

# Legal Update

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## ESTATE PLANNING OPPORTUNITIES: IS YOUR CHILD AT RISK?

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Our February 2015 newsletter discussed estate planning opportunities that you may not have considered for disposition of your digital assets. Our March 2015 newsletter discussed provisions for pets. This newsletter addresses how parents can allow someone else to make health care decisions for their child if the child's parents are unavailable.

### Health Care Power of Attorney for the Benefit of a Minor Child or Short-Term Guardianship

Suppose you and your spouse plan to take a trip to a remote part of the world where phone and email communications may be unavailable. Your parents have graciously offered to watch your son, who is a minor, while you are gone. Your parents are certainly capable of caring for your son, but they may not have the legal authority to authorize medical treatment if, for example, the child needs treatment after a car accident and you cannot be immediately reached. The following are steps you can take to give your parents legal authority to make medical decisions for your son without the burden or delay that can otherwise arise.

By law, a parent generally has the right to make decisions for his or her minor child until that child reaches adulthood. Depending on state law, a parent will likely have two primary options to delegate that right to a grandparent, or other designated individual "agent," while the parent is not available:

#### **Appoint an agent and successor agents under a health care power of attorney to make medical decisions for the minor child.**

Under Section 4-3 of the Illinois Power of Attorney Act, "health care powers that may be delegated to an agent include ... all powers a parent may have to control or consent to health care for a minor child." Although a grandparent in Illinois might not need a health care power of attorney for the benefit of a minor child to take a grandchild for a regular check-up, the general rule is that a grandparent needs such a power of attorney to obtain medical treatment for their grandchild. A parent may choose to make the power of attorney effective during a specific timeframe (*e.g.*, during the trip) or to make it effective only when the parent is incapacitated. The parent should select an agent whom the parent trusts and who is capable of making important medical decisions. The parent also may select several agents to act in the order of preference listed in the health care power of attorney (*e.g.*, grandmother, then grandfather if grandmother is unable or unwilling to act), but only one agent can be designated to act at a time. Such a power of attorney, unlike a short-term guardianship

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(discussed below), ends upon the parent's death.

**Appoint a short-term guardian for the minor child.**

In some states, a parent, under certain circumstances, may also make the grandparent a short-term guardian of the child, which would allow the grandparent to make day-to-day child care decisions. This power is broader than the power to make medical decisions under a health care power of attorney for the benefit of a minor. For example, under Section 11-5.4 of the Illinois Probate Act, the parent “may appoint, in writing, without court approval, a short-term guardian of an unmarried minor.” The written instrument must be signed by the parent before two independent witnesses. The short-term guardianship, unlike the health care power of attorney, is limited in time. The appointment of a short-term guardian can only be made for a period of up to 365 days. A parent may not appoint a short-term guardian if the minor has another living parent whose parental rights have not been terminated, whose whereabouts are known, and who is willing and able to make and carry out day-to-day child-care decisions. Unlike a health care power of attorney, a short-term guardianship does not terminate upon the parent's death, but it can be revoked at any time by the parent.

While parents often think about having a back-up plan in case they cannot make health care decisions about themselves, they often do not think about having a back-up plan in place for their minor child in case the parents are unavailable or unable to act. The rules for creating a legally binding health care power of attorney for the benefit of a minor or a short-term guardianship vary by state. It would be advisable to discuss both options with an attorney experienced in estate planning to help you decide which option is best for you and your children.

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