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## NEWSLETTER ~ OCTOBER 2010

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### **An Open Letter to Clients on Lifetime Appointments of Standby Guardians for Minor Children\***

Dear Jane,

Thank you for your inquiry about guardians for your children if you and Mark become incapacitated.

The provisions in your and Mark's old wills likely have identical clauses in which you and Mark name a person or persons as guardians of your minor children (and possibly a back up or two), in the event both you and Mark have died.

Your wills are not binding instructions in the event of your incapacity, however. Thus, the appointment provisions are not instructive to a court in a guardianship proceeding while you are alive but unable to parent.

This provision in your wills is effective, only after (a) both you and Mark are dead and (b) your wills have been admitted to probate. The probate process can take months when minor children are involved because NY law requires the court to appoint a guardian ad litem (GAL) for minor children.

A GAL must be a lawyer admitted to practice law in NY State who has qualified to be a GAL. The GAL must do an investigation and file a report and recommendation to the probate court on the issues whether the will is proper and the court has jurisdiction over the minor children. That can take time – weeks or months. So, while your and/or Mark's

wills are in the probate process, the big issue is who has custody of your minor children? And it's not necessarily the person or persons you named in your wills – again, the appointments in your wills aren't controlling until the probate court admits the wills to probate and issues its decree.

Moreover, once the probate decree is issued, the person or people you named in your will still have to bring a guardianship proceeding to become the guardians of your minor children. Your appointees can start that guardianship proceeding while they're waiting for the probate, but they won't get very far until the probate decree is issued.

So, what's the solution?

NY Surrogate's Court Procedure Act Section 1726 provides for a parent to designate (appoint) a standby guardian or guardians for his or her minor children in the event of the parent's mental incapacity, physical debilitation or death.

If the cause of your incapacity or debilitation is a sudden event, your kids may be at your house, a neighbor's, the hospital, the local police station or the child services office. The job of the State is to protect your kids until someone in authority shows up to take them. So there needs to be an effective document for the prompt transfer of legal responsibility for your children to someone you want. Without that, your children will likely end up with child protective services or in foster care.

The authority of the designated standby guardian commences upon the guardian's receipt of a determination of mental incapacity of you as parent(s) signed by an attending physician, or receipt of a determination of physical debilitation and a consent signed by you as parent or receipt of a death certificate or other document indicating your death. That's about as prompt as one could hope for.

The commencement of a standby guardian's authority confers upon the standby guardian concurrent authority with you as incapacitated parent until a judicial determination is made (and if the parent is dead, there is no-one with whom the standby guardian would have concurrent authority).

Thus, the standby guardian can take the properly executed documents to the sheriff's office or CPS or where ever your minor children are and often get the children released to him or her very quickly, if not immediately. If the sheriff or CPS person is uninformed or uncooperative, an experienced attorney can employ his or her persuasiveness, go up the "chain of authority" or can bring an order to show cause and get the children released to the standby guardian in a few days.

The standby guardian has 60 days from commencement of his or her authority to file the appointment papers with the appropriate court and commence a proceeding to become the permanent guardian. While the standard of review for the guardianship court is always the best

interests of the children, your standby guardianship designation is presumptive evidence to a court (and to family members and the rest of the world, including CPS/foster care) that you, as the incapacitated or deceased parents, want the person(s) named in the designation to be the guardians of your minor child(ren). Anyone contesting your nominations has an uphill battle and will likely lose unless your standby guardians are determined to be unfit or refuse to serve.

So, by executing a standby guardianship appointment for your minor children, you and Mark eliminate the uncertainty of who will be your minor children's guardian in the event of your incapacity or death and vastly reduce the likelihood that your children will end up in the foster care system for even a day.

There's more to discuss on this - like drafting instructions or guidelines for your standby guardian on how to raise your kids, and whether or how you should discuss your wishes with your children, your designated standby guardian(s), various family members and friends (and memorialize that discussion in a loving letter to those concerned). Doing so makes sure your designation is of no surprise and provides additional support for your choice of guardian for your children.

Taking reasonable steps to ensure that, in the event you are no longer able to care for and protect your children, your children will be protected, provided for and loved by the people you want, is perhaps one of the most important things

we can do for our children. Please let me know if you or Mark have any questions.

Kind regards,  
Ian

\* This Newsletter is adapted from a letter to a new client with old wills. The names have been changed, of course.

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### **Granting Temporary Parental Authority When You are Travelling or Unavailable –**

If you are travelling without your children, does the relative, close friend or au pair you have left your children with have the authority to sign a release for your children to go on a school fieldtrip or take a child to the doctor if he or she comes down with a fever, breaks a bone or cracks a tooth?

New York law allows a parent to designate another person as a “person in parental relation” to their child for up to six months. This designation authorizes the friend, relative or employee to make education and medical decisions on behalf of the child, with some limitations.

The designated person can consent to and make education decisions and any routine medical, dental, health and hospital decisions for the child, but, except in case of an emergency, cannot consent to major medical treatments such as surgery where general anesthesia is required.

Providing teachers, doctors and others with a copy of the designation before travelling can ensure that the decisions of the person you have chosen to

have temporary parental authority will be honored by teachers, doctors and public servants.

If you are interested in discussing how to appoint a standby guardian or to designate a person in temporary parental relation to your child, please contact your MacLean Law Firm counselor.

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**Elder Law Acronym List Additions** – The following acronyms are additions to the Elder Law Acronym List first published in the February 2010 Newsletter.

- AALU** – American Association of Life Underwriters
- ACLI** – American Council of Life Insurers
- ADA** – Americans with Disabilities Act
- CPR** – Cardio Pulmonary Resuscitation
- DNR** – Do Not Resuscitate
- DOH** – Department of Health
- EI** – Early Intervention Program
- EN** – Employment Networks
- FAPE** – Free Appropriate Public Education
- GOL** – General Obligations Law
- IDEA** – Individuals with Disabilities Education Act
- IRA** – Individualized Residential Alternatives
- IWP** – Individual Work Plan
- LISA** – Life Insurance Settlement Association
- MCO** – Managed Care Organizations
- MSP** – Medicare Savings Programs
- NAIFA** – National Association of Insurance and Financial Advisors
- NCOIL** – National Council of Insurance Legislators

**OMRDD** – Office of Mental Retardation and Developmental Disabilities

**OTDA** – Office of Temporary and Disability Assistance

Additions to this list will be published in future newsletters. Please contact us if you have any questions about Elder Law issues.

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**This Newsletter is not legal advice. For more information, to request a consultation, or to engage the law firm, please contact us at 212-682-1555 or by email at [info@maclean-law.com](mailto:info@maclean-law.com).**

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