# PROTECT YOUR MOST PRECIOUS ASSETS

# WHO WILL RAISE THE CHILDREN TOMORROW?

By: ELENORA L. BENZ, ESQ.

Pattie James (all names used are fictitious) brushed her damp hair off her forehead and rinsed the last of the dinner dishes. The sounds of her three young children playing in the summer twilight filtered through the window. However, Pattie's thoughts wandered to a morning conversation she overheard between two mothers in the pediatrician's office, a conversation which she realized now had troubled her as she related it to the three James offspring: Bradley, seven, Nina, five and Julie, age two. What would their summer evenings be like if she and Bill, her husband, were not around to take care of them and watch them grow?

The overheard discussion was about a family from town whose the parents tragically lost their lives while on a second honeymoon. Their four children were now living with the mother's relatives while custody issues were dealt with by the courts because the couple had never provided directions about who they wanted to raise their children, nor had they even prepared a will.

Pattie and Bill had spoken once or twice about having wills prepared, but concluded that they didn't need wills yet, because they really didn't have any assets to worry about. Their mistaken belief, unfortunately, is a common one--that a will deals only with monetary assets. What Pattie

and Bill overlooked when they added up their assets was their most precious possessions, Bradley, Nina, and Julie.

As a mother and grandmother myself, I recognize the need to make provisions for the care and nurturing of our children in the event we should die prematurely. But, as an attorney, I also recognize how difficult it is for young (and sometimes not so young) parents with minor children to even think about the possibility of not being there when our children most need us.

Addressing that issue in my initial client conference often brings the conversation to a halt while the parents debate who the best choice would be. I explain to my clients that the choice should be given a lot of thought and they should consult with the prospective guardians before making that appointment official in their wills. Parents, siblings and close family friends often head the list of possible guardians.

So long as either parent is alive, they, of course, are the "natural" guardian for both the physical person and the property of their children. The need for the appointed guardian only arises when both parents are dead. Since the only legally effective way to appoint guardians for their minor children during their lifetime is through a will, I emphasize to my clients that they each should have a will if they have minor children. The message is clear though--either you select a guardian in your will, or the courts will appoint someone to serve as guardian after you are dead. The overwhelming majority of my clients prefer to make that choice themselves (as I am sure you would) rather than allowing the choice to fall into the hands of an uninformed and possibly disinterested third party.

Once my clients make the initial selection, we go one step further and consider successors to the appointed guardians. By also identifying successors, we eliminate the need for the courts to be involved should the original guardians decide not to serve, or die, or resign after serving for a short time. We have to remember that nominating a guardian cannot force the person or persons chosen to actually serve. Circumstances change over time, and those who were willing when you first made your will may have a change of heart in later years.

A word of caution for parents who may have a disabled minor child. When that child reaches the age of 18, you are no longer that child's natural guardian. In order to be able to continue as your child's legal guardian you must initiate and complete an adult disabled guardianship proceeding. By doing so, you can then continue to name in your will a successor guardian for your now adult child. The proceeding itself is very simple. In fact, in Sussex County, New Jersey, you can handle it "*pro se*" which means you do not need an attorney. SCARC Guardianship Services, Inc., in Augusta, New Jersey, is a great resource for the *pro se* guardianship program for the parents of disabled adults.

Finally, almost as important as the language in your will appointing guardians for your children, is the need for you to leave behind a set of instructions where your family members, a trusted friend, your attorney, or your executor can find them. These instructions should deal with the immediate problem of what should be done with your children before final arrangements can be made to transfer the responsibility for their care to the appointed guardian. To assist my clients with that task, I provide each client with a simple instructional document. One of the items

addressed in that document is the client's wishes with respect to interim arrangements for their children.

(This article does not purport to provide specific legal advice, because sensitive matters such as the appointment of a guardian vary with each family's needs. Anyone wishing to make these kinds of provisions should consult an attorney experienced in estate planning and will drafting.)

Elenora L. Benz, Esq., is a resident of Stillwater, and practices in Newton, New Jersey. She is admitted to practice in New Jersey and New York and concentrates her practice in the areas of estate planning, wills, trusts, probate and administration, business succession planning and elder law. Ms. Benz counsels clients frequently with respect to the issues discussed in this article. She has one son and three grandchildren.