a life insurance policy, and two minor children. Do they need to do estate planning? Yes, they certainly do.

Too often, parents of young children neglect or postpone estate planning, saying they are too young, quite healthy, or cannot afford the expense. Another reason may be that estate planning deals with feelings and attitudes that people often prefer to ignore. Estate planning can provoke a mix of feelings about death, property, marriage and family relationships. These feelings must be explored so the estate plan reflects the parents' desires and needs.

### Feeling and Attitudes

Estate planning assures that certain things happen at death. Some people ignore or postpone planning because of a fear of death. This fear may be caused by worry about care for dependents. It may come from the knowledge that personal plans and projects will come to an end. Estate planning can help to reduce some of those fears.

Some parents permanently postpone writing a will because they cannot decide whom to name as guardians of their children. In their indecision, they leave the court with no guidance and their children with the possibility of inappropriate guardians. It is far better to name a first and second choice for guardians now and to change the designation later if better choices evolve, than to postpone this decision completely.

Parents need to be realistic about their resources. For example, when discussing the care of children, parents often say they want their estate used for a college education without thinking about how the children will be supported until they are of college age or whether their children will be college bound at all. Parents need to think first in terms of support. Children must be fed, clothed and sheltered long before they are ready to enroll in college.

Couples need to question themselves about their goals and feelings concerning marriage and family relationships. How should family property be owned? Is each parent equally able to plan for and support the children? How does each parent feel about the possible remarriage of the surviving parent? How should children be raised if both parents die?

### Planning

For parents of young children, the objectives of estate planning are to:

- plan for care of their children,
- ensure that their property will be transferred to desired individuals,
- determine who should handle the business affairs of the estate, and
- determine who will handle the children's property until they are older.

## Who Will Care for the Children?

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Perhaps the most important benefit of the will is that it allows the parents to determine who will provide for the social training and physical needs of their minor children (under age 18) if neither parent survives. If there is no will nominating a guardian, the court must appoint one even though it cannot possibly know the values, lifestyle and child-rearing philosophy of the parent(s). It must make a decision based on state law and in the best interests of the children. It is often difficult to determine the children's best interests in a brief court hearing.

If one parent dies, the other parent remains the natural guardian of the children. When parents are divorced and one parent dies, children generally go to live with the other parent. It is important for divorced and single parents to have a will or designation of guardianship for their minor children. The will or designation of guardianship of the last parent to die controls guardianship for the children. If the mother dies with a will and then the father dies without one, the mother's will designates who should be guardian for the children.

When nominating a guardian, give careful consideration to lifestyle and values. Consider the physical ability of the possible guardian to raise the children. A small child may be too much for a grandparent. The person being nominated might divorce and remarry or move to another part of the country. Under what conditions would this person be acceptable as guardian? All parents should indicate an alternate choice in case the first choice nominee is unable to accept the responsibility of serving as a guardian. Most importantly, parents should discuss their plans with the person being nominated.

Colorado law allows parents to make a designation of guardianship for their minor children outside of a will. Parents may write the designation on a separate document which states clearly their intention to name an individual or individuals as guardian(s) of their children if the parents die or are disabled and cannot make decisions for their children. This document requires two witnesses.

## Who Will Receive the Property?

For married couples with minor children, most spouses want the surviving spouse to receive their property at death. They usually want the children to receive their property only if both spouses die. Single parents of young children usually want their property to be available for their children.

Who will receive the property if one parent dies? Who will receive the property if both parents die at the same time, or if a single parent dies?

Some property is transferred automatically at death to the person with survivorship rights. This property, called non-probate property, includes most life insurance policies and assets transferred by beneficiary designation (such as retirement plans) and property held in joint tenancy with right of survivorship. Even if all property is non-probate property, a couple still needs wills to transfer the property in case the person with survivorship rights does not survive and to provide for the care of children.

Probate property (property with no survivorship rights) is transferred according to a will or state intestacy law if there is no will. Laws vary from state to state. Colorado intestacy law directs that the property go to the surviving spouse if all of the children are joint children of both the husband and wife. If the children are not all mutual children, the property will be divided between the surviving spouse and the children. The proportion is determined by statute.

Division of property between the surviving spouse and children may not always be desirable. The children's share will be supervised by the court (in a conservatorship proceeding) until the children turn 21. With a will, the maker can indicate that all property is to go to the surviving parent, or can specify which portion should go to previous children, mutual children or stepchildren. Stepchildren do not receive a share of the estate under intestacy laws.

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If both parents die and have no will, state intestacy laws direct that the property be distributed to the children in equal shares. This may sound desirable. However, the financial needs of the children often are not equal. The cost of caring for children varies with age, medical needs, college choice and career choice. With estate planning, parents can have all assets go into a trust fund to be used as they indicate, rather than automatically having assets divided equally.

### Who Will Handle the Business Affairs of the Estate?

Another concern is the appointment of someone to handle the business affairs of the estate. In Colorado and most states, this person is called a personal representative. In some states, the term executor is used. The personal representative's duties consist of gathering the assets of the estate, notifying the creditors, paying the bills of the estate, distributing assets, and hiring an attorney and other necessary advisers, if needed. The personal representative should be someone who is honest and competent and will carry out the individual's wishes.

If a person dies without nominating a personal representative, the court must appoint one. In a will, a person can nominate a personal representative ensuring that the job will be done by someone who knows and cares about the desires of the deceased. This nomination also may save the estate time and money. A will also can expand or limit the powers of the personal representative.

### Who Will Handle the Children's Property for Them?

Parents need to develop financial plans for the care of their children. They should review the status of their assets and their life insurance program. How much money will be available? Is this adequate or is additional coverage needed until the children are grown? Someone must handle the money that will be left to the children. This should be a responsible person who will spend money as you would under the same circumstances. Parents know best who this is.

If parents do not designate someone to handle the children's assets in their wills, the court will have to make the appointment with no information from the parents. If the court appoints a conservator, that person will be supervised by the court and will have to seek court approval for major expenditures. The funds will be divided equally among the children, for administration by the conservator. The remaining assets will be distributed to each child when he or she turns 21.

Many parents would prefer for their assets to be held in trust for their children until they are 25 years old or older. Often parents prefer to have a combined pool of assets for the children, instead of separate equal shares, until the time of final distribution. This can account for different needs of the children. These goals can be achieved through a testamentary trust (a trust built into a will), but not through a conservatorship supervised by the court.

Often, parents who have a testamentary trust have appropriate non-probate assets go directly into the trust if both parents are dead. This is an effective and efficient approach. The proper designation of beneficiaries in a life insurance policy or on a retirement plan can transfer the assets first to the surviving spouse. If the spouse does not survive, the second beneficiary can be the trustee of the testamentary trust, thereby sending the funds directly into the trust for the benefit of the children.

If a trust is not established to receive the life insurance proceeds, and if the life insurance beneficiary designations are not properly established to fund the trust, the court will be obliged to appoint a conservator to handle the children's funds. This is often more cumbersome, more expensive, and less compliant with the parents' wishes than a trust would be.

### Plan Now

If you have minor children, the time to start estate planning is now. Make a list of property you own, how it is titled, its fair market value, and the amount

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of indebtedness against it. List life insurance policies and retirement plans, their owners and beneficiaries. Think about the present and future needs of your family. No plans can be made without this homework.

Regardless of how simple the situation appears, legal help is necessary. People who do not have a regular attorney should talk to friends. They may be able to suggest attorneys whom they feel are trustworthy. Look for a lawyer referral service or check with the state or county bar association.

After locating an attorney, call for an initial appointment. Ask if there is a fee for this initial appointment (usually there is a fee) and how fees are structured. Bring information about the family needs and property. Do not be put off by legal jargon. Ask questions. Insist on understanding the plan and its implications. Clients need to be comfortable with the structure of their estate plans.

## Changing Plans

For a young family, estate planning may be as simple as two wills with testamentary trusts. Whenever you acquire property, life insurance, or retirement plans consider estate planning in deciding how each should be titled and who should be named as beneficiary.

Keep careful records of all property you acquire. Review the estate plan periodically to make sure it continues to meet the family's needs. As the family changes, the children grow up, and the size of the estate increases, a family's goals change. Revisions in estate planning also will be needed over time as circumstances change. Review your will periodically and consult an attorney when changes are needed.

*For more information related to estate planning, see fact sheet 9.101, How Property Passes at Death.*

*This material should not be used as a substitute for seeking needed advice from an attorney or other qualified adviser.*

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