

Choosing a Guardian, Personal Representative or Trustee

[Hershner Hunter](#), LLP

Estate and Business Planning Practice Group

If you and your spouse die, who should be the guardian to care for your young children? Who should be your personal representative to identify your assets, pay any debts, and distribute your net estate? Who should be the trustee to administer and distribute your children's inheritance until they are old enough to manage it for themselves?

These questions are sometimes difficult to answer. However, the decisions are extremely important. The selection of the persons who will carry out your wishes after you die may be as important as the decisions about how your estate is to be distributed.

In selecting a guardian, personal representative and trustee, you should consider at least the following factors:

1. **Ability.** In the case of your personal representative or trustee, the person should have the maturity, judgment, and ability to make financial decisions necessary to manage your property. In choosing a guardian, someone with children close in age to your own children, even if not a family member, may be better able to adjust to the addition of your children into the home than a family member who either has no children or whose own children are grown.

2. **Availability.** Does the person nominated have the time to carry out the task? All of these roles may involve a significant time commitment.

3. **Geographic Proximity.** Does the person to be nominated live reasonably close to where the job needs to be done? In the case of a personal representative, it may be best to choose a nominee who lives or does business in a location that will permit efficient administration of the estate. For example, if your estate will contain a closely-held business, it may not be practical for a personal representative who lives in another state to administer your estate. In the case of a guardian, you need to consider whether the person lives in a place where you would be willing to have your children raised.

4. **Trustworthiness.** You should not nominate anyone as guardian, personal representative, or trustee unless you trust the person implicitly.

5. **Willingness.** Last, but not least, is the nominee willing to take on the proposed task? You should confirm this with the nominee.

In addition to these factors, we recommend that you not appoint the same person to be guardian as the person you appoint to the financial roles of personal representative and trustee. In particular, having one person serve as both trustee and guardian can create difficult conflict of

interest problems for the person and even subject him or her to possible lawsuits by your children if they should be unhappy with trust decisions.

After making a choice, you should also try to designate a successor to serve in the place of your first choice if circumstances should make your first choice unavailable for one reason or another. Since an individual may not be available as a result of disability or death, you might consider naming a bank with trust powers or other corporate fiduciary as the primary or as a successor personal representative or trustee. A corporate fiduciary can be very important if there is a trust which will last a long time.

Often the choice of a person to be guardian or trustee forces you to examine your own values closely. Each of us has our own unique views about asset management and child rearing, and it may be difficult, or impossible, to find a person with identical views. Even if such a person can be identified, some of the considerations set forth above may disqualify that person.

If you find that the decision is particularly difficult, it may be helpful to remember that there sometimes is no obvious choice for a guardian, personal representative or trustee. There may only be a best choice. Accordingly, you might try a check-off system as a means of reaching a decision. List all of the people who you would consider nominating to serve for a particular function. Next, start crossing off names of the people who are less desirable, starting with the least desirable choice. When you have two names left, nominate one as your first choice and the other as your second choice.

The result may not be perfect. However, your decision based on even this rather primitive method is likely to be better than the choice that a court might make after your death if you do not designate a choice in your estate plan.

If you have questions, please contact any member of [The Estate and Business Planning Practice Group](#):

This article provides general information and should not be construed as legal advice or a legal opinion on any specific facts or circumstances. If you have specific legal questions, you are urged to consult with counsel concerning your own situation.