

What Happens to My Kids if I am Sick or Die?

Should I read this?

If you are a single parent, you may worry who will care for your kids if something happens to you. This explains your options. You should also talk to a lawyer.

What is “testamentary guardianship”?

If you are the child’s only living parent, your will can name a testamentary guardian for the child. After your death, the court must finalize the guardianship. The guardian will have legal responsibilities like reporting to the court and posting a bond.

-
- ❖ You can change a testamentary guardian any time before your death by changing your will.
-

What if the other parent is alive?

The court will first ask the other parent to take care of them. You *cannot* keep the other parent from taking custody if you die. Nothing in your will can make someone else your children’s guardian.

Why should the other parent get custody?

A natural (biological) parent has parental rights. Only a court can legally take them away. Naming a testamentary guardian in your will does not end the other parent’s rights. The other parent will get custody of your children if you die, **unless** both these are true:

- The other parent is unfit.

- It would put the children’s welfare in danger.

What if no one can find the other parent?

If you die and the other parent is unknown or no one can find them, a court will probably approve the guardian your will names. You should put in your will that you chose the guardian “because she has a relationship with the minor child. The child’s other natural parent has never known the child.” If someone finds or contacts the other parent and the parent appears before the court, your proposed guardian may not get the court’s approval.

What if the other parent is abusive?

If the other parent is abusive or unfit to care for the child, do everything you can to get proof. Do not make false or defamatory statements in your will, other court documents, or public records. The court or other parent could use those statements against you or your estate.

You can:

1. Make a legally valid will. It must be properly written and have witnesses. In Washington, your will can be handwritten if it meets all legal requirements. Get legal advice about how to draft a will.
2. Your will should name a testamentary guardian. It should state you want your children to live with the guardian even if the other parent is alive. It should

describe the relationship or contact between your children and named guardian.

3. Your will should state that you want your kids raised in a home free of crime, violence, drug abuse, and so on. Do not name the other parent, speak badly of them or accuse them of abuse. A will is a public document. The court might consider such statements untrue or defamatory and could give the other parent legal rights against you or your estate.
4. After your death, your proposed testamentary guardian must be ready to tell the court about the other parent's abuse. Your proposed guardian or lawyer must keep any proof against the other parent of violence, court orders, or other evidence, like your written statements.
5. Your will should state that you waive (give up) any attorney-client privilege if needed to help the named guardian get custody. A lawyer you worked with, like during a divorce, might have confidential info about your abusive relationship that will help prove the other parent unfit to care for the children.
6. Your will must say your personal representative (person who carries out your will) can use your money for legal fees to fight for custody, because it is in your children's best interest.

Can my children have a guardian when I am still alive?

Maybe. A testamentary guardianship takes effect only when both natural parents are dead. The court might appoint a guardian for your children while you are alive **if** both of these are true:

- You are very ill and cannot make decisions for your children.
- There is no other natural parent OR the other parent is unfit.

A guardian would step in to meet your children's needs, like making medical, financial, and personal care decisions. Anyone can ask the court to appoint a guardian. A guardianship like this does not end your parental rights.

Can I get custody of children that are not mine?

Maybe, if one of these is true:

- The children are not living with their parents.
- The parents are unfit to care for the children.

Example: A friend or relative of yours has died. That person had asked you to take care of her children. You can file a "third-party custody action" asking for custody.

Another example: a relative is too sick to care for his children. You get physical custody, not guardianship. The sick parent keeps his parental rights. You take care of the children.

-
- ❖ Read [Non-Parent Custody: Frequently Asked Questions and Answers](#).
-

Can someone adopt my child?

Maybe. You can give up your parental rights through the adoption process. The other parent gets notice of the adoption and can challenge it.

A court can terminate (end) someone's parental rights if that parent

- did not perform parental duties
- is unfit
- has abandoned the children
- is a danger to the children

The court might deny the adoption. In Washington, courts rarely let a parent end their own parental rights, unless a third party is adopting the children.

What is power of attorney?

It is a legal document to use when you are too sick to care for yourself and your children. The person you give power of attorney can make important medical, financial and decisions for you. This is usually temporary. Read [Durable Power of Attorney Documents](#).

-
- ❖ Signing a power of attorney does not end your parental rights.
-

I have a long-term illness. What can happen to my children?

The illness might use up all your money. You might not be able to care for the children.

Child Protective Services (CPS) will investigate if someone like a neighbor, relative, doctor, or teacher, reports to them a possible case of abuse or neglect. CPS will only get involved if your children really are in danger of abuse or neglect. In that case, CPS can take them from you. CPS might try to have a relative care for them. CPS would notify you. You would still keep your parental rights.

-
- ❖ Read [CPS and Dependency Actions](#).
-

If possible, you must make custody, guardianship, and/or adoption arrangements while healthy. If you have not, and your children were in foster care when you die, the court can still appoint a testamentary guardianship. A testamentary guardian, named in your will, should be ready to give CPS and the court evidence and testimony showing that living with the testamentary guardian is in the children's best interests. The testamentary guardian can give evidence and testimony about their relationship with the children.

-
- ❖ Children who are old enough can tell the court who they want to live with.
-

What is Standby Guardianship?

Washington does not officially have "standby guardianship," where someone you chose officially gets guardianship when you are too sick to care for your children. You can informally arrange for a caretaker to help your family. That caretaker has no legal rights or authority.

What is the Indian Child Welfare Act (ICWA)?

It is a federal law governing state court cases about custody of an “Indian child.” An “Indian child” is all of these:

- an unmarried person, under age 18
- either a member of an Indian tribe or eligible to be a member
- the biological child of a tribe member

If a child is an Indian child, any guardianship or adoption is subject to this law. Read [Indian Child Welfare Act](#).

What if I need legal help?

- **Apply online with [CLEAR*Online](#)** - <https://nwjustice.org/get-legal-help> or
- **Call CLEAR at 1-888-201-1014**

CLEAR is Washington’s toll-free, centralized intake, advice and referral service for low-income people seeking free legal assistance with civil legal problems.

- **Outside King County:** Call 1-888-201-1014, weekdays 9:15 a.m. - 12:15 p.m.
- **King County:** Call 211 for info and referral to an appropriate legal services provider, weekdays 8:00 am – 6:00 pm. You can also call (206) 461-3200 or toll-free 1-877-211-WASH (9274). You can also get info on legal service providers in King County through 211’s website, www.resourcehouse.com/win211/.
- **Persons 60 and Over:** Seniors age 60 or over may call CLEAR*Sr at 1-888-387-7111, regardless of income. Assets limits may apply. Seniors in King County may call 2-1-1.

Deaf, hard of hearing or speech impaired callers can call CLEAR or 211 (or toll-free 1-877-211-9274) using the relay service of their choice.

211 and CLEAR will conference in free interpreters when needed.

Free legal education publications, videos and self-help packets covering many legal issues are available at www.washingtonlawhelp.org.

Northwest Justice Project gratefully acknowledges the work of Legal Voice, whose original publication we largely adapted here.

This publication provides general information concerning your rights and responsibilities. It is not intended as a substitute for specific legal advice.

This information is current as of August 2018.

© 2018 Northwest Justice Project — 1-888-201-1014

(Permission for copying and distribution granted to the Alliance for Equal Justice and to individuals for non-commercial purposes only.)