



**Pinney Law Firm** P.C.  
Estate • Family • Injury • Business

## Naming a Guardian for Your Child



"The best way to predict your  
future is to create it."

*-Abraham Lincoln*

By Marcus D. Pinney

## **Caution**

This guide is not a substitute for legal advice. It is published to give general information on how to name a guardian for a minor child. Acting without a lawyer can have unintended consequences. For specific situations, it is always advisable to consult with an attorney.

## **Notice**

NAMING A GUARDIAN FOR YOUR CHILD is for your own personal use and may be shared without changing its form.

Copyright 2019 © Marcus D. Pinney; Pinney Law Firm, PC, all rights reserved worldwide. No portion of this guide, in any format, may be reproduced or translated without the express written consent of the author.

*Prepared by:*

**PINNEY LAW FIRM, PC**

503 Ward Rd.

Baytown, Texas 77520

(281) 425-1300

## Table of Contents

Caution .....	2
Notice .....	2
Table of Contents .....	3
Introduction.....	4
What Should a Parent Do? .....	5
Do I Need a Will to Name a Guardian?.....	7
What Happens if I Don't Name a Guardian?.....	7
How is it Different if I Name a Guardian? .....	9
Who Should I Never Name as a Guardian? .....	9
How Should I Choose a Guardian? .....	10
How do I Exclude a Potential Guardian? .....	12
How do I Make My Choice Legal?.....	13
About the Author .....	16
Appendix.....	18

## Introduction

It's estimated that 1.5 million children will lose one or both parents by the age of fifteen. For Skylin, 6, it happened on a Saturday morning. It seemed like a normal day. Mom and dad had dropped her off at cheer practice. She was looking forward to her birthday party scheduled for later that afternoon. But, when all of the other children's parents came to pick them up, Skylin's didn't.



It turns out, Skylin's parents were among the victims of a mass shooting at Walmart. They had gone into the El Paso store to buy some last-minute party supplies, when a gunman opened fire killing 22 people and injuring more. Skylin was taken to her coach's home. It wasn't until hours later that the coach learned about Skylin's parents.

As a parent, this kind of story (and the uncertainty that little Skylin was thrust into by no fault of her own) is heart wrenching. But sadly, almost 70% of parents have not made plans for raising their child if they die unexpectedly, or become incapacitated and unable to care for their child. And for those who have, the vast majority of plans have one or more mistakes that could make the plan fail. That's why I have written this guide. So you can begin planning for your child today - whether you are ready to meet with a lawyer or not.

You might think that you are too young to be planning for death or disability. I, mean, no one expects to die with minor children or become incapacitated. Or, it might be uncomfortable to think about death or to imagine someone else raising your child. But, protecting your child doesn't have to be a negative experience. Actually it is a gift that you can give both your child and yourself. When you allow yourself to face the inevitable, it can inspire you to make changes, live your dreams, and more-deeply connect with those you love right now. Planning for death is not about dying, it is about living your best life.

## **What Should a Parent Do?**

If you are a parent who has a minor child (or one with special needs) counting on you, you need to name a guardian to provide care if you are unable to do so. Having a plan to ensure that your child is always taken care of by the people you want, regardless of what happens, is one of the most responsible things you can do for your child.

Creating a legal document called "Designation of Guardian" is the way you choose who gets to look after your child if you are unable. It is an essential document when you parent a young child.

If you become incapacitated or die without a plan in place, a judge will make one for you. Picture the additional trauma your child will endure if, after just losing you, she has to watch a judge decide who she lives with. Or worse, a battle unfolds between two different well-meaning sides of the family. Without instructions,

this becomes a possibility—especially if you leave enough money behind to care for your child. And, worse, a judge who doesn't know you or your family has to decide (based on a few hours of testimony and a loose legal standard) who will raise your child; even if it's the last person you would ever want.

Judges hate this. They want to know your thoughts about who would be best to raise your child. And, except under extreme circumstances, they will do their best to honor your wishes.

Because I think that every parent should make this decision, I have written this free guide to help you. Please don't procrastinate. There is no good reason to leave your child's future to chance. Deciding who will raise your child if you can't is way too important to be left in the hands of a stranger.

## **What Types of Guardians are There?**

There are two types of guardians—guardians of the person and guardians of the estate. The guardian of the person makes personal decisions for your child and cares for his well-being. This is the guardian that decides where your child lives, the school he attends, makes medical decisions, and handles discipline. The guardian of the estate handles your child's money, property, and financial affairs. The same person can be both types of guardian, or the responsibility can be split up.

If you do basic estate planning, appointing a guardian of the estate will often be unnecessary. An estate guardian is needed if the

child's inheritance goes directly to him. In those instances the court will supervise the property until your child turns eighteen. The court supervision process is expensive and at least some of the property is depleted to fund this oversight. Estate planning also avoids your eighteen-year-old child having full access to his inheritance.

## **Do I Need a Will to Name a Guardian?**

While many parents use a will to name guardians, doing so is not required. In fact, naming a guardian outside your will is actually better. In Texas, a family has to wait at least 30 days after a loved one dies to file a will for probate. This means that, unless other measures are taken, the child will be without a guardian for an extended period of time. And, sometimes parents become incapacitated without dying. In those cases, the nomination in a will is useless.

## **What Happens if I Don't Name a Guardian?**

Without a legal guardian, your child is going to be in limbo until the State or a family member steps in. That means there may be problems enrolling the child in school, seeking medical care, or qualifying for important benefits. Often, Child Protective Services ("CPS") becomes involved and takes possession of your child. They prefer the child to be with a close friend or family member, but this doesn't always happen.

In the case of Weltzin Mirelas, the children were actually taken from family members. Mireles had gone missing, and the children's estranged father couldn't be found either. Family members from both sides asked the court to place the children with them. Eventually, the father was charged with her murder. During the whole ordeal, her children were with strangers in a foster home.

When you don't name a guardian, a judge chooses one for you. The legislature made guidelines on how a court is to do this. The first choice is a grandparent. If no grandparents are available, the court must choose the nearest kin. Finally, if no relatives are willing or able to be guardian, the court appoints "another qualified person."

These rules often result in unnecessary conflict when the child has living grandparents from both the mother and father's sides, or other kin of equal standing. In those circumstances, the judge chooses between the competing options by deciding what the court believes to be in your child's best interest.

You should be aware that naming a guardian will not give your child total protection from being (at least temporarily) in the care of strangers. If that possibility is unacceptable for you, you need the help of a lawyer. At my firm we use a comprehensive approach that designates first responders, temporary guardians, alerts caregivers, and even helps the authorities find them in an emergency. Our plans also allow you to confidentially exclude someone from consideration as a guardian.



## **How is it Different if I Name a Guardian?**

First, in most cases, your designation never gets considered so long as your child has another living parent. If you are the last surviving parent and something leaves you unable to care for your child, your designation helps the judge choose the appropriate person.

The judge generally follows your wishes as to who raises your child, so long as the designated person agrees to be the guardian and is not an unsuitable choice. To veto your choice, the judge must find that the proposed person would not serve your child's best interest. In making this determination the judge considers factors such as education, sophistication, relationship with the child, living conditions, capability of guardian, among others. Your child will have her own attorney, whose opinion will carry great weight. Some people, like convicted felons cannot be appointed. The judge also has to follow your wishes if you exclude someone from consideration—which may be an important tool to use if you want to prevent a relative from challenging your choice.

## **Who Should I Never Name as a Guardian?**

While a judge is generally bound to follow your choices, there are certain people who will be disqualified. As such, you should not name:

- A minor or other person who is unable to legally make decisions for themselves;

- A person that you know that because of inexperience, lack of education, or other good reason would not be able to properly manage and control your child;
- A person found to have committed family violence and is subject to a protective order;
- A person who was convicted of serious crimes like aggravated assault, any sexual offense, injury to a child/elderly/disabled individual, abandoning a child, terroristic threat, or continuous violence against your family; or
- A person who has or will have an active lawsuit representing a competing interest to your child.

## **How Should I Choose a Guardian?**

I recommend that you begin the process by listing the traits that you (and your partner) believe are most-important for the person who raises your child to possess. Here are some things to consider:

- Parental/Personal Values

- Discipline Style
- Religious/Spiritual Background
- Age of the Guardian (Is he or she physically able to care for the child?)
- Other Kids (Would adding your kids to the mix be too much?)
- Location (Where do you want your child to grow up? What school would he attend?)
- Current Relationship With Child

Your next step, based on the qualities you find important, is to make a list of people in your life who exhibit those qualities. Don't limit yourself to family members. Choosing a guardian is not about protecting feelings, it is about making the best choice for your child's future.

If you are having trouble, try picturing who a judge would pick without your input. Ask yourself if there is anyone

else you would prefer. Or, think about people who are currently involved in your child's life who interact well and have gained your

**Pro Tip:**

I usually don't recommend choosing a guardian based on financial resources. Ideally, you will leave enough resources to support your child. There are good ways to do this and bad. Failing to have an estate plan in place puts your child's financial future in jeopardy. You should speak with an attorney to make sure your support plan is adequate and in the best form. In most situations your child will, at a minimum, qualify for a social security death benefit which can be used for her support. But, you should strongly consider purchasing a term life insurance policy (if possible) to guarantee your child's financial needs

child's love and trust. Remember, any choice you make is probably better than letting a stranger decide. And, you can change your mind as often as you like.

Once you have the list, you should go through the candidates and narrow your choices to four or five people. Having backups is vital to a good plan because you can never be sure your first choice is going to be able to serve if the time comes.

I also recommend that you have a discussion with your top choices. Make sure the person understands and agrees with your expectations. Give the nominee an opportunity to think things over. Even if you get an immediate "yes," let your guardian know that you would prefer she think about it for a few days to be sure. Then, make sure you follow up to get her final thoughts.

## **How do I Exclude a Potential Guardian?**

If there is a person who is on the list of potential choice for a judge that you want to keep from raising your child, you can express your wish in the guardianship declaration. So long as you name that person in your declaration and make it clear that you do not want them selected, the judge is prohibited from choosing that person—even if it means your child is placed with strangers. If you wish to do this, copy the form from the appendix and add your exclusion to it.

Beware, however, these exclusions often cause conflict. Those you exclude are likely to be close family members who you, for

whatever reason, would not want raising your child. Because these exclusions can be the source of hurt feelings, embarrassment, and conflict, I often use a confidential process for my clients. If it makes you uncomfortable to place the exclusion in your declaration, you should talk with a lawyer about strategies for keeping your wishes confidential unless absolutely necessary.

## **How do I Make My Choice Legal?**

Once you have determined who should parent your child if you are unable you must complete a legal document called a "Declaration of Guardian." I have included a form in the appendix of this book that you can fill out and print.

The form has space for up to four choices. If you are choosing a couple, they must be married for the court to appoint them. You will also have to modify the attached form to do so. But, choosing a couple can create unnecessary problems in the event that one of them dies, becomes incapacitated, or the couple decides to divorce. So, you should carefully consider doing this. If you are adamant about naming a couple, it is best to consult a lawyer so that your contingencies are properly expressed.

For this do-it-yourself guardian nomination it is safest to choose one person at a time to be guardian, but you are not required to do so.

The form has a different place to nominate the guardian of the person (basic parenting duties) and the guardian of the estate (money manager). You can choose the same person for both roles, or completely different people. Some feel better with the

person dealing the child on a daily basis not having to deal with the financial issues of the child.

And, under the best of circumstances, your child will not need a guardian of the estate.

You and your spouse or partner should each complete a separate declaration. These declarations do not have to be the same. If one of you is unable to care for the child, the other parent will be in charge without need for court intervention. The last-surviving parent is the only declaration followed. If you are both lost in a common disaster leaving it unclear as to who that is, the court will have to consider both declarations and make the choice that is best for your child.

Once you complete the form, print it but do not sign it. You need to sign the document in front of two witnesses and a Notary Public. These witnesses must be at least 14 years old, and should not be your child or any of the proposed guardians. Often you can use a notary for free at your bank.

Take the signed document and place it in a safe place. Make sure the right people are aware of its existence and location. For this document, the original is needed. If you update your choices, you should destroy any previous designations. If a judge is presented with a copy of the designation, there is a presumption that you must have destroyed the original—thus, revoking it. Anyone seeking to use a copy has to overcome this presumption.

## Conclusion

For a responsible parent, naming a guardian is a must. If you become unable to care for your child, your choice will usually be far better than a judge would make.

Even if nominating a guardian is hard or unpleasant to think about, it is an important gift for both you and your child. Estate planning is not about dying. It's about living with the confidence that if or when something does happen, you are prepared. And, knowing that your child won't be left with the consequences of you not making a choice.

I wrote this manual so that every parent, regardless of resources, can be sure her child is taken care of if tragedy strikes. I tried to make it as easy as possible for you. You should even be able to turn to the appendix and type directly into the nomination form. But, please be aware that this nomination form represents the bare minimum coverage for your child.

If you want to ensure your child will always be taken care of by the people you want, in the way you want, no matter what happens, please feel free to contact my firm and ask how you can get a comprehensive Kid Security Plan for your child.

## About the Author



Marcus Pinney is the founder of the Pinney Law Firm, P.C., which draws on his deep experience in litigation to help families stay out of court and conflict through a creative approach to estate planning. Marc grew up on the Gulf Coast and attended Port Neches-Groves High School.

Before college, Marc owned several small businesses and managed a chain of restaurants. Intent on better serving his community, he decided to pursue a career in Law.

After earning a B.A. in Business from Lamar University in Beaumont, Texas, Marc attended University of Houston Law School. In law school, he took a diverse range of legal courses, wrote for a scholarly journal, lead student organizations, and interned for Federal Bankruptcy Court Judge. As a student, Marc also worked with several law firms, gaining valuable experience in both prosecuting and defending lawsuits.

In 2004, after graduating from law school in the top 5% of his class, Marc was licensed by The Texas Supreme Court. He spent his first years of practice with a very large personal injury firm in Texas, devoted exclusively to helping injured people throughout the United States. After a brief stint with another nationally-



renowned law firm, Marc decided he could better serve his clients by opening the Pinney Law Firm in Baytown, Texas.

As a plaintiff's personal injury attorney, Marc has assisted thousands of seriously-injured clients from all over the United States. He has helped these clients stand head to head with some of the largest companies in the world. He has also represented businesses and individuals in a diverse range of legal matters. As a local practitioner, Marc has helped hundreds of families deal with a broad range of issues including divorce, incapacity, estate planning, probate, and business litigation.

After the sudden death of his wife, Marc realized that traditional approaches to estate planning had too many short comings. So, he invested in the development of a different approach to estate planning—one that could ensure that when the time comes, the plan will work effectively. To this new approach, Marc brings his passion for helping families, and combines it with his experience as a litigator, a widower, and a single parent of three to provide comprehensive planning to the families he serves.

Marcus Pinney is licensed to practice law in Texas. He has routinely been temporarily admitted in other states for individual cases and was licensed in Pennsylvania for many years. In addition to being a member of The Texas Bar, and several other professional associations, he is also the father of three young children, and an active member in his church, a Rotarian, and a director for a Texas-based police charity.

## Appendix



**DECLARATION OF APPOINTMENT OF GUARDIAN FOR  
MY CHILDREN IN THE EVENT OF MY DEATH OR INCAPACITY**

I, \_\_\_\_\_, make this Declaration to appoint as guardian for my child or children, listed as follows, in the event of my death or incapacity:


I designate \_\_\_\_\_ to serve as guardian of the person of my (child or children), \_\_\_\_\_ as first alternate guardian of the person of my (child or children), \_\_\_\_\_ as second alternate guardian of the person of my (child or children), and \_\_\_\_\_ as third alternate guardian of the person of my (child or children).

(If applicable) I designate \_\_\_\_\_ to serve as guardian of the estate of my (child or children), \_\_\_\_\_ as first alternate guardian of the estate of my (child or children), \_\_\_\_\_ as second alternate guardian of the estate of my (child or children), and \_\_\_\_\_ as third alternate guardian of the estate of my (child or children).

If any guardian or alternate guardian dies, does not qualify, or resigns, the next named alternate guardian becomes guardian of my (child or children).

I, \_\_\_\_\_, as declarant, after being duly sworn, declare to the undersigned witnesses and to the undersigned authority that this instrument is my Declaration of Appointment of Guardian for My Children in the Event of My Death or Incapacity, and that I have made and executed it for the purposes expressed in the declaration. I now sign this declaration in the presence of the attesting witnesses and the undersigned authority on this \_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

\_\_\_\_\_  
Declarant

The undersigned, \_\_\_\_\_ and \_\_\_\_\_,  
each being 14 years of age or older, after being duly sworn, declare to the declarant and  
to the undersigned authority that the declarant declared to us that this instrument is the  
declarant's Declaration of Appointment of Guardian for the Declarant's Children in the  
Event of Declarant's Death or Incapacity and that the declarant executed it for the  
purposes expressed in the declaration. The declarant then signed this declaration and  
we believe the declarant to be of sound mind. We now sign our names as attesting  
witnesses on this \_\_\_\_ day of \_\_\_\_\_, 20 \_\_\_\_.

\_\_\_\_\_  
Witness

\_\_\_\_\_  
Witness

Subscribed and sworn to before me by the above named declarant, and affiants, this  
\_\_\_\_ day of \_\_\_\_\_, 20 \_\_\_\_.

\_\_\_\_\_  
Notary Public in and for the State of Texas  
My commission expires: \_\_\_\_\_