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CAN A DEAD HAND FROM THE GRAVE PROTECT THE KIDS FROM DARLING DADDY OR MOMMIE DEAREST?

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The brilliant nineteenth century English Romantic poet,¹ Percy Bysshe Shelley, was also an absent father of two, an occasional husband, an impetuous adulterer, and an avowed atheist.² In the midst of his expulsion from Oxford University at age nineteen, he eloped with sixteen-year-old Harriet Westbrook, who was already pregnant with his first child.³ Less than three years later, Shelley left Harriet, pregnant and with a two-year-old, for an openly scandalous love affair with Mary Wollstonecraft Godwin.⁴ Two years later, Harriet, again pregnant, drowned herself, leaving two young children behind, and Shelley free to elope (again) with Godwin.⁵ When Shelley decided to raise the children himself, Harriet's parents refused to release them into Shelley's custody.⁶ Shelley went to court to fight for custody of his children on the grounds of natural parental rights.⁷ This article analyzes whether parents in similar circumstances should win such battles.

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¹ See Donald H. Reiman, *Percy Bysshe Shelley*, Britannica, <https://www.britannica.com/biography/Percy-Bysshe-Shelley> (last visited Oct. 4, 2017).

² *Shelley v. Westbrook*, 37 Eng. Rep. 850, 850 (Ch. 1817).

³ Reiman, *supra* note 1; See *Percy Bysshe Shelley*, BBC, http://www.bbc.co.uk/history/historic_figures/shelley_percy_bysshe.shtml (last visited Sept. 28, 2017).

⁴ See LYNN D. WARDLE, MARK P. STRASSER & LYNNE MARIE KOHM, FAMILY LAW FROM MULTIPLE PERSPECTIVES 913 (2014) (discussing the *Shelley v. Westbrook* case). Mary Wollstonecraft Godwin was the daughter of the women's rights movement advocate, Mary Wollstonecraft, drafter of "A Vindication of the Rights of Woman," and British philosopher William Godwin. *Id.* Mary Godwin Shelley went on to write the chilling tale, *Frankenstein*. *Id.* at 913-14.

⁵ Reiman, *supra* note 1.

⁶ See Eugene Volokh, *Parent-Child Speech and Child Custody Speech Restrictions*, 81 N.Y.U. L. REV. 631, 633 (2006).

⁷ See *Shelley*, 37 Eng. Rep. at 851.

The natural connection between parent and child matters both in life and in death. This article considers the legal conflicts that may arise when a primary caregiver parent dies. Shelley left his children in their mother's care while he took another lover, but does it necessarily follow that he would be a terrible custodial parent? Imperfect parents are not uncommon. Consider whether a manipulative, self-involved, child-abusing, alcoholic mother who beat and badgered her children, tied them to their beds, and whose abuse of the children became cinematic legend,⁸ should be able to maintain custody of her children when the children's other parent dies? Who should take guardianship of a child who is subject to neglect and attempted rape while in the care of foster homes?⁹ Alternatively, shall a child, removed from "an insatiable womaniz[ing]" father by the woman she knows as mother, be returned to her father when her mother is killed in a house fire?¹⁰ Can a parent take any testamentary steps to protect his or her children, even from the grave? Children who survive the death of their primary caregiving parent are generally, by operation of law, transferred to the care and custody of their surviving parent.¹¹ However, should that surviving parent need to be "fit" for parenting? Should the court be required to protect the best interests of the children? Alternatively, can the deceased parent ever leave guardianship directions that are afforded weight against natural parental rights? Can a court determining custody of children in the death of the primary caregiving parent be allowed to entertain a rebuttal of the natural parent presumption if diverging wishes of the decedent parent are left by will? This article explores these questions and offers potential answers for practitioners working to protect clients' children in the event of the demise of the primary caregiving parent, particularly when the surviving natural parent has exhibited conduct that does not seem to be in the best interests of the child.

Part I outlines the law, juxtaposing probate rules and family law rules surrounding natural parents and their children, and examines how states have handled or may handle the conflict of laws. Part II offers some suggestions to practitioners regarding how to best protect the rights of parents and the best interests of the children.

Shall a child in the decedent's custody be left to the care and custody of

⁸ See STEPHEN M. SILVERMAN, WHERE THERE'S A WILL...WHO INHERITED WHAT AND WHY 44 (1991) (discussing Joan Crawford, whose abusive parenting was so legendary it became the subject of a movie, *Mommie Dearest*).

⁹ *Id.* at 128 (discussing Norma Jean Baker, later known as Marilyn Monroe).

¹⁰ *Id.* at 179-80 (discussing Dorothy Ruth, daughter of baseball great Babe Ruth).

¹¹ See Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents' Rights*, 14 CARDOZO L. REV. 1747, 1785 (1993) (stating that "[c]ustody and visitation laws generally give priority to natural parents in disputes with third parties over a child's custody."). Under circumstances where the natural father is the non-custodial parent, that parent can make the strongest claim for custody or guardianship with proof of paternity, either in the form of DNA, or an appropriate acknowledgement by the parties. See generally Katherine Shaw Spaht, *Who's Your Momma, Who Are Your Daddies? Louisiana's New Law of Filiation*, 67 LA. L. REV. 307 (2007) (detailing how paternity may be established).

a surviving parent despite the parent-testator's wishes to the contrary? The answer, as always, lies in the law as applied to the facts of each case. So, what happened to the children of Harriet Westbrooke and Percy Shelley? "Though fathers had nearly absolute rights under then-existing English law, Shelley became one of the first fathers in English history to lose custody of his children."¹² The question remains whether the outcome would have been more easily reached if their mother had left a will.

Part I: The Conflict of Laws

Shall a child in a decedent's custody be thwarted from the care and custody of a surviving parent based on the testator's wishes otherwise? "Child custody decisions are some of the most difficult decisions that courts have to make in family law cases."¹³ Surviving parent rights should be discussed because people who are parents may nonetheless die while their children are still minors. Furthermore, the rise of non-marital children¹⁴ has challenged traditional family frameworks, often leaving new questions for courts to consider in the demise of a parent of minor children. Natural parenthood, rather than marital status, however, is generally the determining legal fact in a custody action. This section explores the appropriate legal rules and how they conflict in cases involving surviving minor children. These rules include the natural parent presumption, the testator's intent, and the best interests of the child standard.

Rule 1: Presumption for the Natural Parent

It is a well-established, fundamental constitutional principle that parents have the right to direct the upbringing of their children.¹⁵ That parental right is

¹² Volokh, *supra* note 6, at 633. See also *Shelley*, 37 Eng. Rep. at 850-52; WARDLE, *supra* note 4, at 914-15 (discussing the natural law concept of *patria potestas*, or paternal power). But see Sarah Abramowicz, Note, *English Child Custody Law, 1660-1839: The Origins of Judicial Intervention in Paternal Custody*, 99 COLUM. L. REV. 1344, 1384-87 (1999) (citing pre-*Shelley* cases denying fathers' rights to custody on various grounds).

¹³ WARDLE, *supra* note 4, at 911.

¹⁴ According to the Center for Disease Control, in 2017 the percentage of all births in America to unmarried women was 40.3%. See Center for Disease Control and Prevention, *Unmarried Childbearing*, (2017) <https://www.cdc.gov/nchs/fastats/unmarried-childbearing.htm>. Furthermore, there may be a higher possibility of conflict over children when parents are not married to each other.

At the time of their child's birth, half of the parents in fragile families are living together and another third are living apart but romantically involved. Despite high hopes at birth, five years later only a third of parents are still together, and new partners and new children are common, leading to high levels of instability and complexity in these families.

Sara McLanahan & Audrey N. Beck, *Parental Relationships in Fragile Families*, (Mar. 2011) <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3053572/>.

¹⁵ See *Meyer v. Nebraska*, 262 U.S. 390 (1923) (holding unconstitutional a Nebraska law that prevented parents from allowing their children to learn); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (holding that parents' choice of an appropriate education for their children is a constitutional right and liberty interest under the constitution); *Troxel v. Granville*, 530 U.S. 57 (2000) (holding that state law cannot grant visitation to any third party against a fit parent's objection).

guaranteed until the parent has been shown to be unfit by clear and convincing evidence of abuse, neglect, or abandonment¹⁶ and has his or her parental rights terminated.¹⁷ Therefore, a “fit” surviving parent will generally regain custody of his or her child in the event of the death of the custodial natural parent. If a child’s parents are divorced, “the prevailing rule is that the divorce decree abates upon the death of one of the parties, and the custody of the children automatically passes to the surviving parent.”¹⁸ If the parents were never married, a child’s surviving biological parent would also benefit from this presumption.¹⁹ Custody will usually be granted to the surviving natural parent, unless the court finds his or her parental rights have been terminated.²⁰

Although child custody laws vary from state to state, generally, when a custodial parent dies, a non-custodial parent can obtain custody without much legal difficulty.²¹ The United States Supreme Court has brought some uniformity to the various state laws. In *Troxel v. Granville*, the High Court reaffirmed that parents have an inherent constitutional right in the rearing of their children.²² The Court stated that the “interests of parents in the care, custody and control of their children . . . is perhaps the oldest of the fundamental liberty interests recognized” by the Supreme Court.²³ This right belongs only to parents and not to relatives, stepparents, godparents, or any type of psychological parent, though individuals of such standing may indeed petition for custody or visitation under appropriate circumstances.²⁴ The surviving parent, even if divorced or estranged from the deceased parent, is generally the person favored to take guardianship of the child.²⁵ Additionally, he or she is generally the person favored to gain control over the child’s inheritance in the event that a trustee is

¹⁶ See *Santosky v. Kramer*, 455 U.S. 745, 747-48 (1982) (holding that “[b]efore a State may sever completely and irrevocably the rights of parents in their natural child, due process requires that the State support its allegations by at least clear and convincing evidence.”).

¹⁷ See generally *Termination of Parental Rights*, Child Welfare Information Gateway (2016) at <https://www.childwelfare.gov/topics/systemwide/courts/processes/legal-issues-in-adoption/termination/> (explaining that “[b]efore children are legally free to be adopted, their birth parents’ rights must be terminated.”).

¹⁸ Jay Frederick Wilks, *Right of Surviving Divorced Parent to Custody of Children*, 19 WASH. & LEE L. REV. 123, 124 (1962).

¹⁹ See UNIF. PARENTAGE ACT § 202 cmt. (2002) (stating that the provision reaffirms “the principle that regardless of marital status of the parents, children and parents have equal rights with respect to each other.”).

²⁰ See *id.* at § 203 (stating that “[u]nless parental rights are terminated, a parent-child relationship established under this [Act] applies for all purposes, except as otherwise specifically provided by other law of this State.”).

²¹ See Howard Fink & June Carbone, *Between Private Ordering and Public Fiat: A New Paradigm for Family Law Decision-making*, 5 J. L. FAM STUD. 1, 3-4 (2003) (discussing a declaratory judgment as one way to secure a potential family law dispute).

²² See *Troxel*, 530 U.S. at 65-66.

²³ *Id.* at 65.

²⁴ See *Id.* at 72-73.

²⁵ See Wilks, *supra* note 18, at 124-25 (stating that “[t]he numerous jurisdictions which follow the prevailing rule usually emphasize the right of the surviving parent to custody of the children.”).

not appointed.²⁶ When a married parent of minor children dies, the surviving parent shall be presumed the custodian without court interference based on this presumption. However, when parents are divorced, the non-custodial parent may need to obtain a court order for the custody of his or her children, unless a shared custody order is already in place.²⁷

Rule 2: Testator's Intent

A testator's intent generally controls a probate court's interpretation of any testamentary document. Testamentary intent is "[a] testator's intent that a particular instrument function as his or her last will and testament. [It] is required for a will to be valid."²⁸ Good legal drafting generally ensures a testator's intent is clear in a testamentary document by the plain meaning rule and the four corners of the document rule.²⁹ That intent, however, may sometimes be a challenge to discern because "the main witness is *never* available when the interpretation occurs."³⁰ Nonetheless, a testator's intent generally controls in the absence of fraud, duress, undue influence, or lack of testamentary capacity.³¹ When testamentary documents reflect mistakes in their construction, patent ambiguity on their face, or latent ambiguity in their interpretation, courts will generally work "to conform the terms to the transferor's intention if it is proved by clear and convincing evidence what the transferor's intention was and that the terms of the governing instrument were affected by a mistake of fact or law, whether in expression or inducement."³² Other areas of estates law have created "gap filling rules to effectuate testamentary intent."³³

²⁶ DOUGLAS E. ABRAMS, SARAH H. RAMSEY & SUSAN VIVIAN MANGOLD, *CHILDREN AND THE LAW IN A NUTSHELL* 382 (5th ed. 2015) (stating that "[i]n the absence of a contrary determination, parents are naturally the guardians of the person of the child, and thus are also a logical choice to manage the child's property.").

²⁷ The majority rule is set out in *Wilks*. See *Wilks*, *supra* note 18. However,

[i]n line with the minority approach, it has been held that the death of the parental custodian does not affect the power of the court of equity that has assumed jurisdiction over the custody of the children. The children become wards of the court by virtue of the [divorce] decree, and no one succeeds to the right of custody of the children because of the death of the parental custodian. His death merely serves to require the court to make other provisions for the custody of the children.

Wilks, *supra* note 18, at 127.

²⁸ *Testamentary Intent*, BLACK'S LAW DICTIONARY (10th ed. 2014).

²⁹ See JESSE DUKEMINIER & ROBERT H. SITKOFF, *WILLS, TRUSTS, AND ESTATES* 328-29 (9th ed. 2013) (explaining the plain meaning rule and the four corners of the document rule).

³⁰ ALFRED BROPHY, DEBORAH GORDON, NORMAN P. STEIN & CARYL YZENBAARD, *EXPERIENCING TRUSTS & ESTATES* 471 (2017) (emphasis in original).

³¹ See DUKEMINIER, *supra* note 29, at 265-66.

³² BROPHY, *supra* note 30, at 483.

³³ *Id.* These rules include the doctrine of lapse to cover predeceased heirs, the doctrine of ademption by satisfaction, ademption by extinction, accretion, abatement and exoneration. "In all of these circumstances, had the testator been able to predict the future, she could have drafted around the problem that has resulted; absent direction, however, the court applies 'gap filling' rules that are designed to approximate the decedent's intent." *Id.*

If the second parent leaves a will naming a guardian other than the surviving parent, those wishes usually guide the court's decision, unless those wishes conflict with the presumption for the natural parent as mentioned above. When the custodial parent's testamentary intent is in contravention of another's parental rights, does it still have any control or force? If it is found that the intent does control or have force, why does it have such force? Testamentary intent may make a difference because the decision is about the best interests of the children.

Rule 3: The Best Interests of the Child

The Best Interests of the Child Doctrine is the general rule applied in most legal situations involving children.³⁴ While it is the general rule applied in custody disputes between two parents, it is also used to protect juveniles charged with or convicted of a crime.³⁵ The doctrine generally leaves a great deal of discretion to a judge in any case regarding children.³⁶ Judges consider several statutory factors to determine what is in the best interests of the child, including, e.g., stability, finances, abuse, neglect, educational opportunities.³⁷ Overall, the doctrine requires a court to balance a parent's rights and a parent's ability to care for their child.³⁸

When a custodial parent dies, the non-custodial parent and other family members may be concerned about who will receive custody of the child. While the local probate court will certainly be involved, so may the local family court. Attorneys and clients have attempted to deal with the conundrum presented by the conflict of these basic rules, contemplating how parents can plan for their minor children in the event of the parent's death. Remarriage or cohabitation can raise an element of *de facto* parenthood,³⁹ complicating a determination of what is best for the child.⁴⁰ While these circumstances can draw greater judicial inquiry, a formal adoption can settle matters more easily in favor of a non-

³⁴ See Lynne Marie Kohm, *Tracing the Foundations of the Best Interests of the Child Standard in American Jurisprudence*, 10 J. L. & FAM. STUD. 337, 337 (2008) (stating that "[t]he best interests of the child doctrine is at once the most heralded, derided and relied upon standard in family law today.").

³⁵ See Lynne Marie Kohm & Alison Rae Haefner, *Empowering Love and Respect for Child Offenders Through Therapeutic Jurisprudence: The Teen Courts Example*, 4 SOCIOLOGY AND ANTHROPOLOGY 212, 212 (2016).

³⁶ Kohm, *supra* note 34, at 337.

³⁷ *Best Interest of the Child*, N.Y.C Bar, <http://www.nycbar.org/get-legal-help/article/family-law/child-custody-and-parenting-plans/best-interests-of-the-child/> (last visited Sept. 8, 2017).

³⁸ *Id.*

³⁹ See generally Robin Fretwell Wilson, *Undeserved Trust: Reflections on the ALI's Treatment of De Facto Parents*, (University of Maryland Legal Research Paper No. 2005-57, 2005), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=825664##.

⁴⁰ See generally Michelle R. Gros, *Since You Brought it Up: Is Legally Separating a Child from a Nonbiological Third Party Who has Essentially become the Child's Psychological Parent Really in the Best Interest of the Child?*, 44 S.U. L. REV. 367 (2017) (challenging the parental presumption when the best interests of the child have been protected by a psychological parent).

natural parent.⁴¹ Courts generally find that it is in the best interests of the child to be with his or her biological parents absent extraordinary circumstances;⁴² therefore, when guardianship is at stake, extraordinary circumstances need to be brought to the attention of the court.

A custodial parent should be concerned with the conflicting nature of these rules, and with determining a plan for custody or guardianship of a minor child in the event of death. While the non-custodial parent will be first in line based on the presumption of the natural parent, third parties interested in guardianship of the minor child might be grandparents (as in *Shelley v. Westbrook*),⁴³ other extended family members, family friends, neighbors, godparents, or even a parent's lover.⁴⁴ If no guardian comes forward, children will become wards of the state, entering the foster care system.⁴⁵

Harmonizing the Conflicting Rules

How a court harmonizes these rules depends on the jurisdiction and the discretion of a probate court judge reviewing the matter. Because a court's jurisdiction over parents is generally invoked by an initial pleading of custody, divorce, or paternity in a family court, some states' courts have determined those orders to last only for the lifetime of the parents. Arkansas law, for example, dictates that when a custodial parent dies after receiving custody in a divorce decree, the family court no longer has jurisdiction over the parties, as the court's primary purpose—settling the family dispute—is no longer needed.⁴⁶ The result is that any final order is abated upon the death of the custodial parent, and

⁴¹ In terms of stepparent adoption,

[a]n uncontested stepparent adoption generally gives the law's imprimatur to an existing family structure. Where the surviving stepparent wishes to adopt his deceased spouse's child, the best-interests-of-the-child standard would determine the outcome. If no competing petition is filed, the court would likely approve the adoption unless the stepparent appears unfit. If a close relative also petitions to adopt the child, however, the stepparent may lose because the stepparent (like the close relative) is a legal stranger to the child.

ABRAMS, *supra* note 26, at 263-64.

⁴² See Kohm, *supra* note 34, at 370-76. Elements of natural affection seem to have driven judicial decision-making regarding children for much of legal history. See generally Louis Hensler, *The Legal Significance of the Natural Affection of Carlisle Gard's Parents* (Connecticut Public Interest Law Journal, Forthcoming, June 21, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2990594 (describing the role natural affection plays in the context of family law).

⁴³ See, e.g., *Shelley*, 37 Eng. Rep. 850.

⁴⁴ See, e.g., VA. CODE ANN. §§ 20-124.1-20-124.2 (2017) (outlining Virginia's classifications of third parties' legitimate interest in gaining child custody).

⁴⁵ See generally Barbara Bennett Woodhouse, 'State Orphans' in the United States: A Failure of Intergenerational Solidarity (Emory University School of Law Legal Studies Research Paper No. 12-202, 2012) (describing how foster care works to protect vulnerable children).

⁴⁶ See, e.g., *Brown v. Brown*, 238 S.W.2d 482, 484 (Ark. 1951) (holding that, "[o]n the death of a parent, the power of the court over custody of the child derived from the divorce action, together with the effectiveness of the decree, terminates, and the surviving parent ordinarily succeeds to the right of custody.") (citation omitted).

custody of a minor child should immediately pass to the non-custodial parent without any necessary legal action.⁴⁷ An Arkansas court has also ruled that where a custodial parent “appoints a testamentary guardian other than the surviving parent, such appointment is not valid against the rights of the surviving parent.”⁴⁸ The court held that the parental custodian’s right “does not descend nor can it be transmitted.”⁴⁹

Conversely, it is unsettled in South Carolina whether custody automatically reverts to the non-custodial parent after the death of the custodial parent. The South Carolina Code of Laws would suggest that custody reverts automatically to the surviving parent upon the other’s death:

[t]he mother and father are the joint natural guardians of their minor children and are equally charged with the welfare and education of their minor children and the care and management of the estates of their minor children; and the mother and father have equal power, rights, and duties, and neither parent has any right paramount to the right of the other concerning the custody of the minor or the control of the services or the earnings of the minor or any other matter affecting the minor.⁵⁰

Yet, when there has been a substantial period of time with the child living outside of the surviving parent’s household, the return is not necessarily automatic. Instead, a South Carolina court would likely apply factors set out in *Moore v. Moore*, which include: 1) the petitioning parent must prove parental fitness and the ability to properly care for the child and provide a good home; 2) the amount of contact, in the form of visits, financial support or both, which he or she had with the child while the child was in the care of a third party; 3) the circumstances under which temporary relinquishment occurred; and 4) the degree of attachment between the child and the temporary custodian.⁵¹ While the *Moore* standard would only appear to apply where the child has been living with a third party, courts have also applied the *Moore* standard where the child was living with the recently deceased parent.⁵² South Carolina appellate courts occasionally overturn family court decisions that have awarded custody to a third party over the surviving parent.⁵³ They have also reversed a family court

⁴⁷ See *Id.* at 484-85 (explaining that “[u]pon the death of the spouse given custody the right to such custody usually devolves upon the surviving parent unless such survivor is unfit or the best interests of the child would otherwise require.”) (citation omitted).

⁴⁸ Wilks, *supra* note 18, at 125 (citing *Brown*, 238 S.W.2d at 484).

⁴⁹ *Brown*, 238 S.W.2d at 484.

⁵⁰ S.C. CODE ANN. § 63-5-30 (2017). In its decision affirming in favor of the father in a custody dispute between a child’s natural father and maternal grandmother, the court in *Kay v. Rowland* stated, “[o]nce the natural parent is deemed fit, the issue of custody is decided.” 331 S.E.2d 781, 781 (S.C. 1985).

⁵¹ *Moore v. Moore*, 386 S.E.2d 456, 458-59 (S.C. 1989).

⁵² See, e.g., *Dodge v. Dodge*, 505 S.E.2d 344, 349-51 (S.C. Ct. App. 1998) (where father sought custody after the death of the children’s mother).

⁵³ See, e.g., *Moore*, 386 S.E.2d at 459; *Harrison v. Ballington*, 498 S.E.2d 680, 684 (S.C. Ct. App. 1998);

decision awarding custody to a parent over a third party.⁵⁴ Therefore, while there is a fair amount of case law in South Carolina on this matter, it is still not entirely clear how easily custody reverts to a surviving parent. Similarly, in Ohio, a court reasoned that the surviving parent's right to the custody of the child is not "absolute," for the court must look after the best interests of the child.⁵⁵ Therefore, in Ohio, a surviving parent may have to establish his or her fitness.

In Virginia, while there is a presumption of fitness of the surviving parent,⁵⁶ there is also a possibility of adjudication,⁵⁷ whereby a court may at least consider, and possibly follow, the desire of the parent as expressed in the will regarding his or her child's guardianship. If parents make no appointment via a valid will, then third parties may petition for custody under the Virginia Code, which requires a determination that such third party is a "person with a legitimate interest."⁵⁸ Any person whom the court deems to be a person of legitimate interest able to act in the best interests of the child can petition the court for custody; this third party can then potentially be granted custody over a surviving parent if he or she demonstrates that the surviving parent is unfit and that it is in the best interests of the child for said child to be placed in the custody of the petitioner.⁵⁹ Furthermore, in a state like Virginia, a probate court order may take precedence over an order from family court because the probate court is a circuit court at a level above the family court.⁶⁰

Because the analytical outcome of these conflicting laws is unclear—no matter what state they are applied in—every lawyer will want to prepare his or her client with the best course of action to protect minor children in the event of the death of the custodial parent.

Part II. Lawyering Solutions

Presumably, a parent's main objective is to protect his or her children. An estate planning client who is a custodial parent is generally shows a

Sanders v. Emery, 452 S.E.2d 636, 640 (S.C. Ct. App. 1994).

⁵⁴ See, e.g., *Kramer v. Kramer*, 473 S.E.2d 846, 849-50 (S.C. Ct. App. 1996).

⁵⁵ *Tanner v. Tanner*, 62 N.E.2d 654, 655 (Ohio Ct. App. 1945).

⁵⁶ See generally *Hutchison v. Harrison*, 107 S.E. 742 (Va. 1921) (holding that natural parents are presumed fit for parenting).

⁵⁷ Wilks, *supra* note 18, at 128.

⁵⁸ See VA. CODE ANN. § 20-124.2 (allowing for any "person with a legitimate interest" in the care and custody of a child to petition for custody); VA. CODE ANN. § 20-124.1 (stating that a "[p]erson with a legitimate interest" shall be broadly construed and includes, but is not limited to, grandparents").

⁵⁹ See VA. CODE ANN. § 20-124.2.

⁶⁰ See *Virginia Courts in Brief*, (2014), <http://www.courts.state.va.us/courts/cib.pdf>. Furthermore, family courts in Virginia are not courts of record, and therefore may not carry as much authority as a circuit court level probate court, which is a court of record. See generally *The Juvenile and Domestic Relations District Court* (2010) <http://www.courts.state.va.us/courts/jdr/jdrinfo.pdf>. See also VA CODE ANN. tit. 16.1 (titled "Courts Not of Record" and covering court rules for courts including Juvenile and Domestic Relations District Courts).

particular interest in the care of his or her children in the event of death. An estate planning lawyer must advise a custodial parent client of the legal standards of the natural surviving parent presumption, the client's ability to clearly state wishes in a last will, and the court's legal standard in protecting children. The client's estate plan should also contain only facts supporting the testator's guardianship wishes. Guardianship sections of a will can contain provisions discussing why a surviving natural parent would not act in the best interests of the child. Stating facts that rely on police records, arrests, criminal convictions, media accounts, and other verified facts should be detailed in those provisions. While the custodial parent wants to do everything in his or her power to protect the best interests of the child in his or her custody in the event of death, he or she must do so while also avoiding defamation of the surviving natural parent. Because a will may one day become a public record, the key is to use only facts in testamentary provisions.

In advising clients who are trying to determine a guardianship plan in the child's best interests when the surviving natural parent has been abusive, involved in criminal activity, or an absent parent, every attorney must assist their client in forming a strategy for his or her estate plan. A smart practitioner should anticipate this issue for every parent of minor children. In advising a custodial parent who does not feel that the surviving parent would be fit to raise the children, the attorney must direct that client to decide who he or she would want to raise the children in the event of his or her unexpected death. Putting a clear estate plan in order is absolutely essential. A custodial parent should draft and execute a will naming a preferred guardian for the children, setting out the special relationship that individual has with the children, and why that person is most appropriate to act in the best interests of the children. Last will and testament provisions regarding the care of the children might also include facts about how the surviving parent is unfit to gain or regain custody. While unfitness has no fixed definition, a history of violence and abuse, a history of illegal or criminal conduct, a history of substance abuse, severe lapses in judgment, neglect of the child, a general lack of stability, *e.g.*, would all be evidence of potential unfitness. Again, to avoid slander or defamation charges, these details should only include clear and indisputable facts.

If you die with children, the law presumes that the minor children will be adequately cared for by their other living natural parent, and not necessarily by whom those children live with or are being cared for. If you feel that the biological father of your children is not the best choice for your children's custody and care, indicate why in your will in a clearly factual manner and name your choice for custodian. There is no guarantee that a court will overcome the natural parent presumption, but courts are required to do what is in the best interests of the children, and your will may have an important

bearing on that matter.⁶¹

After properly executing their will, the client should consider: 1) filing or recording their valid will in the appropriate county clerk's office where the children reside, and 2) having the attorney and the named guardian(s) retain copies. Armed with a copy of the will, the named guardian(s) must be ready to immediately take possession of the children upon the death of the custodial parent.

This matter is equally important for a non-custodial parent who fears losing his or her children to a third party. That parent should have a legal strategy to be ready to object to a third party claim of guardianship of his or her children against the parental presumption. As with any litigation, these matters can take years to litigate and resolve. Obviously, this can interfere with the need to maintain stability and continuity for minor children. Helping a client prepare ahead of time could prove significant.

There are effective ways of reducing the risk that a non-custodial parent will face a third party custody battle if the other parent dies. A non-custodial parent should be sure to have any initial custody order grant him or her "secondary custody," ensuring that custody of the children will be retained, even in the event of the death of the custodial parent. A non-custodial parent will also want to be sure to stay involved in his or her child's life, exercising substantial visitation with the child, offering the child continuity and stability. Additionally, a parent could petition a family court to compel both parents to enter an automatic transfer of custody to the surviving parent into their respective wills. While these solutions may not create absolute certainty, taking these steps cannot hurt one's parental rights. Furthermore, upon the death of a custodial parent, a non-custodial parent must be ready to immediately take possession of the children and file for full physical and legal custody as soon as he or she learns of the death of the custodial parent. Preparing the required paperwork in advance accelerates that process.

Parents may also wish to consider taking steps to control and protect their children's inheritance. While an attorney assists a client with guardianship concerns, a wise additional step is to consider property transfer. "Quite frequently the guardian of the person of minor children will also be custodian of the children's property."⁶² An attorney will want to help a client think through the guardianship of the child and any prospective property they may acquire. "The focus of the process should be on producing a plan which meets the desires of the particular client. . . . In order for documents to reflect what clients really intend lawyers should be sure their clients understand the factors which the client

⁶¹ LYNNE MARIE KOHM & MARK L. JAMES, *ESTATE PLANNING SUCCESS FOR WOMEN* 105 (2005).

⁶² BROPHY, *supra* note 30, at 234.

would find relevant to a decision.”⁶³ The surviving parent must also follow the appropriate steps to ensure proper transfer of inheritable property to the children. Using a minors’ trust is a suitable option where parents do not have confidence in each other to properly manage the children’s property.⁶⁴

A lawyer’s duty to his or her client may involve making a plan to protect his or her children. With that protection in place, a client may more easily move forward with less worry over the eventual fate of his or her children. The following is an example of some of the fears that clients may have when estate planning:

[w]hen the doctors told Lydia she was dying of pancreatic cancer, her first concern was for her two preschool age children. Being a single parent, Lydia was their sole provider. The children had not seen their father in years as he had been in and out of incarceration. Lydia wanted to be sure to provide for their care and their best interests in the event of her death. She contacted an attorney to draft her will that named custodian whom she thought would act in the best interests of her children, and she described the facts surrounding why the children’s father was not now caring for them. She had peace of mind when she left the attorney’s office knowing that a judge would now understand the complications of their family and act in the best interests of the children.⁶⁵

A dead hand from the grave may indeed work to protect the minor children. Setting out custodial preferences can afford a measure of stability in an otherwise uncertain future for children.

Conclusion

Would Mr. Westbrooke, Harriet’s father, have succeeded in his custody claim against Percy Shelley more easily if Harriet had left a will? We will never know that answer; though even absent fathers had nearly absolute rights under then-existing English law,⁶⁶ Shelley became one of the first fathers in English history to lose custody of his children.⁶⁷

Consider again whether a manipulative, self-involved, child-abusing,

⁶³ Roger W. Andersen, *Informed Decisionmaking in an Office Practice*, 28 B.C. L. REV. 225, 236-37 (1987).

⁶⁴ *But see* William H. Soskin, *Gifts to Minors after 2001: Minors’ Trust, Qualified Tuition Programs, Education IRAs, and Custodial Accounts Compared*, 27 ACTEC J. 344 (2002) (noting the limitations in doing so).

⁶⁵ KOHM & JAMES, *supra* note 61, at 106.

⁶⁶ *See* WARDLE, *supra* note 4, at 914-15 (discussing the natural law concept of *patria potestas*, or paternal power).

⁶⁷ Volokh, *supra* note 6, at 633.

alcoholic mother, whose abuse of the children became legendary in the movie *Mommie Dearest*,⁶⁸ can collect her children when their other parent dies. While there was apparently no custody fight among the parents of the Crawford children, could the manner in which Joan Crawford was claimed to have abused her children be used against her as their custodian in the death of the children's father? Possibly yes. The only question may be if that individual named as guardian could be as ferocious in fighting for the children in court as Joan herself was in her care of them.

Who should take guardianship of a child who is subject to neglect and attempted rape while in foster care due to her mother's mental illness?⁶⁹ Little Norma Jean Baker, who grew up to be Marilyn Monroe, somehow survived in the custody of a mother burdened with poor mental health even long after Marilyn's death.⁷⁰

Shall a child who has been removed from the custody of her father, "an insatiable womanizer," by the woman she knows as mother be returned to her father when that mother is killed in a house fire?⁷¹ After Helen Ruth tragically died in a fire, her child, Dorothy, was placed in an orphanage, but her father, Babe Ruth, found and raised her thereafter.⁷² If Helen had left a will outlining Ruth's well-documented flaws, would that have kept The Babe from regaining custody of little Dorothy after Helen's death? A probate judge indifferent to Babe's athletic accomplishments may have taken her claims largely into consideration if Helen had named another guardian to thwart his paternal claims. Regardless, Dorothy Ruth survived being raised by her famous, hard-living, womanizing, darling daddy.⁷³

The bottom line in each of these scenarios and in the surrounding conflict of laws is that without the testator's intent clearly laid out in a last will and testament, the surviving natural parent will almost always gain custody of his or

⁶⁸ SILVERMAN, *supra* note 8, at 44.

⁶⁹ *Id.* at 128.

⁷⁰ *Id.* at 128-29. In the end, Marilyn's foresight in her own last will and testament turned the tables, and provided high quality care for her mother until her death. Ms. Monroe may not have appeared to be a very sage woman outwardly, but her estate plan was one of the most well-thought-out in Hollywood history.

⁷¹ *Id.* at 179. Dorothy Ruth is the only known natural child of Babe Ruth. She mysteriously arrived at the home of Babe and Helen Ruth at age two, and Helen protected and raised her until death. *Id.* at 180.

⁷² SILVERMAN, *supra* note 8, at 180.

⁷³ Though unrelated to the topic of this article, Dorothy's story got more interesting, as she discovered her true origins thirty years after her father's death. Later married with a family of her own, Dorothy also had

living with her an eighty-six-year-old woman - Juanita Jennings - who was part of Babe Ruth's retinue when Dorothy was a child. Juanita had married Babe Ruth's accountant, and came to live with Dorothy when her husband died. Two weeks before she died, in a truth-is-stranger-than-fiction twist, Juanita told Dorothy that she was her real mother. She had had an affair with Ruth when he was playing ball in California and when she became pregnant, he moved her to New York and supported her.

Id. at 181.

her children due to the un rebutted presumption that natural parents will act in the best interests of their children. While there are no definitive answers on how any given judge will harmonize the conflict between the natural parent presumption, the intent of a testator, and the best interest of the child standard, it is absolutely certain that a deceased custodial parent—leaving no last will and testament detailing what he or she deems best for the guardianship of the surviving minor children—will have no dead hand control from the grave to protect their children when they are by operation of law transferred to darling daddy or mommie dearest.