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Planning for the Future Care of Your Children in the US [1]

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It is difficult for most parents to think about not being able to take care of or make decisions for their children. While it is important for all parents to consider this possibility, it can be even more important ? and scary ? for parents who are living with HIV (HIV+). If you plan ahead and make arrangements while you are healthy, you will have less to worry about if you become sick. Also, knowing that your children will be well cared for if anything happens to you can help both you and your children feel safe and secure.

With proper planning, you can make sure that your children will have good care in the event that you become too ill to provide for them. Planning ahead can not only give you peace of mind, but also allow you to make choices that reflect your values and what you would like for your child.

Arrangements for the future care of children require formal legal procedures. These legal procedures vary from state to state in the US, so it is important that you consult the legal department at a local AIDS service organization or a private attorney who knows your state?s laws. You may also be able to get valuable information and assistance in planning for the future care of your children from a local social worker. Sometimes there are low-cost or no-cost (?pro bono?) legal services available in your area. For help finding these, check out the websites for Pro Bono Net [2] and LawHelp [3].

The most common ways of making plans for the future care of children are described below.

Guardianship

Guardianship is a legal arrangement that allows you to select someone else to care for your children in case you become unable to do so. The legal guardian has the right to act as the children?s parent and can make important decisions for the children, including decisions about health care, education, and housing.

There are different types of legal guardianships. Full guardians are responsible for both the personal and financial care of the children. Limited guardians are ?limited? to being responsible for either the personal aspects of the children?s care (nurturing and physically caring for the children) or the financial aspects of their care (handling the monetary needs of the children).

Selecting a guardian for your children can be a challenging but rewarding process. It is important to do it when you are well, since in an emergency, the state?s court system steps in to select a guardian and may choose someone without your input. Here are some questions to help you think about whom to select as a guardian for your children:

- Is the person dependable and capable of caring for your children? Will he/she be able to provide a stable and nurturing home for your children?
- Is the person willing to take on the long-term responsibility of parenting your children?
- Do you want your children to stay together? If so, it is important that the person you name as guardian be willing to care for all your children and that you name that same person as guardian for all your children.

You may also want to consider if you feel comfortable talking to the guardian about your health, what your children think of the guardian, and if the guardian shares your values and has similar ideas about raising children.

Making someone a legal guardian of your children requires a court hearing. At the hearing, you will need to explain to the judge why you want someone else to take care of your children. The person you want to name the guardian is called the designated guardian.

The designated guardian must also appear in court and show that he or she is a person over 18 years old and has never had a felony conviction. The court will look into the designated guardian to see if he or she is qualified to provide care for the children. The court will legally recognize the guardian of your children once the court is convinced that the guardian you chose is qualified and that having a guardian is in the best interest of the children.

In making these arrangements, you must understand that both parents may have parental rights to care for the children, even if one parent has never been involved in the children?s life. If you believe that your children?s other parent would not provide good care for them, you obtain a court hearing to testify why your selected guardian would be a better caregiver than the other parent. The court can make the legal decision, based on the evidence, as to which person would make a better guardian.

The guardianship arrangements you make now do not have to be permanent. You can make changes in the future if you decide you would like different arrangements for your children.

Standby Guardianship

Standby guardianship allows a parent to name someone who will become the children?s guardian at a future date. This future date occurs when the parent becomes unable to care for the child, the parent dies, or the parent chooses to make the guardian the legal caretaker of the children. Standby guardianship is not available in all states.

Selecting someone as a standby guardian enables a parent to keep her/his parental rights and decision-making responsibilities while the parent is able. Then, if the parent becomes unable to provide care to the children, the standby guardian can take responsibility and has legal authority for 180 days after the parent becomes unable to provide care. Within 180 days the standby guardian must make a legal request for guardianship of the children in order to maintain legal authority. If the parent?s health improves, parental authority is restored to the parent, and the guardian goes back on standby.

How to name or ?designate? a standby guardian for your children depends on the state in which you live. Most states require that you either (1) go to court and tell the court whom you wish to name as the standby guardian, or (2) designate the standby guardian in writing, and that person goes to court after you become disabled. As with regular guardianship, you can change or reverse the standby guardianship arrangement at any time.

Wills

You can designate a guardian in your Will to make plans for the care of your children after you die. However, you should not rely on your Will to select a guardian because it is not legally binding in court. While the court would view a guardian named in your Will as strong evidence of your intention, it is possible that the court would make a guardianship decision different from the one you wanted. In most cases a parent should make formal guardianship arrangements in addition to designating a guardian in the Will.

Adoption

Parents can also arrange for future care of their children through adoption. With adoption, the biological parents give up all of their legal rights to their children. The adoptive parents take full parental rights and responsibilities, which are legally recognized and enforced. For this reason, many parents are reluctant to arrange for adoption of their children.

An adoption decree would end the biological parents? rights to custody and visitation. The adoption process can be time consuming. Both biological parents, if alive, must consent to an adoption and the court must conduct investigations regarding the suitability of the adoptive parents.

Some states recognize standby adoptions, in which the adoptive parent(s) is given legal parental rights after the biological parent(s) becomes too disabled to care for the children or dies. The standby adoption arrangement is often more attractive to parents because they do not lose their parental rights until they become too ill care for their children or die.

Conclusion

Although many people living with HIV are living long, healthy lives, it is wise to make formal arrangements for the future care of your children. A parent?s failure to make these arrangements will result in the state having to make decisions about the future care of the children in the event of the parent?s incapacity or death. Unfortunately, it is possible that a state decision, though well-intentioned, could go against a parent?s wishes or cause unintended confusion and disruption for the children.

You may find it helpful to look at the pros and cons of the various ways of making plans for the future care of your children. It may help to talk to a social worker or counselor about the emotions and concerns that these issues may cause. In order to save your family, your children, and yourself difficult decisions during a period of serious illness, it is best to make your wishes known about your children?s care clear and legally binding. It is also easier and better to make your wishes known while you are healthy. If you become ill, you can focus on healing and not have to worry about arrangements for your family.

Tags:

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- guardianship and HIV [5]
- taking care of children [6]
- designated guardian [7]
- standby guardianship [8]
- wills [9]
- adoption [10]
- future care for children [11]
- children HIV [12]
- adoption HIV [13]

Additional Resources

Select the links below for additional material related to guardianship.
HIV, Custody and Guardianship (PWN-CA) [14]
Future Care and Custody Planning (National Abandoned Infants Assistance Resource Center or AIA) [15]
Programs for Families Affected by HIV/AIDS (DHHS) [16]
Standby Guardianship (AIA) [17]
Guardianship (National Resource Center for Permanency and Family Connections) [18]
Standby Guardianship (Child Welfare Information Gateway) [19]
Providing a Guardian for Your Children (LiveStrong) [20]
Long-Term Planning for Children Whose Parents Have HIV, AIDS, or Other Terminal Illnesses (ProJusticeMN) [21]

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[16] https://www.childwelfare.gov/systemwide/service_array/health/hiv.cfm
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[21] http://www.projusticemn.org/legalsteps/item.4172-V_LONGTERM_PLANNING_FOR_CHILDREN_WHOSE_PARENTS_HAVE_HIV_AIDS_OR_OTHER_TERMI