

**Standby Guardian Laws**  
**A Guide for Legislators, Lawyers, and  
Child Welfare Professionals**

prepared by  
Judith Larsen, J.D.

for  
The American Bar Association  
Center on Children and the Law

and

Circle Solutions, Inc.

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## Introduction

The seed for this manual on standby adoption laws was planted by Congress in section 403 of the Adoption and Safe Families Act of 1997:

*It is the sense of Congress that the States should have in effect laws and procedures that permit any parent who is chronically ill or near death, without surrendering parental rights, to designate a standby guardian for the parent's minor children, whose authority would take effect upon—*

- (1) the death of the parent;*
- (2) the mental incapacity of the parent; or*
- (3) the physical debilitation and consent of the parent.*

[Section 403, 11 Stat. 2134; PL 105-89]

Building on this “Sense of Congress,” the Children’s Bureau of the U.S. Department of Health and Services has supported development of standby guardianship laws across the Nation. In its *Adoption 2000 Guidelines for Public Policy and State Legislation Governing Permanence for Children*, the Children’s Bureau recommended that States include standby guardianship in their statutes. [Duquette & Hardin, June 1999] The Bureau also sponsored this manual as a guide for States that are developing, or just beginning to use, new standby guardian laws. The manual is prepared by the American Bar Association’s Center on Children and the Law in partnership with Circle Solutions, Inc., as part of a technical assistance project for communities that are improving services to families living with HIV/AIDS.

The five distinguished members of our project’s Steering Committee are: Linda S. Coon, President of LSC and Associates; Barbara Draimin, Executive Director of the Family Center, Inc.; Lisa Nadine Ramos, Assistant Counsel of the National Treasury Employees Union; Robert Washington, Executive Director of the St. Francis Center; and Lori S. Wiener, Coordinator of the Pediatric HIV Psycho-Social Support Program of the National Cancer Institute. Anna Laszlo, Research Director for Circle Solutions, and Sally Jue, the company’s Senior Technical Advisor, worked with Patricia Campiglia of the HHS Children’s Bureau to bring the project to fruition.

This manual on standby guardianship laws benefited from the experience and skills of many lawyers. Chief among these is Linda S. Coon, a pioneer in developing legal tools for families in crisis, who read the manuscript front to back at least twice and thoughtfully commented on it. Jeffrey Selbin, Director of the East Bay Community Law Center in Berkeley, California, and co-author of the forthcoming chapter on Issues in Family Law for People with HIV for the Supplement of the 3<sup>rd</sup> Edition of AIDS and the Law exchanged drafts of his manuscript with ours. This manual certainly profits from his analysis. Lisa Ramos examined and commented on the entire manuscript as well.

Focusing on the sections that pertain to their particular States, the manual was profoundly strengthened by: Abigail Trillin from California; Tom Courtney, Sharon Langor, and Leslie Powell from Florida; Connie Davis, Cynthia Schneider, and Maureen Brooks from New York; and Kathy Miller-Wilson, Nan Feyler, and Rodney Cunningham from Pennsylvania. These attorneys are committed to the highest standard of legal care for families living with HIV/AIDS.

Early research for the manual was accomplished by Yolande Samerson at the ABA. Howard Davidson, Director of the ABA Center for Children and the Law and supervisor of the ABA's part of the project not only gave the manuscript astute readings, but offered especially helpful suggestions about supporting material and knowledgeable people.

To all, my heartfelt thanks.

Judith Larsen

**PART ONE**

**STANDBY GUARDIAN LAWS DESCRIBED AND COMPARED**

Parents need legal tools to plan stable and safe futures for their children in the event that the parents themselves may die or be disabled by illness. Standby guardian laws are one of a number of legal tools parents can use to make stable arrangements for their children. Other tools include powers of attorney, temporary and short-term guardianships, affidavits, wills and trusts, and standby adoptions.

One value of a standby guardianship is that it bridges between a child's care during a disabled parent's lifetime, and the child's life after the parent dies. The ideal standby guardian law permits a parent to choose a competent, trusted person to "wait in the wings," stepping in to help care for the child only if the parent becomes seriously disabled, and taking over child rearing if the parent dies—at least until a permanent guardian is appointed. (Although we use the term "parents," many States permit anybody who is a child's primary caretaker to use standby guardianships.)

While a very few States have long had a law that permits parents to designate guardians before they are needed, for most States the concept is new. Modern standby guardian laws grow out of public awareness of the impact on families that contagious, often fatal, diseases like AIDS and tuberculosis have in today's society. It is natural for parents who struggle with these diseases to search for ways to assure safe, stable futures for their children—and in many States, other laws available to them do not offer long term security. Often a parent wants to *know* who will be caring for her children when she can no longer do so—but she also wants to *assure* that she will be allowed to care for them as long as she is able.

Economically well-off people traditionally have used wills, trusts, and tax strategies to plan for their children's futures. For families that do not have extensive property to manage, those are not practical options. Parents may be more intensely focused on the quality of daily, personal care and guidance their children will receive. A guardian chosen by the parent, often a friend or family member, may well meet those needs. Establishing a guardianship, however, requires some court contact. If a family carrying the cumulative burdens of poverty and illness has had bruising encounters with family and criminal courts they may be deeply reluctant to engage with court systems again. It is a challenge for law makers to

create standby guardian laws that are plainly written, require only minimal contact with courts, and yet protect parental rights and promote the child's best interests.

## COMMON ELEMENTS OF STANDBY GUARDIAN LAWS

When standby guardianship is explained to parents who seek to secure a protected future for their children, their questions usually include:

- (1.) Is it a complicated procedure for me to nominate a standby guardian?
- (2.) Does my child's other parent have to agree to my plan?
- (3.) What kind of control do I have over what the standby guardian does?
- (4.) When will I have to give up my children?
- (5.) How involved will I have to be with the court?

To determine how statutes address these questions, we analyze four aspects of State standby guardian laws: (I.) designation of the standby guardian, (II.) agreement of the non-custodial parent, (III.) role of the standby guardian, and (IV.) court process. In this section, Part One, our analysis is general and comparative. In Part Two, there is a State-by-State analysis of the 18 States that have standby guardian laws as of March 1, 2000.

Some questions that parents may have are rarely addressed in guardianship law, and must be answered by other means. Chief among these concerns is: how will the guardianship affect such benefits as Social Security Income (SSI), Temporary Assistance for Needy Families (TANF), Medicaid, and "Section 8" housing? Answers to such questions turn on the facts of each case and usually require research by both a social worker and a lawyer.

As more States promulgate standby guardian laws, certain elements appear over and over again. Although standby guardian laws take many forms because they must respond to State case law and local

court culture, there are certain elements that have appeared in a majority of the laws. Different States make up the majority for each element. **Variations are described in greater detail in Appendix A.** However, the following elements appear frequently enough that we might we call them common.

#### I. DESIGNATION OF A STANDBY GUARDIAN

- A. There is a process, similar to writing a will, for designating a person to be a standby guardian for a child.***
- B. The designation document indicates that the parent qualifies to establish a standby guardianship because he or she has a “terminal” or “chronic” illness.***
- C. The standby guardianship will become active when a “triggering” event or condition occurs.***
- D. The future event that is likely to occur to the parent is mental incapacity, physical disability, or death.***
- E. The parent’s consent—insofar as he or she is able to give consent—controls many aspects of the guardianship.***

#### II. AGREEMENT OF THE NON-CUSTODIAL PARENT

- A. Through notice of a court hearing, the non-custodial parent has an opportunity to be heard on the issue of guardianship.***
- B. Reasonable or diligent efforts must be made to notify the non-custodial parent.***

#### III. ROLE OF THE STANDBY GUARDIAN

- A. The guardian’s tasks will begin when a future event or condition occurs to the parent.***
- B. The standby guardian has responsibility to bring to the court evidence that the “triggering” event or condition has occurred.***
- C. Once the guardianship is activated by a triggering event, the standby guardian and the parent share decision-making for the child.***

#### IV. COURT PROCESS

- A. A judge (or designated court officer) will determine whether a standby guardianship is in the best interests of the child.***
- B. The court determination occurs after the designating document is filed.***
- C. The guardianship can be confirmed officially only after evidence is filed with the court that the triggering event or condition has occurred.***
- D. A physician’s statement is required to be filed as evidence if the triggering event is the parent’s mental incapacity or physical disability.***
- E. After a parent’s death, a standby guardianship converts to a permanent guardianship.***

No Federal law imposes particular requirements on States enacting standby guardian laws. If they do not already have an old standby guardian law on the books, legislators may wish to follow the example of a few States that developed laws in the early 1990s, but also work in variations that best fit their court systems and State laws. Thus, there are many variations to the common pattern. *At a minimum, a standby guardian law must permit a parent to nominate a preferred guardian who is formally approved by the court, and whose responsibilities toward the children may commence during the parent's lifetime.*

Standby guardianship differs from a guardianship established by will in that the parent can know in advance of death whether the court has accepted her choice of guardian. Standby guardianship also differs from most guardianships for children in that it typically permits the parent and guardian to work together with the children. It bridges between the parent's life and death. Some standby guardian laws are simple. [e.g., WY] Other standby guardian laws are very thorough, prescribing every step to be taken: how to designate the guardian, how to find and secure the agreement of the non-custodial parent, what the responsibilities of the standby guardian will be, what rights the parent retains, and what must be presented to the court. [e.g., WI] In this section we will look closely at the typical provisions and interesting variations.

In this analysis we denote some laws as standby guardian laws that arguably are not. [e.g., CA, WY, IA] These are laws that accomplish many, but not all, of the preventive, protective purposes of classic standby guardian laws. We include them so that the reader will have a wide view of legislative possibilities.

## **DESIGNATING A STANDBY GUARDIAN**

An essential element of any standby guardian law is the parent's ability to choose a preferred person to care for the children. Without this option, a law probably cannot be recognized as a true standby guardian law. Every State that we present here does have such an option (although in Nebraska, the process is implied rather than described).

Some States helpfully include right in the statute a designation form that a parent has the option to use. [e.g., CT, IL, MD, NJ, NY, PA] In some States the court clerk might reprint the statutory form so that a parent could simply fill in the blanks in the clerk's office and have it witnessed there.

The requirement that the parent's signature be witnessed by two adults probably is drawn directly from laws pertaining to wills, an important concept where extensive property is at stake. Witnessed documents can less easily be forged. Most states place their standby guardian laws in the probate code that also governs wills. It follows then that most States require this witnessing for the document that designates the standby guardian, or alternatively for the petition that accompanies it; a few States do not. [e.g., CA, VA, WY]

Perhaps because the modern need for standby guardian laws is in direct response to HIV, the idea of serious illness currently underlies most State statutes: one must be sick in order to take advantage of the law, and it is illness or death that is the triggering event that activates the guardianship. A number of States follow New York, New Jersey, and California in requiring that the parent have "a progressively chronic illness" or "irreversible fatal illness" [NY], or a variation of that, before asking the judge to appoint a standby guardian. Future events that activate guardianship are, typically, mental "incapacity," physical "debilitation" in conjunction with a parent's consent, and "death."

There is, however, no innate reason why sickness should be the qualifier and limitation written into the law. In Illinois, it is the parent's inability to make day-to-day decisions, rather than sickness, that triggers a standby guardianship. Several States include, but do not limit, the catalyst events to mental or physical health. [CT, IA] Wyoming's law merely states "that the petition shall be acted upon by the court only upon the occurrence of a specified event or on the existence of a described condition of the mental or physical health of the petitioner." A number of States ease the illness limitation considerably by providing that the parent's consent alone can be one of the events that activates the guardianship. [IL, MD, MA, NY, NC, PA, VA, and WV]

Aside from the limiting, qualifying requirement of illness, most States give the parent a great deal of control over the guardian relationship. The parent may withdraw the nomination and, during its active stage, usually may make as many decisions for the children as possible while well enough to do so. If the triggering event is physical debilitation, typically the parent's consent is required before the guardianship commences.

#### **AGREEMENT OF THE NON-CUSTODIAL PARENT**

Single custodial parents may feel nervous about contacting the other parents of their children. It can open up stressful relationships when the parent also is dealing with illness, the children's future, and many other issues. Necessity for obtaining agreement of the other parent to the guardian arrangement can be a barrier to using standby guardian laws as a permanency planning tool. Nevertheless, as in any legal action involving custody of a child with two living parents, all birth parents must, at a minimum, have notice of the court action and an opportunity to intervene. The typical exception to this constitutionally-based requirement is if a court has already found that the other parent is not fit, willing, or able to exercise parenting responsibilities. [*Stanley v. Illinois*, 405 U.S. 645 (1972); *Santosky v. Kramer*, 455 I/S/ 745 (1982); *Lehr v. Robertson*, 462 U.S. 248 (1983); *Adoption of Kelsey S.*, 823 P.2d 1216 (Cal. 1992)]

Is there any way around this requirement? Suppose that a single parent knows that the other parent would not be a reliable guardian, or would not want the responsibilities. Perhaps there is only a putative father whose parental responsibilities have never been determined by a court. New York narrows the burden on the custodial parent considerably: notice need only be given to the non-custodial parent if his residence is known, it is in New York, and he has not been deprived of guardianship rights by a court (for example, through imprisonment, abandonment, or divorce). The constitutionality of this provision has not yet been tested in court. (New York lawyers say that in practice judges require notice to be given according to the standard, more comprehensive requirements of family law.) A number of States ask for "reasonable efforts" to locate non-custodial parents. Maryland is the only State to use that term, but other

States, in listing what must be done to notify the other parents, show that they mean “reasonable efforts.” A typical example of “reasonable” steps to be taken is an attempt to mail the notice of the court hearing, followed by personal delivery of the notice, and if that fails, notice published in the classified advertisement section of a widely-read newspaper. A few States require what is closer to “diligent efforts” of the sort one would make if there were to be an actual termination of parental rights: searching hospitals, jails, telephone directories, and so forth. [e.g., PA, WI]

There are other ways to make this part of preparing a standby guardianship easier. If the non-custodial parent already has been found to be unfit to raise children, as for example through a parental termination action in family court, evidence of that could be presented in court. Virginia allows only 10 days “turn around” time between mailing a notice and the court hearing, reasoning that if the other parent misses the court hearing, he or she can ask for a review of the decision at any time.

If, however, the law states as a definite matter that standby guardianship is not applicable if there is a fit, willing, and able parent, and there has been no court determination that the non-custodial parent is unfit, the only process open is to bring the matter to court as an issue of fact, and ask for a determination of a parent’s fitness as part of the standby guardian hearing. [CT, FL, IL, MA]

## **ROLE OF THE STANDBY GUARDIAN**

A critically important idea to standby guardianship is “concurrent decision-making.” The standby guardian steps into tasks when the triggering event or condition occurs—usually incapacity or debilitation, in conjunction with consent. However, during their lifetimes, parents still wish to participate in their children’s lives, guiding them to the extent possible. It is this active role during the parents’ lifetimes that distinguishes standby guardianship from other kinds of guardianship appointments. Some States describe plainly in their laws that the standby guardian’s duties must be sensitively undertaken in a manner consistent with the known wishes of the parent. [e.g., VA, WV] As the Pennsylvania law expresses, “A coguardian shall assure frequent and continuing contact with and physical access to the child and shall

further assure the involvement of the parent, to include, to the greatest extent possible, in the decision-making on behalf of the child.”

Nevertheless, concurrent decision-making is not an inevitable part of every State’s vision. Some statutes are either silent as to this factor, or imply a complete transfer of responsibility. [CT, FL, IL, IA]

A standby guardian typically begins his or her child-rearing tasks when a future event occurs, as described in the designating document or court petition. Yet not all State laws provide for that. In California, the standby guardian elements are found in the “Joint Guardian” law, and the guardian duties are assumed as soon as the court appointment is made; there is no future event catalyst.

States tend to accord a period of interim authority to the guardian ranging between 30 days and a number of months after the triggering event, before evidence is filed in court and the guardianship is confirmed by the judge. Because the guardian usually is close to the family, he or she typically will gather a physician’s statement, the parental consent form, or other evidence and file all required papers in court. These matters usually also can be handled by a lawyer, if the family has engaged one, or other person close to the family and active on its behalf.

## COURT PROCESS

An essential element of guardianship for a child is that the arrangement must support the “best interests of the child.” That also is true for standby guardianships. The parent is given discretion to *nominate* a preferred person as guardian, and the court will give great weight to the nomination, often presuming its validity unless compelling evidence is introduced against it. The court itself, however, will weigh the issues and make the ultimate decision about whether a particular standby guardian arrangement is good for a child.

All courts have case precedents that guide a judge in the “best interests” decision. Often “best interest” factors are written right into the law itself—less often in the probate section of the legal code [but see CT, CA]; more often in the laws bearing on divorce and on termination of parental rights. [e.g., WI] Every time a custody case arises in family court, the “best interests” issue is there. Pennsylvania places its standby guardian law in the domestic relations code specifically so that it will draw upon the extensive case law on custody and the best interests of children. Some standby guardian laws that are located in the probate code refer the judge to the family code for these issues [e.g., CA], or may even permit a guardianship case to be decided in either probate or family or juvenile court. [MD, NY, OH] A number of States specify that a guardian *ad litem* or counsel can be appointed for the child to help the judge make the “best interests” decision. [IL, NE, NJ, VA, WV] In some other States that is an implied part of the process, though not specifically stated in the standby guardian law. [e.g., PA]

As a rule, the “best interests” hearing in court takes place after the document designating the standby guardian is filed in court, and after the required notices of the hearing are sent to any non-custodial parents and other interested persons (like the standby guardian and older children). According to typical procedure, a judicial decision is made about the suitability for the children of the guardianship arrangement for the children—and the fitness of the particular nominated guardian for these duties—and then matters are suspended until evidence of the triggering event is filed in court. At that point the court confirms the active phase of the guardianship.

There is a major variation in this pattern. New York law developed two processes between which a parent can choose: (1.) an early-filing strategy for parents who wish to settle all issues before they become really ill (this follows the major rule); and (2.) a late-filing strategy in which the designation document would be prepared ahead of time, but not filed until later, even after the triggering event occurred. North Carolina, Pennsylvania and Wisconsin also have chosen a two-track model. In Florida, there are two separate laws to cover the different strategies: one law applies if the parent chooses to settle issues in court at an early point; another law is used by those who wish to make an early designation but only involve the court after the triggering event. Virginia and West Virginia have only one strategy—it might be called file-any-time,

even after the triggering event has occurred. In effect, that provides the same choice: to file before the triggering event or after it. In all States where there is a choice of when to file, late filing would place a burden on the standby guardian, who would have to gather and present all of the evidence. At the same time, it relieves the parent from having to do it, and thus removes one of the psychological barriers to use of standby guardian laws.

A few States do not hold a hearing unless the evidence contained in the submitted papers seems to require it (for example, if a non-custodial parent claims the right to be guardian, or the nominated standby guardian potentially is unfit). [NC, PA, VA, WV] No hearing requirement is stated in the Connecticut statute; at the same time the law does not seem to foreclose the opportunity for a hearing.

In North Carolina, authority over guardianships has been delegated to the court clerk, so the matter would be unlikely to reach a judge. The hearing may be informal; for example, it might take place in the clerk's office. In Ohio, the hearing officer may be a referee. That possibility probably exists in many other States, though stated in court rules, rather than the law.

The usual pattern, then, is that the full court hearing takes place after the designating document is filed, but the guardianship is not activated until evidence of the triggering event is filed. There are many variations on this general rule. In California there are no triggering events: there is a simple appointment of a guardian, which begins the active phase. No confirmation process is necessary. Of course, in States where the possibility exists to file the designation after the triggering event, a full hearing could only follow that filing. [FL, NY, NC, PA, VA, WV, WI]

If the triggering event is either mental incapacity or physical debilitation, many States require a physician's statement to be filed in court as evidence. [MD, NJ, NY, NC, WI] Florida's elaborate process for committee review of incapacity probably would include a physician's statement as part of the evidence. Connecticut just requires an affidavit by the standby guardian that the event has occurred. Iowa

provides a decision-making standard—“clear and convincing evidence”—rather than specifying what the evidence shall be.

The final step of court process really is outside of the standby guardian law, but should be mentioned. If the parent dies, does the standby guardian become the permanent guardian? How does that shift to permanency take place? A number of States require an additional petition to appoint a permanent guardian. After all, the shift to permanency might be interpreted as an incursion on parental rights, in that actual custody of the children may be transferred to a non-parental adult. As a result, a more stringent standard of notice to the non-custodial parent could be required, probably involving diligent search. Some States specify the additional steps in their standby guardian laws. For example, Illinois requires a separate petition to establish a permanent guardianship. In Virginia the process is for the standby guardian to petition the court to make a formal custody determination. West Virginia mirrors this process. Massachusetts requires the petition to appoint a permanent guardian to be filed within 90 days of the triggering event. Pennsylvania’s law, which is silent on this issue, would permit the standby guardian automatically to become a permanent guardian. It also may be that some probate courts expect permanent guardianship to be resolved in the usual context of the post-death probate process, which assumes that there will be a separate process to appoint a permanent guardian, or that such process will be triggered if there is a challenge.

The key to this end process is that a permanent guardianship actually can alter the rights and responsibilities of the non-custodial birth parent, which a standby guardianship explicitly does not. Therefore, if all of the parental rights of the non-custodial parent are not dealt with when the standby guardianship is established, it may be necessary to deal with them after the death of the custodial parent.

## **LOOKING AHEAD**

How likely is it that standby guardianships will be widely used as a permanency planning tool for children’s futures? Complexity is one factor that can limit their use: there is tension in the laws between

assuring that the arrangement will "hold" through any later legal assaults, contrasted with ease of establishing the guardianship. Most standby guardian laws are developed with probate code notions of permanency. Experience with wills and estates has developed probate procedures that withstand attacks on rich estates by outsiders. Are all of these same procedures needed where the concerns are for personal care of children more than for management of property? Should standby guardian laws be placed in the family code and follow family court procedures that are more susceptible to adaptation to changing circumstances and less aimed at resisting attack? If a final step is required to convert a standby guardianship to a permanent guardianship after death of the custodial parent, is it redundant to put in elaborate protections before that point? Should standby guardian laws give parents a choice between simple and durable legal formats, as does the two-track process? [NY, NC, PA, WI]

A reading of all of the laws makes one aware of another issue: the theme of sickness and death runs through them. Does this have the relevance today that it did in the early 1990s when AIDS often was considered to be a terminal illness? Looked at carefully, standby guardian laws appear to have utility as a planning tool for the future quite apart from illness. Perhaps it is time to free these laws so that they can better serve multiple situations. Could a parent's intent to plan for her children's futures against any exigencies that might arise, activated by the parent's consent, be a sufficient rationale for these laws? Are there other events that also may present themselves with urgency warranting special legal treatment? For example, if a custodial parent serving in the army reserves is called up for active duty, might that not be a sufficient reason to establish a standby guardianship? Or perhaps the parent may be called away from home for short periods of time on potentially dangerous assignments, like putting out oil well fires, or especially demanding police duty. Injuries or death as well as absences might occur, justifying the bridging effect of a standby guardianship. Illinois' statute may lead the way in making the inability of the parent to make day-to-day decisions for the children the basis for activating the guardianship.

*The Uniform Guardianship and Protective Proceedings Act (1998)* offers an interesting option for States that seek a flexible, simple statute that does standby guardianship work. Its Guardianship of a Minor Provision, Section 5-202, provides that:

- A parent may appoint a guardian in a will or other signed writing.
- A court may “confirm the parent’s selection” and “terminate the right of others to object.”
- The appointment becomes effective upon the parent’s death or incapacity.
- The appointment does not supercede parental rights.

The provision’s brevity is appealing, but also restrictive. Guardianship of a Minor does not address concurrent decision-making, nor does it provide that the guardianship can become active on the parent’s consent alone. The theme of illness is retained: the petition to the court must be based on the likelihood that the parent will be unable to care for the child within 2 years. The Act was developed by the National Conference of Commissioners on Uniform State Laws and approved the American Bar Association’s House of Delegates in 1998. It has not yet been adopted by any State. [See Appendix D, this document]

Standby guardian statutes might best be viewed as one part of an array of legal tools to plan stable futures for children. Guardianships are found in many places in a State’s laws: typically in the juvenile, domestic relations, and probate codes. Each statute is likely to have a particular focus. For example, short term guardianships may be limited to a year, or even to 60 days. They transfer authority to an adult, usually for an emergency when the parent must be absent for a brief time. Some States can transfer authority for a child’s medical care or school enrollments, which would be a suitable solution when a parent is hospitalized. Standby guardianships have a longer perspective: they bridge from the parent’s life to the children’s lives after the parent dies. Usually they create a presumption of permanency because the court ordinarily will not appoint a different guardian when the parent dies, unless there are compelling reasons to do so. But standby guardianships are not the most permanent arrangements. That honor goes to standby adoptions, which have the attractive feature of leaving custody and decision-making with the parent until that is no longer possible, either because of incapacity or death, and then placing the child securely in the adoptive home. [IL]

A State legislature’s reasons for establishing standby guardian laws include providing orphaned children opportunities for care and nurture free of State intervention. A parent’s reasons for taking advantage of

standby guardian laws include preventing the break-up of the family by the State, and providing a secure home and wise guidance for children, free of government intrusion. State legislators currently are searching for ways to meet the needs of both the family and the broader society. Simplifying the process and broadening the purpose of standby guardian laws may help some States meet those needs.

## **PART TWO**

# **STATE-BY-STATE ANALYSIS OF STANDBY GUARDIAN LAWS**

**Principal Legal Citations to State Standby Guardian Laws**

As of March 1, 2000

Arkansas	Arkansas Code of 1987 Annotated, sec. 28-65-221
California	California Probate Code, sec. 2105
Connecticut	Connecticut General Statutes Annotated; Probate Courts and procedures, sec. 45a-624(a)-(g)
Florida	Florida Statutes Annotated, sec. 744.304; 744.3046
Illinois	Smith-Hurd Illinois Compiled Statutes Annotated, 5/11-5.3
Iowa	Iowa Code Annotated, sec. 633.560; 633.591A
Maryland	Annotated Code of Maryland, sec. 13-901 through 13-907
Massachusetts	Massachusetts General Laws Annotated, sec. 201-2B through 201-2G
Nebraska	Nebraska Revised Statutes of 1943, sec.30-2601, 30-2611, 30-2613, 30-2601; 30-2611; 30-2613; 30-2614
New Jersey	New Jersey Statutes Annotated, sec. 3B:12-72 through 3B:12-77
New York	McKinney's Consolidated Laws of New York Annotated, Surrogate's Procedure Act, sec. 1726
North Carolina	General Statutes of North Carolina, sec. 35A-1370 through 35A-1382
Ohio	Ohio Revised Code, Commercial, sec. 1337.09(B); Probate, sec. 2111.02, 211.042, 2111.12, 2111.121, 2111.13
Pennsylvania	Pennsylvania Consolidated Statutes Annotated, Title 23 Domestic Relations, Chapter 56 Standby Guardian Act, sec 23-5602; 23-5611; 23-5612; 23-5613; 23-5614
Virginia	Code of Virginia, Juvenile, sec. 16.1-349 through 16.1-354
West Virginia	West Virginia Code Annotated, sec. 44A-5-1 through 44A-5-8
Wisconsin	Wisconsin Statutes Annotated, Children's Code, sec. 48.978
Wyoming	Wyoming Statutes (1985 & Supp 1995), Probate sec. 3-2-101; 3-2-104; 3-2-108; 3-2-201; 3-3-301 through 3-3-305.

## ARKANSAS

### I. Designation of Standby Guardian

The Arkansas standby guardian statute at Probate 28-65-221 is very brief—just one paragraph. By its terms, however, it follows procedures set forth in the larger chapter on guardianship.

No process is described for nominating a standby guardian. However, such nomination is certainly permitted, and even implied. For example, the court will give “due regard” to requests “in a will or other written instrument executed by a parent.” Preferred “over all others” as guardians are parents. The rule that will guide the court, however, is that the most suitable guardian is one “who is willing to serve.” The court reserves to itself the right to make a final selection. [Probate 28-65-204]

A parent who is eligible to use the standby guardian statute is one who is “chronically ill or near death.” [Probate 28-65-221] No standard of evidence or procedure for asserting this condition is described. General guardianship provisions state that a petition must make “a statement of the respondent’s alleged disability.” [Probate 28-65-205] Most likely such statement would refer to the child’s incapacitation through minority (assuming the child would be the respondent) but the parent’s disability might also be described here.

The parent does not give up any parental rights through standby guardianship. The guardianship is to be activated upon the future death, mental incapacity, or physical debilitation plus consent of the parent. [Probate 28-65-221]

### II. Agreement of Non-Custodial Parent

Parents “if qualified and, in the opinion of the court, suitable, shall be preferred over all others for appointment as guardian of the person.” [Probate 28-65-204] The court thus reserves a right to determine suitability.

Notice of the hearing for appointment of guardian must be served on parents of a child. However, notice need not be given to anyone whose “whereabouts is unknown and cannot by the exercise of reasonable diligence be ascertained.” [Probate 28-65-207]

### III. Role of Standby Guardian

The standby guardian is given specific duties in the short Arkansas statute to “immediately” notify the court of the death, incapacity, or debilitation of the parent. [Probate 28-65-221] No process for doing this or standard of evidence is described. The statute goes on to state that the standby guardian “shall immediately assume the role of guardian for the minor children.” [Probate 28-65-221] The language suggests that the court would look on this as a permanent guardianship.

Guardians are to care for, maintain, protect, train, and educate the children who are their wards. [Probate 28-65-301] A guardianship order would often add many more details. In the order the court may limit the power and duties of a guardian, decide whether the guardianship will cover the child’s person and property (or be limited to the child’s person), and what rights the child may exercise without intervention. [Probate 28-65-214] The wishes of children over 14 will be given particular weight.

Apparently the standby guardian exercises concurrent decision-making with the parent, in the sense that the parent does not give up parental rights. [Probate 28-65-221]

### IV. Court Process

Court process begins with the filing of a petition for appointment as standby guardian. [Probate 28-65-205] This may be accompanied by the parent’s designation in writing of a particular person suitable to be guardian. [Probate 28-65-204 (b)(1)] The petition would state that the guardianship would become active upon the death, incapacity, or disability plus consent of the parent. [Probate 28-65-221] Notice would issue to parents whose whereabouts can be ascertained. [Probate 28-65-207 (a)(4) and (b)(1)] An

appointment hearing would be held, at which matters in controversy would be settled. A guardianship order would be issued describing the particular terms of the guardianship. [Probate 28-65-214]

When a triggering event occurred, the appointed standby guardian would immediately inform the court and assume guardianship duties. [Probate 28-65-221] The court would then issue an order for guardianship—apparently a permanent guardianship that would last until terminated by court order or the child’s majority. [Probate 28-65-401]

Arkansas Code of 1987 Annotated Title 28: Wills, Estates and Fiduciary Relationships Subtitle 5: Fiduciary Relationships Chapter 65: Guardians Generally Probate Sections: 28-65-203; -204; -205; -207; -214; - <b>221</b> ; -301; -401
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## CALIFORNIA

### I. Designation of Standby Guardian

California lawmakers inserted standby guardian elements into a law governing joint guardians. The intent is to minimize children's stress and disruption "whenever the parent is incapacitated or upon the parent's death." [Probate 2105(f)] There is no legal process special to this kind of guardianship; it moves through the court like any other request to designate a guardian.

The basis for the request to the court to appoint a joint guardian is the parent's "terminal condition as evidenced by a declaration executed by a licensed physician." The physician's declaration would describe "an incurable and irreversible condition that, without the administration of life-sustaining treatment, will, within reasonable medical judgment, result in death." [Probate 2105(f)] Beyond that, there is no triggering event, because the guardianship is not contingent upon some future event; joint care and custody begin as soon as the court appoints the co-guardian.

There is no requirement that the designation be in an attested document. The name of the proposed joint guardian appears in the petition for appointment. [Probate 1510 *et seq.*] While it is reasonable to assume that the parent's designation would carry significant weight with the court, there is no assurance that the parent's wishes would dominate the court's analysis.

### II. Agreement of the Non-Custodial Parent

Both parents must be named in the petition for appointment and the non-custodial parent must be given notice within 15 days of the hearing. [Probate 1510-1511] A guardian shall not be appointed over the objection of the non-custodial parent "without a finding that the non-custodial parent's custody would be detrimental to the minor." [Probate 2105(f)] The process for proving that the other parent's care of the child would be detrimental is found in the Family Code at sec.3041. Thus, if the non-custodial parent

won't agree to the appointment, the custodial parent does have a way to overcome that barrier, although it will require a hearing (perhaps combined with the hearing on guardianship), giving parties an opportunity to present evidence.

### III. Role of the Standby Guardian

From the moment of appointment as a joint guardian, decisions are shared by both parent and guardian. [Probate 2105(b), (c)(1) and (f)] The legislative intent was for the parent to “make arrangements for the joint care, custody and control” of the children “whenever the parent is incapacitated, or upon the parent’s death.” [at (f)] That language suggests that the guardian would want to step into the background when the parent’s illness is in remission and she is able to parent effectively, but no process is suggested for working out decision-making arrangements.

The duties of a guardian are the care, custody, and control of the child. [Probate 2105(f); 2351] These powers are activated as soon as the appointment is made, and end only when the parent dies, the guardian is replaced, or (presumably) the appointment is revoked. If the joint guardian becomes the permanent guardian, the duties cease when the child attains majority, dies, or is adopted or emancipated. [Probate 1600]

### IV. Court Process

A relative, a child of 12 or older, or any other person may file a petition for appointment of a joint guardian, beginning the process. [Probate 1510] The petition names the proposed guardian as well as the child and the parents. Along with the petition, a licensed physician’s statement must be submitted, declaring that the parent is suffering from a terminal condition that is “incurable and irreversible.” [Probate 2105(F)]

A court hearing is scheduled at this initial point. There are no other triggering events requiring court confirmation. There is no provision for automatic transformation of the joint guardianship into a permanent guardianship upon the parent's death. In fact, the Joint Guardianship provision was established "to avoid the need to provide a temporary guardian...pending appointment of a guardian" as might otherwise be required upon the parent's death. [Probate 2105(f)]

The court hearing is conducted according to a standard of "best interests of the child." Sources of guidance for the judge as to what is in the child's best interests might be found in the Family Code, which describes factors to be weighed in custody decisions, and the Probate Code, which addresses the long term welfare of the child. (Note that the Probate Code specifically refers to the Family Code for guidance in matters of child welfare.) If the child is of "sufficient age to form an intelligent preference," the child's wishes will be considered. [Probate 1514 (e) and Family 3011; 3040]

The guardianship is permanent when established.

California Probate Code Div.4.Guardianship, Conservatorship, and Other Protective Proceedings Part 4. Provisions Common to Guardianship and Conservatorship Chapter 1. General Provisions Probate Code sec. 1510; 1511; 1514; <b>2105 (a)–(f)</b> ; 2351; Family Code 3011; 3040; 3041
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Resources:

*Joint Guardianship in California: A Manual for Providers* (East Bay Community Law Center, ed. Pub. sched. Spring 2000).

Laura J. Roopian, *Family; Guardians and Conservators—Removal of Two Year Requirement of Pending Death or Terminal Condition*, 27 Pac.L.J.799 (1996).

Sunny Rosenfeld, *Developments in Custody Options for HIV Positive Parents*, 11 Berkeley Women's L.J. 194 (1996).

Kelly C. Rozmus, *Representing Families Affected by HIV/AIDS*, 6 Am. U. J. Gender & L. 299 (Spring 1998).

Marina T. Sarmiento, *Legal Needs of Women with HIV*, 9 Berkeley Women's L. J. 155 (1994)

Jeffrey Selbin & Mark Del Monte, *A Waiting Room of Their Own: The Family Care Network As a Model for Providing Gender-Specific Legal Services to Women with HIV*, 5 Duke J. of Gender L. & Policy 103 (Spring 1998).

## CONNECTICUT

### I. Designation of Standby Guardian

The designation process is very simple: the parent can fill out a one paragraph optional form included in the statute naming the standby guardian, the children, and the contingencies upon which the guardianship will commence. Two witnesses attest the designation document. [Probate 45a-624b] Court filing is implied, but not described.

A simple affidavit by the standby guardian that a specified triggering event has occurred is enough to commence the guardianship. [Probate 45a-624c] The events that would activate the guardianship are not limited to those listed in the statute: mental incapacity, physical debilitation, or death. [Probate 45a-624] That might leave room to add consent, or any other event. There is no requirement that the parent be terminally ill, or ill at all. However, it is clear that lawmakers thought a parent would only choose this process if death were close. For example, the standby guardianship only lasts for 1 year, or until the contingency is over, whichever is shorter [Probate 45a-624d], unless it is in effect at the time of the parent's death.

The parent can revoke the authority at any time, in writing. [Probate 45a-624f]

### II. Agreement of the Non-Custodial Parent

It is in finding and securing agreement of the non-custodial parent to the guardianship that the greatest barrier is raised. Connecticut imposes an absolute requirement that both parents consent to the guardianship unless "either parent has been removed as guardian" or had their parental rights terminated. [Probate 45a-624a] The statute does not explain the phrase "removed as guardian," nor does it impose notice or evidence requirements. It just states that the both parents must agree. However, elsewhere in the Probate Code there is a procedure for "removal of parent as guardian." [Probate 45a-609] Such a

hearing would require proof of parental unfitness. It would be a complex undertaking for a single parent who is not well—but it does provide a way to proceed with the standby guardianship when the non-custodial parent cannot be found or does not agree.

### III. Role of the Standby Guardian

The standby guardian is to have “care and control” of the child and “authority to make major decisions” affecting the child’s welfare. [Probate 45a-604(5)] The concept of concurrent authority with the parent is not raised in this law. It appears that either the guardian or the parent has authority. Disputes over interpretation of the law may be referred to Probate Court. [Probate 45a-624g]

The authority begins when the triggering event occurs and ends when the event is over, or after 1 year, whichever is shorter. [Probate 45a-624d] It would no doubt fall to the standby guardian to file the affidavit that the triggering event has occurred. [Probate 45a-624c] Also, if the parent dies, the standby guardian has 90 days within which to file a petition asking the court to appoint a permanent guardian. [45a-624c]

### IV. Court Process

The initial filing can be as simple as the parent or guardian submitting the statute’s suggested one paragraph attested form to the court. The standby guardian statute carries no provision for a court hearing at that initial period. When the specified contingency occurs, the standby guardian files an affidavit. Again, no court hearing requirement is stated.

Note, however, that the standby guardian is a guardian of the minor, and all provisions for such guardians are construed in the best interests of the child. [Probate 45a-605] This implies judicial discretion to call a hearing, probably based on in-chambers review of documents, or request of parties. (Reference to another section of the probate code entitled *Appointment of Guardian or Coguardian For Minor; Rights*

*Same As Sole Surviving Parent* [Probate 45a-616] gives clues as to potential court hearings. This provision also covers guardianships where mental incapacity, physical debilitation, or death of the parent are contingencies that commence guardianship. It states that upon receipt of the affidavit that the contingency has occurred, “the court may hold a hearing to verify the occurrence.” [Probate 45a-616(b)]

In any hearing, “best interests of the child” is the standard. Counsel may be appointed for the child. [Probate 45a-620] Any child 12 or older receives notice of the hearing. [45a-609(b)] The court’s inquiring into the fitness of the guardian will include [Probate 45a-617]:

- ability of person to meet child’s daily needs
- the child’s preference (if child is of sufficient maturity to express that)
- the relationship between the child and the adult
- the child’s best interests.

There is no discussion of the weight that the court would accord the parent’s designation. Witnesses, evidence, and presence of either parent would evidently be determined according to the usual civil procedures in probate court.

Connecticut General Statutes Annotated  
Title 45 A. Probate Courts and Procedure  
Chapter 802 H Protected Persons and their Property  
Part II. Guardians of the Person of Minor.  
Probate Code sec. **45a-624(a)–(g)**; -604(5); -605; -609; -616–620.

#### Resources

Joyce E. McConnell, *Securing the Care of Children in Diverse Families: Building on Trends in Guardianship Reform*, 10 Yale J.L. & Feminism 29 (1998).

Lenore M. Molee, *The Ultimate Demonstration of Love for a Child: Choosing a Standby Guardian: New Jersey Standby Guardianship Act*, 22 Seton Hall Legis. J. 475 (1998). [Includes discussion of Connecticut law.]

## FLORIDA

As in a number of other States, Florida laws permit court appointment of a standby guardian prior to the triggering event, or alternatively, through parental designation with court proceedings occurring after the triggering event. These separate procedures are embodied in two different laws. If the parent wishes to obtain court process prior to the event, Florida Statute 744.304, entitled *Standby guardianship* is followed. If private designation is chosen, to be followed by court process after the triggering event, Florida Statute 744.3046 entitled *Preneed guardian for a minor* sets out the requirements. [Dom. Rel. 744.30046(1)–(4)]

### I. Designation of Standby Guardian

Domestic Relations law 744.3046 states that both parents, or a single surviving parent, may make a “written declaration” naming a guardian for the child in case the parent dies or becomes incapacitated. If there are two parents, both must sign. The document must be witnessed. This declaration is filed with the clerk of the court, to be produced when a petition for incapacity or a death certificate commences the court appointment process. Through the declaration, the designated guardian is rebuttably presumed to be fit to serve.

Although designation is not explicitly addressed in the other applicable statute [Dom. Rel. 744.304], it seems likely that the parents usually would nominate a particular person as the guardian in that situation as well, and that the designation would accompany the petition for standby guardianship.

### II. Agreement of the Non-Custodial Parent

The issues of locating and securing agreement of the non-custodial parent are not addressed in either statute. Nevertheless, it is clear that such agreement is expected. “Both parents, natural or adoptive,” must sign the written attested declaration that nominates the guardian. [Dom. Rel. 744.304(1);

744.3046(1)–(2)] The petition relating to incapacity or death is only filed for the “last surviving parent,” with the implication that any living parent would otherwise assume guardianship of the child. [Dom. Rel. 744.304(3); 744.3046(5)] As another section describes, “The mother and father jointly are natural guardians of their own children, and of their adopted children, during minority. If one parent dies the natural guardianship shall pass to the surviving parent, and the right continue even though the surviving parent remarries.” (Dom. Rel. 744.301(1)] Therefore, a person who is the single head of a family must find the non-custodial parent, or explain to the court why that could not be done. The statute does not indicate whether “reasonable efforts” or “diligent search” would be the standard of notification the court would apply.

If the non-custodial parent is found, but his agreement cannot be secured, a proceeding to override his refusal by declaring him unfit could be arduous. There is no easy way out of this procedural dilemma, in that many Florida divorce decrees provide for shared parental responsibility, rather than sole custody of the child to one or the other parent.

If the non-custodial parent is found, and his agreement is secured, he needs to sign the written designation in front of two witnesses. [Dom. Rel. 744.3046(2)]

### III. Role of the Standby Guardian

A guardian for a child in Florida is a “plenary guardian.” That means one who can exercise all the legal rights and powers for the child that can be delegated—in a practical sense, standing in the place of the parent. [Dom. Rel. 744.102(8)(b)] There is no question of concurrent authority, because the guardianship is not activated until the parent is incapacitated or dead. Once the power is transferred from the sole surviving parent, it is fully delegated to the guardian. [Dom. Rel. 744.304(3); 744.3046(5)]

When the parent is perceived to be incapacitated, it often will be the task of the designated guardian to file a "Petition for incapacity" with the Clerk of the Court. [Dom. Rel. 744.3046(3)] An Examining Committee of three experts will be required to meet with the allegedly incapacitated parent within 5 days and report its conclusions to the court. [Dom. Rel. 744.3201; 744.331] If the court adjudicates incapacity, the guardian's duties begin at once. Within 20 days the guardian must file a petition for confirmation of the guardianship. [Dom.Rel.744.3046(7); or 744.304(4)]

#### IV. Court Process

Florida lawyers say that the defining difference between the *Standby guardianship law* [Dom. Rel. 744.304] and the *Preneed guardian of a minor law* [Dom. Rel. 744.3046] is that letters of guardianship issue *before* the triggering event under the former, and *after* the triggering event under the latter. In other major respects, the two laws are similar. Under both laws, the triggering events are either death or incapacity. If incapacity, a petition for incapacity is filed. When the court either receives a death certificate or adjudicates incapacity after receiving a petition for incapacity and a report from an Examining Committee of three experts, the appointed (if under 744.304) or designated (if under 744.3046) guardian's duties begin. Within 20 days the guardian files for confirmation of appointment. Under 744.3046, the hearing is then held and letters of guardianship issue.

Florida Statutes Annotated  
Title XLIII. Domestic Relations  
Chapter 744. Guardianship  
Part III. Types of Guardianship  
Sec. 744.102; 744.301; **744.304**; 744.331; **744.3046**; Juv. Code 39.01; 39.810; Dom.Rel.61.13

#### Resources

Richard C. Milstein, et al, Chap.3, *Planning for Disability*, in Basic Estate Planning in Florida. (The Florida Bar, 1998).

## ILLINOIS

### I. Designation of Standby Guardian

Designation of a standby guardian by a parent (including adoptive or “adjudicated” parents whose parental rights have not been terminated) can be in any written form. If it is attested, for example as part of a will witnessed and signed by 2 people over the age of 18, it is presumed to be valid. A simple form is included in the statute that the parent may optionally use. [Probate 5/11-5.3(e)] The form does not contain any language limiting commencement of the standby guardianship to specific events or conditions.

The designation accompanies a petition to be filed in court. The petition must provide more of the information a court must have to make a best interests decision: for example, the names and addresses of family members, details about the other parent’s consent, and any legal matters like adoption petitions or parentage disputes that could affect the guardianship.

If the parent completes the designation and an attorney prepares the petition and files papers, the process for the parent is quite simple.

### II. Agreement of Non-Custodial Parent

Illinois law is clear that designation by a custodial parent does not affect the rights of the non-custodial parent. If the child has another living “parent, adoptive parent or adjudicated 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,” that parent must be given an opportunity to assume the custodial role. In fact, there is a presumption that the non-custodial parent would be able to assume that role; the presumption can be rebutted by a preponderance of the evidence. The guardianship opportunity is offered the non-custodial parent through notice of the hearing. If he receives notice and fails to object, the guardianship can proceed. [Probate 5/11-5.3 (c); 5/11-10.1]

While not explicit, the words of the statute that refer to a parent “whose whereabouts are known” would seem to leave the door open to proof of reasonable, but unsuccessful, efforts to reach him. [Probate 5/11-5.3 (c)]

### III. Role of Standby Guardian

The standby guardian does not assume any duties until a specified event or condition occurs. The triggering events to which the statute refers are death, consent of the parent, or the inability of the parent to make day-to-day decisions. This can be proved by the parent’s admission or an attending physician’s written certification. [Probate 5/11-13.1(b)]

When the triggering event occurs, the standby guardian assumes all guardian duties. Note that the law does not state that the parent and guardian shall be co-decision-makers. When the parent is able, she cares for her children. When she can no longer do so, decision-making transfers to the standby guardian. Illinois law makes it easy to delineate whether the guardianship shall include the child’s estate as well as the “custody, nurture and tuition” and education of the child’s person. [Probate 5/11-13] Assuming “due care,” any health care provider or other professional has a right to rely on the guardian’s directions, and will not incur liability for doing so. The guardian who acts legally and reasonably will be protected from criminal prosecution. [Probate 5/11-13.3] An attractive part of the Illinois standby guardianship law is that it is included in a cluster of other laws that provide an array of tools to plan for the child’s future. The duties of the standby guardian [Probate 5/11-13.1] can be read in the context of general guardianship duties for a child [Probate 5/11-13] and short-term guardianship for emergencies. [Probate 5/11-13.2]

When the triggering event does occur, in addition to daily decision-making, the guardian has 60 days to file confirming evidence with the court and a petition to be appointed as guardian. [Probate 5/11-13.1(b)-(c); 5/11-8] Illinois law states that the court “shall appoint the standby guardian as the guardian” unless there is a good cause not to. [Probate 5/11-5 (b-1)]

The court may limit or terminate the authority of a standby guardian. [5/11-13(e)]

#### IV. Court Process

Court process begins when the parent files in court a document designating a standby guardian, and a petition requesting that the person be appointed as standby guardian. The parent must give notice of the hearing to the non-custodial parent and any relatives or others referenced in the petition, as well as any children 14 years or older. [Probate 5/11-10.1] The court then appoints the standby guardian if it determines that to be in the child's best interests. [Probate 5/11-5.3(b)] The standby guardian must take an oath to faithfully carry out the duties, and must file a bond once the duties commence. [Probate 5/11-5.3(d)]

The court may appoint a guardian *ad litem* to represent the child. [Probate 5/11-10.1(b)] The Probate Court has abundant case law to help determine what shall be in the child's best interests. In addition, factors to be considered when determining the best interests of the child are listed in the Illinois Family Code. [Family 5/602]

After the triggering event occurs, the standby guardian has 60 days of temporary authority within which she must file confirming evidence (for example, a parent's written consent to begin the guardianship, a physician's certification of debilitation, or a death certificate) and a petition for establishment of a permanent guardianship. [Probate 5/11-13.1(c)]

Illinois Compiled Statutes Annotated  
Chap. 755. Estates  
Art. 5. Probate Act of 1975  
Article XI. Minors  
Sec. **5/11-5.3; -8; -10.1; -13.1; -13.2**; Family 5/602

#### Resources

Linda S. Coon, *Illinois Standby and Short Term Guardianship Law*, (Families and Children's AIDS Network, 1998).

## IOWA

### I. Designation of Standby Guardian

A parent (or other person having “physical and legal custody of a minor”) may file a petition for a standby guardian. The petition would instruct the court to act only if a particular event or condition of mental or physical health occurs. The parent would describe in the petition how the event or condition is to be proved. [Probate 633.560, referring to 633.591A] Thus, in Iowa there is great flexibility for a parent to decide the circumstances under which the standby guardianship would go into effect.

The petition must be “verified.” Although there is no further requirement that the designation appear as an attested document, preference is given to any “qualified and suitable” person nominated as guardian in a will. [Probate 633.559] One can deduce that an attested document would add weight to the parent’s choice. However, it is clear throughout Iowa law that any proceeding involving children requires the court to exercise its judgment as to the child’s best interests. [e.g., *Matter of Guardianship and Conservatorship of DDH*, 538 N.W.2d 881 (1995)] Moreover, if a child to be served by a guardian is 14 years or older, that child’s opinion will carry great weight with the court.

The parent may change guardians or end the guardianship by petitioning the court to terminate it.  
[Probate 633.679]

### II. Agreement of the Non-Custodial Parent

Parents, “if qualified and suitable,” are preferred over all others as guardians. [Probate 633.559]. The guardian statutes do not describe how to locate or serve a non-custodial parent, nor how to determine whether a parent is “suitable.” There are many cases that bear upon the issue of parental fitness, however, with a strong trend to support parental rights, for example, even if the parent is mentally

retarded [*In re Interest of Rohde*, 503 NW 2d 881 (1993)] or very poor and a victim of domestic violence. [*Zvorak v. Beireis*, 519 NW 2d 87 (1994)] Quite possibly a custodial parent would have to resolve the fitness or abandonment issue under the Juvenile or Domestic Relations Code prior to seeking guardianship.

### III. Role of the Standby Guardian

There is no provision for concurrent decision-making under the standby guardianship provision. The Iowa law is very specific about the duties of a guardian. The court may select among the listed tasks to tailor them to a particular guardianship. The basic duties are to provide for “care, comfort, and maintenance,” including training and education. [Probate 633.635]

### IV. Court Process

The standby guardianship provision, through reference to the standby conservatorship law, describes the first steps to be taken: a “verified petition” for appointment of a guardian is filed, stating that the court shall only act when the events or conditions described in it occur. [Probate 633.591A] Other details to be included in the petition are found in the general guardianship provisions: names, addresses, and so forth. [Probate 633.552] There is no further special process devoted to standby guardianship; it must be deduced.

One may assume that the task of reporting to the court that the events or conditions described in the petition have occurred could fall on the standby guardian. Those events or conditions have to be proved by clear and convincing evidence. [Probate 633.556] The petition itself describes how the event or condition is to be proved. [Probate 633.591A] Once again, Iowa law leaves much discretion with the petitioners. The guardian might wish to use a physician’s statement to describe mental or physical incapacity, but would not be obligated to do so unless the petition listed that as the proper proof.

Notice must be given to the child, although it may be given to an attorney, or in some other way, if the court allows. [Probate 633.554] The court may decide that the child is entitled to legal representation.

[Probate 633.561]

Iowa law is firm that the court will make an independent decision based on best interests of the child. Best interests are established in the Probate Code through abundant case law, but there are very specific factors listed in the Juvenile Code, as part of the Termination of Parental Rights provisions. [Juvenile 232.116] Note that if the family is already under authority of the Juvenile Court, no guardianship action can take place in Probate Court without concurrence from the Juvenile Court judge. [Juvenile 232.3]

A guardianship ends when the child reaches maturity, or the court decides for any reason that it is no longer necessary. [Probate 633.675]

Iowa Code Annotated  
Title XV. Judicial Branch and Judicial Procedures  
Subtitle 4. Probate—Fiduciaries  
Chapter 633. Probate Code  
Division XIII. Opening Guardianship and Conservatorship.  
Part 1. Opening Guardianship  
Sec. 633.554; 633.556; 633.599; **633.560**; 633.561; **633.591A**; 633.635; 633.675; Juvenile 232.116;  
232.3

#### Resources

Kristin Mueller, *The Evolution of Guardianship Law in Iowa: A Search for Fairness and Justice in Guardianship Proceedings*, 45 Drake L. Rev. 963 (1996–97).

## MARYLAND

### I. Designation of Standby Guardian

A parent may designate a standby guardian in an attested document. The designation law permits the triggering event to be either mental incapacitation or physical debilitation accompanied by written consent. (However, if the designation goes through the judicial appointment stage, two other triggering events may be added: a written, attested consent of the parent [Probate 13-903(e)(3)] or death [Probate 13-903(d)(2)(1)]) The parent retains parental rights throughout, and can revoke the guardianship in writing. [Probate 13-904]

To be eligible to use the standby guardian law, the parent must be at significant risk of incapacitation or death within 2 years. A basis for making that statement must be included in the petition, although there is no requirement that the basis be a physician's diagnosis. [Probate 13-903]

An optional designation form is part of the statute, which simplifies this process for an ill parent. She need only fill in the blanks and sign the documents along with the proposed guardian before two witnesses who are over the age of 18. [Probate 13-904]

### II. Agreement of Non-Custodial Parent

A unique and appealing aspect of the Maryland law is the provision for "reasonable efforts" in searching for the non-custodial parent. [Probate 13-903(a)-(3); 904(f)(3)] When the triggering event occurs and the guardian files papers with the court, if the non-custodial parent's consent has been sought but not obtained, the guardian includes evidence of the reasonable efforts that were made. Typically, such efforts include an attempt at personal service, followed by mailing to last known addresses, and finally, publication of notice in a widely-read newspaper.

### III. Role of Standby Guardian

Although the law does not explicitly state that the parent and standby guardian shall have concurrent decision-making authority, it does state that the determination of incapacity, debilitation, or consent "may not, itself, divest a parent of any parental or guardianship rights." [13-9007(a)] That authority can be modified as the court sees fit. [Probate 13-907(b)] In the designation, the parent can choose whether it shall be a guardianship limited to the child's person, or whether it shall include the child's property as well. The standby guardian must sign the designation, so he is fully informed of its provisions. [Probate 13-904(d)(3)]

If a standby guardian has been identified through a parent's designation, a petition for guardianship must be filed within 180 days or the standby guardian's authority will lapse. [13-904(e)(2)]

Once the triggering event occurs—mental incapacity or debilitation accompanied by consent, (if only the designation is in force) or in addition death or consent alone (if judicial appointment of the standby guardian has already occurred)—the guardian assumes a number of obligations. He must obtain a physician's statement that describes the parent's condition along with the parent's consent—or the parent's consent alone or a death certificate where appropriate. This must be done within 90 days of the event. [Probate 13-903(e)]

The standby guardian's authority can be revoked at any time by the parent in writing, or it can be rescinded by the court. [13-904(h)]

### IV. Court Process

A court hearing is held when the standby guardian files a petition for appointment along with an attested designation document that includes a basis for stating that there is significant risk of death or

incapacitation within 2 years. Presence of the custodial parent may be waived if she is too ill to appear. If reasonable efforts have not produced a non-custodial parent, the hearing may proceed. The court makes a judgment based on whether the child's best interests will be promoted by the guardianship. [Probate 13-903(d)] The court can put whatever limitation it deems necessary upon the guardianship. [Probate 13-907(b)]

When the triggering event occurs, confirming documents must be filed within 90 days. Those documents could include the attending physician's "Determination of Incapacity or Debilitation," if such events had been listed in the petition. [Probate 13-903(e); 13-906] Incapacity is a "chronic and substantial inability, as a result of mental impairment, to understand the nature and consequences of decisions concerning the care of the person's dependent minor child," and debilitation is a "chronic and substantial inability, as a result of a physically incapacitating illness, disease or injury" to care for the child. [Probate 13-903(c)(d)] Proof may also include the parent's written, attested consent. [Probate 13-903(3)] While it is not entirely clear from the Maryland statute whether consent of the parent can operate alone under judicial appointment, or whether it need always be tied to debilitation, it can be noted that the statute only goes into effect for someone who will become incapacitated or die within 2 years. Consent would seem to be never far away from the issue of debilitation. There is no requirement that there be another hearing at this point.

Orphan's Court and Circuit Court have concurrent jurisdiction over guardianships for children. [Probate 13-105; 106; Orphans 2-102 through 2-105]

Annotated Code of Maryland Estates and Trusts Title 13. Protection of Minors and Disabled Persons Subtitle 9. Standby Guardian Sec. <b>13-901; -903; -904; -906; -907</b> ; -106; Orphans 2-102; -103; -104; -105
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#### Resources

Joyce McConnell, *Standby Guardianship: Sharing the Legal Responsibility for Children*, 7 Md. J. Contemp. Legal Issues 249 (Fall/Winter 1995–1996).

## MASSACHUSETTS

### I. Designation of Standby Guardian

A parent may designate in an attested document a standby guardian for her child (including children yet unborn). [Probate 201-2B] She is permitted to describe her plans for the child's future and proposed permanent custody arrangements. She can explain the extent to which she is willing and able to participate in daily child care decisions. [Probate 201-2C] Parents are thus encouraged to visualize and express plans for a stable future for their children.

The triggering events permitted to activate the standby guardianship are death, consent of the parent, or incapacity "to make and carry out day-to-day child care decisions" as certified by a physician. [Probate 201D]

A parent may revoke the designation in writing [Probate 201-2E] or withdraw its active status after it has commenced, either by withdrawing consent or establishing remission of the incapacitating condition. [Probate 201-2F]

### II. Agreement of the Non-Custodial Parent

The standby guardian statute is silent on the necessity to secure the agreement of the non-custodial parent. By comparison, an accompanying statute in the same section of the code, referring to emergency guardianship that lasts for 60 days, is very explicit on that point. It says "A parent shall not appoint an emergency proxy of a minor, 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 concerning the minor, unless the nonappointing parent consents to the appointment by signing the written instrument of appointment." [Probate 201-2G] Clearly, a standby guardianship that

can endure for a longer period of time and may evolve into a permanent arrangement would require the consent of the non-custodial parent. [See *Adoption of Carlos*, 576 NE 2d 701 (1991)] The usual exceptions would no doubt apply: proven unfitness, prior termination of parental rights, and perhaps inability to locate after diligent search. Elsewhere in the guardianship statute there is reference to the potential for the court to find a parent unfit [Probate 201-5] so it is possible that unfitness could be determined in the standby guardianship hearing.

### III. Role of Standby Guardian

Once the duties commenced after a triggering event, the standby guardian would exercise custody and care of the child concurrently with the parent. [Probate 201-2D] Those powers may be modified either by the terms of the designation or by the court. [Probate 201-5] The law speaks of the standby guardian being more or less active depending on the health and ability of the parent. [Probate 201-2F]

The standby guardian's authority begins "immediately" upon occurrence of a triggering event. Within 90 days the standby guardian must to gather and file documents and a petition to enable the court to confirm the active status. That would include certification of a licensed physician if the triggering event were incapacity. These must be accompanied by a petition for guardianship. [Probate 201-2D] If the standby guardian becomes the permanent guardian, that relationship continues until the child reaches 18 years, unless the guardianship is revoked. [Probate 201-4]

### IV. Court Process

The process begins with the filing of a petition to appoint a standby guardian. The petition, which lists the triggering events (required to be death, consent, or incapacity) may be accompanied by the attested document designating the proposed guardian and an affidavit describing the parent's plan for the child. [Probate 201-2B; 2C] The court then holds a hearing to determine whether the guardianship is in the

child's best interests. [Probate 201-2] Notice of the hearing is sent to the parents, but if either is ill, their presence can be waived. [Probate 201-2C]

The court applies a "best interests of the child" standard. Custody cases under the Domestic Relations Statute make clear that the trial court retains discretion to weigh any factors pertinent to the particular case in its decision. [e.g., *R.H. v. B.F.*, 653 N.E.2d 195 (1995)]

After the appointment is made, the next court step typically is the standby guardian's filing of documents certifying a triggering event or condition. He does this within 90 days of the event, having been granted temporary authority for that length of time. These are to be accompanied by a petition to appoint a permanent guardian, very likely the standby guardian. [Probate 201-2D]

Massachusetts General Laws Annotated  
Part II. Real and Personal Property and Domestic Relations  
Title II. Descent and Distribution, Wills, Estates of Deceased Persons and Absentees, Guardianship,  
Conservatorship and Trusts  
Chapter 201. Guardians and Conservators; Guardians of Minors  
Section **201-2B; -2C; -2D; -2F; -2G; -2; -4; -5.**

## NEBRASKA

### I. Designation of Standby Guardian

Nebraska lawmakers expressed concern for families whose parent is “chronically ill or near death” by creating a way for the court to appoint a standby guardian for the child. [Probate 30-2608 (c)] While the new law does not provide a designation process tailored to standby guardianship, the general guardian law does permit a parent to designate a regular guardian in a will, which the court shall “take into consideration.” [Probate 30-2608 (a)] (In fact, the general guardian law gives priority to a designation in a will over a guardian the court might otherwise select, if both parents are dead. [Probate 30-2608 (d); 30-2606]) It seems reasonable, therefore, that the court would permit a designation to be made for a standby guardian.

The law specifies three triggering events: death, mental incapacity, and physical debilitation plus consent. [Probate 30-2608(c)] An “incapacitated person” is defined as one who “lacks sufficient understanding or capacity to make or communicate responsible decisions.” [Probate 30-2601(1)]

The parent and standby guardian would have concurrent authority to make decisions for the child, in that the appointment “does not suspend or terminate the parent’s parental rights of custody to the minor.” [Probate30-2608(c)] There is no description about how the parent and standby guardian would work that out. There is no provision for the parent to revoke the guardianship.

### II. Agreement of Non-Custodial Parent

A non-custodial parent would take precedent over a guardian, unless he consented, or “all parental rights of custody” had been “suspended by prior or current circumstances or prior court order.” [Probate 30-2608(c)] There is a special provision for the natural non-custodial parent of a child born out of wedlock.

There, the court will give particular weight to the deceased parent's testamentary designation including "the natural parent's acknowledgment of paternity, payment of child support, and whether the natural parent is a fit, proper, and suitable custodial parent for the child." [Probate 30-2608(b)] [See *Jones v. Uhing*, 488 N.W.2d 366(1992) for parental unfitness factors.]

Notice of the hearing must be given to the parent [Probate 30-2611(a)(3)], and attempted by mail, personal service, and/or publication in a newspaper. [Probate 30-2220] As abandonment is a concept recognized in Probate Court [Probate 30-2608 (a)], evidence of reasonable efforts might suffice if the parent cannot be located.

### III. Role of Standby Guardian

The parent and standby guardian have concurrent decision-making authority over the child. [Probate 30-2608(c)] Duties of a full guardian are explained. They include a mixture of personal and estate management, facilitating the child's education and social activities and authorizing professional care, treatment, and advice. [Probate 30-2613] However, a standby guardian is a "limited" guardianship [Probate 30-2601(6)] in that it does not deprive a parent of custody, and is suspended until certain events or conditions occur. Those triggering events are, by law, death, mental incapacity, or physical debilitation plus consent. [Probate 30-2608(c)] The court can further limit the duties in the appointment order.

No duty to file confirming evidence of the triggering event or time limits within which the standby guardian must act are stated in the law. The implication is that the guardianship would begin at the moment of the event, as long as there was no living parent. [Probate 30-2608(c)]

The guardianship lasts until the child attains majority, or it is interrupted by some other event like adoption, marriage, or death. A guardian's resignation must be approved by the court. [Probate 30-2614] There is no provision for the parent to revoke the guardianship.

## IV. Court Process

The court process begins when a petition for appointment of a standby guardian is filed. [Probate 30-2611] There is no particular provision for designation of a standby guardian, but if such a writing exists—for example, in a will or other attested document—this would be the time to file it. Notices of a court hearing are then sent out to any child who is age 14 or older, the custodian, and parents. The court may appoint an attorney for the child. [Probate 30-2611(a); (d)]

A court hearing is held to determine whether the guardianship is in the best interests of the child. [Probate 30-2611(b)] Probate case law sheds some light on best interests [e.g., *Stewart v. Herten*, 254 N.W. 698 (1934)], and the judge may also look for guidance to Juvenile and Domestic Relations law.

The law does not state any other action to be taken by the standby guardian after the judicial appointment—other than to assume duties when the triggering event occurs. Subsequent matters may be covered by court rules or Nebraska probate practice. If the guardianship is considered to be permanent, it will last until an intervening event like the child's majority, marriage or death, or court action, ends it. [Probate 30-2614]

Nebraska Revised Statutes of 1943  
Chapter 30. Decedent's Estates: Protection of Persons and Property  
Article 26. Protection of Persons under Disability and their Property  
Part 2. Guardians of Minors  
Sec. **30-2601; -2608; -2611; -2613; -2614**

## NEW JERSEY

### I. Designation of Standby Guardian

The New Jersey Standby Guardianship Act applies to parents or legal custodians who are “suffering from a progressive chronic condition or fatal illness.” [Probate 3B:12-68] A parent may designate a standby guardian for her children in an attested written document. A simple optional form is included in the statute. The triggering events may include all, but must include at least one of the following: mental incapacitation; physical debilitation accompanied by written, attested consent; or death.

A designation that is not followed by a petition for court appointment of the standby guardianship expires in 6 months. [Probate 3B:12-76.a] A designation plus petition for appointment must show that there is a “significant risk” of death, incapacitation, or debilitation as a result of a “progressive chronic condition or fatal illness.” [Probate 3B:12-72.b(2)] When the designation is filed along with a petition, the court holds a hearing to determine whether such a guardianship promotes the best interests of the child. [Probate 3B:12-72.d] The designation carries the weight of a “preference” with the court, subject to another parent’s rights. [Probate 3B:12-76.b] However, the court also considers the preferences of the child. [Probate 3B:12-77]

The parent retains “full parental rights to the extent consistent with [her] condition.” [Probate 3B:12-74.b] She may revoke the designation orally or in writing, or in any other way that shows her intent. [Probate 3B:12-75.e]

### II. Agreement of Non-Custodial Parent

Notice of the court hearing must be given to the parent within 30 days of the filing, unless the non-custodial parent’s rights “have been previously terminated by court order or consent.” A “diligent search”

must be made for the non-custodial parent. If the parent cannot be located in this way, the case can proceed. [Probate 3B:12-72.f] There is no requirement that the non-custodial parent sign the designation.

### III. Role of Standby Guardian

The standby guardian's duties begin when the triggering event occurs as described in the designating document or court order. That triggering event will be mental incapacity; debilitation accompanied by written, attested parental consent; or death. [Probate 3B:12-72.d] A court-appointed standby guardian is to receive the attending physician's written determination of the incapacitating or debilitating condition, and file it with the court. The standby guardian has 60 days after the events to do this. [Probate 3B:12-73; 12-75]

When the triggering event occurs, the standby guardian shares decision-making authority with the parent, depending on the parent's condition, unless the designation and court order provide otherwise. [Probate 3B:12-75.d] A guardian for a minor has, in broad terms, parental powers. [Probate 3B:12-51]. He facilitates the child's education and social activities and authorizes professional care, treatment, and advice. [Probate 3B:12-52]

Duties of a standby guardian who is designated, but not court appointed, expire in 6 months. [Probate 3B:12-76.a] Once the appointment is made, if confirming documents are filed and the court appoints the standby guardian as a permanent guardian, duties last until the child reaches majority, the appointment is revoked, or an intervening event like death or adoption occurs. [3B:12-55]

### IV. Court Process

The court process begins when the designation document is filed along with a petition requesting appointment of the standby guardian. Notice is given to the non-custodial parent, if he can be found, any child 14 or older, as well as others named in the petition who are in close relationship to the family.

[Probate 3B:12-72.f] The court sets a hearing to determine the facts and whether the guardianship is in the child's best interests. [Probate 3B:12-72(d)] There is abundant case law under the Children's Code to guide the court in a "best interests" determination. A guardian *ad litem* or legal counsel may be appointed to represent the child. [Probate 3B:12-77] Presence of the petitioning parent at the hearing may be waived if she is too ill to appear. [Probate 3B:12-72(c)]

Once the appointment of a standby guardian is made by the court—with whatever modifications to the designation it deems necessary—there is no court action until documents such as a physician's determination or a death certificate are filed, confirming that a triggering event has occurred. That filing must take place within 60 days of the event. The court then may confirm the guardianship, presumably without another hearing being necessary in the typical case. [Probate 3B:12-73]

Upon the parent's death, there is a rebuttable presumption that the standby guardian is capable of serving as permanent guardian. [Probate 3B:12-76.b]

New Jersey Statutes Annotated  
Title 3B. Administration of Estates—Decedents and Others  
Chapter 12. Minors and Mental Incompetents.  
Article 7. Standby Guardianship Act  
Sec. 3B:12-51; -52; **3B:12-72**; -73; -74; -75; -76; -77; Children's Code 9:2-9

#### Resources

Lenore M. Molee, *The Ultimate Demonstration of Love for a Child: Choosing a Standby Guardian*. *New Jersey Standby Guardianship Act*, 22 Seton Hall Legis. J. 475 (1998).

## NEW YORK

### I. Designation of Standby Guardian

New York's standby guardianship law is developed for parents who are fatally, progressively, or chronically ill, and who want to plan for their children's future. There are two ways that a standby guardianship may be formed: by petition, prior to a triggering event; or by designation at any time, ideally to be followed by petition even after a triggering event. A particular person may be nominated as standby guardian under either method.

The early-petition strategy requires the parent to declare that she has a "progressively chronic illness" or an "irreversibly fatal illness." She must state the basis for this, although she does not have to file a physician's statement. [Surrogate 1726.3(b)(ii)] The petition must list any or all of four triggering events: mental incapacity, physical debilitation plus consent, consent alone, and death. [Surrogate 1726.3(b)(i) and (d)(ii) and (e)(iii)]

The designation strategy, on the other hand, is a step toward guardianship, with formalization through the court occurring at some later point. The parent prepares a document that lists two triggering events: mental incapacity and physical debilitation plus consent. An optional designation form is provided in the statute. By contrast with the early-petition process, the statute does not require death to be listed as a triggering event, although legal practitioners' designation forms in New York City do so list it. The law permits the designation to go forward if the parent dies after the designation is created but before the petition is filed. [Surrogate 1726.4(b)]

In practical terms, the major difference between the two strategies is that the early-petition process allows a parent to resolve all issues relating to future care of her child in court, before she becomes severely incapacitated. The designation process allows the plans to develop privately, and shifts the administrative burden to the standby guardian.

The parent retains “full parental rights” after the guardianship begins. [Surrogate 1726.4(b)(iii)] This amounts to concurrent authority shared by the parent and the standby guardian. [Surrogate 1726.7] In practical terms, the parent has primary authority unless she is unable to exercise it. The parent may revoke the designation either orally, in writing, or in any other way that indicates intent. [Surrogate 1726.4(f)] (Practitioners forms used in New York City state that a revocation is to be in writing.)

The designation is filed in court together with a petition requesting appointment of the standby guardian.

## II. Agreement of Non-Custodial Parent

The standby guardianship law is silent as to the involvement of the non-custodial parent. He is not required to sign the designation. The legal provisions applicable to general guardianships require notice to be given to parents if they are in the State and their residences are known. Moreover it states that, “No process shall be necessary to a parent who has abandoned the infant or is deprived of civil rights or divorced from the parent having legal custody of the infant or an incompetent who is otherwise judicially deprived of the custody of the infant....” [Surrogate 1705.1(a) and .2] At a minimum, there must be notice to the parent, an affidavit describing why no notice is necessary, or consent of the parent. (Attorneys state that in Family Court, where standby guardian cases usually are heard, judges typically would require notice to an out-of-State parent if the residence were known.)

## III. Role of Standby Guardian

A standby guardian’s authority does not begin until one of the triggering events listed in the petition or designation document occurs. Upon the occurrence, the standby guardian must gather the required evidence. Evidence would be a physician’s determination of incapacity or debilitation; a parent’s written, attested consent; a death certificate; or a funeral home receipt. Under the early-petition strategy the standby guardian has 90 days to gather the evidence and file it in court to activate the guardianship.

[Surrogate 1726.3(e)] Under the designation strategy, the standby guardian has 60 days to do this, and the evidence must be accompanied by a petition for appointment. [Surrogate 1726.4(c)] If the documents are not filed within 60 days, the guardian's temporary authority lapses. If lapsed, a later filing can occur, and usually the request for renewed authority is granted. [Surrogate 1726.4(c)]

The standby guardian's authority is concurrent with the parent's, and may include parental kinds of decisions relating to the personal welfare of the child, unless Surrogate's Court has also granted authority over the child's property. [Surrogate 1726.7]

Once the guardianship becomes permanent, unless it is revoked or rescinded, it lasts until the child's majority or until another intervening event, such as the child's marriage. [Surrogate 1707.2]

#### IV. Court Process

Court process for a standby guardianship can commence either with filing a petition for appointment prior to a triggering event or with filing a designation document along with a petition for appointment after the triggering event occurs. The law states that the filing is for "the sole purpose of safekeeping and shall not affect the validity of the appointment or designation." [Surrogate 1726.8(a)] In other words, the guardianship is not effective until the court makes a finding based on declarations in the designating document and the petition. The court must ascertain whether the guardianship will promote the child's best interests. [Surrogate 1726.3.(d)(I). See also *Matter of Guardianship of Rene O.C.606 NYS 2d 872* (1993)] To do that, a court hearing is implied, even if the petition is uncontested. [*Matter of Guardianship of F.H.*, 632 NYS 2d 777 (1995)] Notice is given to any parent living in the State in a known residence, unless the parent is adjudicated unfit, incompetent, etc. Notice must also be given to children named in the petition who are 14 years or older. [Surrogate 1705] A parent's presence in court can be waived if she is too ill to appear. [Surrogate 1726.3 (c)]

Under the early-petition strategy, once the court has made a decision, the matter lies dormant until one of the specified triggering events occurs. The standby guardian then files confirming documents within 90 days of the event, along with a petition for appointment as guardian. [Surrogate 1726.3(e)] Under the designation strategy, the documents are filed within 60 days of the triggering event, along with a petition for appointment. [Surrogate 1726.4(c)] The court then examines whether the facts are as stated and the child's interests will be promoted. [Surrogate 1726.4(e)] Note that this process can take place either in Family Court under the Family Court Act, Title 6, or in Surrogate Court under the Surrogate's Act, Title 17. Overall, the New York Court retains a great deal of flexibility and discretion.

McKinney's Consolidated Laws of New York Annotated  
Surrogate's Court Procedure Act  
Chapter 59-A of the Consolidated Laws  
Article 17—Guardians and Custodians  
Sec. 1705; 1707; **1726**

#### Resources

Jeffrey G. Abrandt, *The Non-Traditional Family: Planning for the Elderly and Those with Life-Threatening Illness*, 242 PLI/Est 405 (1995).

*Facing the Future: A Legal Handbook for Parents with HIV Disease, Brooklyn Legal Services Corp. B. and Gay Men's Health Crisis.*

Theresa McGovern and Zelda E. Stewart, *Permanency Planning Worker's Handbook. Legal Permanency Planning Options (for NY Social Workers).*

Lauren Shapiro, *An HIV Advocate's View of Family Court: Lessons from a Broken System*, 5 Duke J. of Gender L & Policy 133 (Spring 1998).

## NORTH CAROLINA

### I. Designation of Standby Guardian

North Carolina law provides two ways for a standby guardianship to be created: appointment by petition [Probate 35A-1373] or appointment through written designation. [Probate 35a-1374] It therefore follows the two-track model. While both methods permit the parent to designate a proposed standby guardian, the process for appointment by petition process commences before any triggering event occurs. If the designation process is followed, a petition for appointment typically would occur after the triggering event, and it would be filed by the standby guardian. It is only through appointment by petition that the parent must state and prove that she suffers from “a progressively chronic illness or an irreversible fatal illness.” [Probate 35A-1373(b)(3)]

In practical terms, from the parent's point of view, the question that defines the difference between the two processes is this: Should I resolve all questions well before any incapacity or debilitation begins while I can fully participate? Or, should I keep the designation private until I absolutely need help, in which case the standby guardian can handle the court details?

Both processes require the triggering event to be any of these: incapacity, debilitation plus parental consent, consent alone, or death. Incapacity is defined as “a chronic and substantial inability, as a result of mental or organic impairment, to understand the nature and consequences of decisions concerning the care of one’s minor child....” Debilitation is defined as “a chronic and substantial inability, as a result of a physically debilitating illness, disease or injury, to care for one’s minor child.” [Probate 35A-1370(3) and (8)] Evidence of either incapacity or debilitation is to be provided by an attending physician in the form of a written determination. [Probate 35A-1375] If the parent’s consent alone is the basis for activating the guardianship, it must be in a written document, attested by two adult witnesses. [Probate 35A-1373(l); and as referenced in 35A-1374(d)(3)] Proof of death may be a death certificate, a funeral home receipt, or evidence of like quality. [Probate 35A-1373(i); 1374(d)(4).]

Once the guardianship is activated, the parent is not divested of parental guardianship rights. The parent and guardian have concurrent authority to make decisions for the child. [Probate 35A-1377] The parent may revoke the guardianship in writing [Probate 35A-1373(m); 1374(j)], but if the matter has already been filed, also file a copy of the revocation. Moreover, if the parent recovers from incapacity or debilitation, she can claim full guardianship of her child again by obtaining the attending physician's written explanation of her recovery and filing it with the court. [Probate 35A-1376]

## II. Agreement of Non-Custodial Parent

The process for obtaining agreement of the non-custodial parent sufficient to satisfy the court is simple in North Carolina. His signature is not required on the designating document. Notice of the time, date, and place for the hearing must be given to him. Rules of Civil Procedure (Rule 4) govern this search, requiring the usual attempts at personal, postal, and published service. If a non-custodial parent files a written claim for custody, the Clerk of the Court stays proceedings for 30 days, allowing a complaint for custody to be filed under the Domestic Relations law. If no complaint is filed, the guardianship matter proceeds. [Probate 35A-1373(c)–(d); 1374(g)–(h)]

## III. Role of Standby Guardian

Under either appointment by petition or appointment by written designation, the standby guardian's role begins when the triggering event occurs. [Probate 35A-1373(g); 1374(d)] That triggering event may be incapacity, physical debilitation plus parental consent, consent alone, or death. The guardian has 90 days after the event to gather evidence and file it with the court. This 90 days of temporary authority applies even where the designation has not been filed already in court. [Probate 35A-1373( i) and (l); -1374(e)]. Evidence is to include a physician's statement, if the triggering event is incapacity or debilitation, or a death certificate. [Probate 35A-1373(l)-(k); 35A-1374(f); 35A-1375]

The standby guardian has concurrent authority with the parent after the guardianship is activated. [Probate 35A-1377] Depending on the court appointment, the guardian will either make decisions just for the child's person, or also as to the child's property. [Probate 35A-1378; 1202(7); (10)] Basically, a guardian of the child's person is concerned with care, comfort, maintenance, training, education, employment, and rehabilitation. It includes deciding where the child shall live; approval for all services; and reasonable care of clothing, vehicles, furniture, and personal effects. [Probate 35A-1241]

A standby guardianship can last until the child is 18, unless it is terminated earlier by the court. [Probate 35A-1382] Of course, during the parent's lifetime, the appointment can be revoked in writing by the parent [Probate 35A-1373(m); -1374(j)]

#### IV. Court Process

An unusual aspect of North Carolina law is that judicial authority over guardianships has been delegated to the Clerk of the Court. [Probate 35A-1203] All documents and evidence are filed with the Clerk, and the hearing is held before him. That hearing may be informal. [Probate 35A-1223] Such a process might be less intimidating for an ill parent than a hearing in open court. A parent who is "medically unable" to appear shall not have to do so. [Probate 35A-1373(e)]

There are two processes for appointing a standby guardian. In the "appointment by petition," the court process begins when the parent files a petition for a standby guardian, which can be accompanied by a document designating the guardian. A hearing is held before the Clerk of the Court. Evidence of the existence of a "progressively chronic illness or irreversibly fatal illness" is examined. Letters of Appointment may be issued. The next court contact occurs when the standby guardian files confirming evidence of the triggering event (incapacity, debilitation plus consent, consent alone, or death) within 90 days of it. Assuming the evidence to be sufficient (determination of incapacity or debilitation by an

attending physician, and/or a written attested consent, or a death certificate or funeral home receipt), the guardianship is activated at that point. No further court process is required. [Probate 35A-1373]

If the chosen method is appointment by written designation, the court process does not begin until a triggering event occurs. At that point the standby guardian files the required evidence, along with the written attested designation and a petition for appointment. A hearing is then held, and Letters of Appointment may issue. No further court process need occur to validate the guardianship. [Probate 35A-1374]

General Statutes of North Carolina  
Chapter 35A. Incompetency and Guardianship  
Subchapter IV. Standby Guardians for Minor Children  
Article 21. Standby Guardianship  
Sec. 35A-1202 (7); (10); -1223; **35A- 1370; -1373; -1374; -1375; -1376; -1377; -1378; -1382**

## OHIO

### I. Designation of Standby Guardian

In Ohio, the main way to nominate a guardian for children has been through a Durable Power of Attorney. Therefore, it is in the commercial code that standby guardianship is described: "the power of attorney shall become effective at a later time or upon the occurrence of a specified event, including, but not limited to, the disability, incapacity, or adjudged incompetency" of the parent. [Commercial 1337.09(B)] However, lawmakers also have provided in the "guardian" section of the probate code a way for a parent to nominate a standby guardian in any other written attested document. [Probate 2111.121] Whether through a Durable Power of Attorney or through another kind of attested writing, the emphasis is on the occurrence of a future event that begins the guardianship. The event need not be incapacity or disability.

Such a nomination amounts to a preference for the court to consider. A child 14 years or older also may express a preference, but the parent's nomination would tend to carry greater weight with the court. The law is clear, however, that the court ultimately will make an independent judgement about what is in the child's best interests. [Probate 2111.02(D); 2111.12]

The parent is free to design the terms of a designation—whether it shall apply to both the child's activities and property or just the activities, when it shall commence, who the guardian shall be, whether it is to include unborn children, and how long it shall last. [Commercial 1337.09; Probate 2111.121] The parent likely will require the help of a lawyer to work out a designation plan for her children unless the Clerk of the Court has very clear forms.

### II. Agreement of Non-Custodial Parent

There is no requirement that the non-custodial parent sign the nominating document. The standby guardianship laws do not describe requirements for finding and obtaining the consent of the non-custodial parent. However, other parts of Ohio law lay down specific factors for determining from whom consent needs to be obtained. For example, the adoption laws exclude the following kinds of parents from having to consent: those who have “failed without justifiable cause to communicate with the minor or to provide for the maintenance and support” for at least the preceding year; a putative father who fails to register as the father within 30 days of the birth, who has willfully abandoned the mother during her pregnancy, or whose parental rights have been terminated; one who has been “judicially declared incompetent” and failed to respond to a request for consent or one who simply fails to respond to the request whether or not incompetent; or wherever it is “unreasonably difficult” to obtain the consent, whether because of prolonged absence, unavailability, or any other reason. [Adoption 3107.07]

In other words, a non-custodial parent who demands preference over another nominated guardian will have to have already expressed his willingness and ability to parent.

### III. Role of Standby Guardian

A standby guardian’s powers are first proposed in the parent’s nominating document, and then agreed to or modified by the court. Powers may include responsibilities for the child’s property, as well as decision-making regarding activities including protection, control, maintenance, and education. [Probate 2111.13] The Ohio law does not describe “concurrent authority.” When the guardianship goes into effect, it would appear that those duties are not shared with the parent (unless informally, or by specific decree of the court).

Because Ohio law does not define what the triggering events shall be, the guardianship might begin in whatever way the parent suggests and the court agrees.

A hearing is held at the time the nominating document and petition for appointment of a standby guardian are filed. The proposed guardian must appear at the hearing and take an oath to fulfill his duties. Because those duties may well include filing reports and accounting to the court, they also may include filing evidence of the triggering event; however, that is not alluded to in the law. Specifically, there is no requirement for medical certification of incapacity or debilitation. [Probate 2111.02 (C)]

A standby guardianship would last as long as outlined in the court decree—or in lieu of specific instructions, until the child reaches majority—unless ended by an event or court action.

#### IV. Court Process

Court process begins when the parent (or interested other person) files a Durable Power of Attorney [Commercial 1337.09] or other nominating document [Probate 2111.121] with the court, along with a petition requesting appointment of a standby guardian. Prior to holding a hearing in the case, the court may appoint a Probate Court investigator to report on the facts and recommend a course of action. [Probate 2111.042]

The court will hold a hearing to determine if the guardianship is in the child's best interests. A referee, rather than a judge, may preside. The proposed guardian must appear and take an oath that he will faithfully fulfill the duties of a guardian. [Probate 2111.02(C)] Bond may be waived. Because any child 14 or older may express a preference, one would assume older children would appear in court. [Probate 2111.12] If the guardianship appointment is made, the court's decree will set the terms. Guidance for the court to determine the best interests of the child can be found in a number of places in Ohio law. For example, in the adoption statute there are many factors to consider that lead to a stable environment. [Adoption 3107.161]

Once the appointment is made, whether or not the court will require a subsequent filing of documents confirming a triggering event will depend on the terms of the court's decree. It is not a specified action in the law.

Ohio Revised Code  
Title XXI. Courts – Probate – Juvenile  
Chapter 2111. Guardians; conservatorships, general provisions  
(1996 Session laws, 121<sup>st</sup> General Assembly)  
Sec. **Commercial 1337.09(B); Probate 2111.02; .042; .12; .121; .13**; Adoption 3107.07

## PENNSYLVANIA

### I. Designation of Standby Guardian

The Pennsylvania Standby Guardianship Act permits a parent to designate a standby guardian in a written, attested document. An optional, simple form is printed in the statute, for which a parent can fill in the blanks with pertinent information. The statute's optional form permits the parent to describe the events that will activate the guardianship, seeming to give the parent a free hand. [Domestic Relations 23-5611] However, mental and organic incapacity, as well as physical debilitation plus consent are described in the definitions [Dom. Rel. 23-5602] and, along with consent alone and death, are required to be included as triggering events in the petition that accompanies the designation. [Dom. Rel. 23-5612] Moreover, the section of the law that requires proof of the triggering event does refer to a physician's determination of incapacity or debilitation [Dom. Rel. 23-5612(a)] and the form of that determination is described in the definitions. [Dom. Rel. 23-5602]

There is strong support for the validity of the parent's designation. If the designator is a sole surviving parent or if the other parent has consented (or his consent is not required), there is a rebuttable presumption that the guardianship is in the child's best interests. [Dom. Rel. 23-5612(d)] A hearing may not even be required. [Dom. Rel. 23-5612(e)]

The designation and petition for appointment may be filed at any time. If before the triggering event, only the parent may file; if after, the standby guardian may file. If the matter is approved by the court before a triggering event, no further court action is required—not even filing confirming documents. [Dom. Rel. 23-5613(b)] In Pennsylvania, therefore, if the paperwork were carefully completed, there would be little formal involvement with in-court appearances.

After a petition has been filed, a parent may revoke the designation in writing and file the revocation with the court. Alternatively, an oral revocation can be proved by clear and convincing evidence. [Dom. Rel.

23-5614(a) and (c)] The effect is to give a parent maximum control over the process. She never gives up her parental rights [Dom. Rel. 23-5611(4); -5613(a)], and she may designate and revoke at will.

## II. Agreement of Non-Custodial Parent

The general rule is that designation of a standby guardian is improper if there is another parent who is willing and able to care for the child, whose whereabouts are known, and whose parental rights have not been terminated. [Dom. Rel. 23-5611(a)] There are “diligent search” procedures described in the Pennsylvania Rules of Civil Procedure in Custody Matters that would permit a parent to show the court that the non-custodial parent cannot be found. [Dom. Rel. 23-5612(b)(2)] There are descriptions of parental unfitness in several places in Pennsylvania law. For example, the Probate Court does not permit a non-custodial parent to appoint a guardian through a will if he has neglected or refused to provide for his child for 1 year previous to his death, or if he deserted the child or failed to perform parental duties. [Probate 20-2519] A parent has a number of legal tools to develop evidence for the court that the non-custodial parent cannot be found, or that his consent need not be obtained.

If he is found and he does consent to the guardianship, his signature can be added to the designating document or submitted in a separate signed document. [Dom.Rel.23-5611(c)(2) and (4)]

## III. Role of Standby Guardian

Although the standby guardian is not required by the law to sign the designating document in the presence of witnesses, there is a signature line on the printed form for the standby guardian. [Dom. Rel. 23-5611(c)(4)] The law describes the nature of shared authority with the parent once the guardianship has been activated. “A coguardian shall assure frequent and continuing contact with and physical access to the child and shall further assure the involvement of the parent, to include, to the greatest extent possible, in the decision making on behalf of the child.” [Dom. Rel. 23-5613(a)]

If the designation and the petition are filed prior to any triggering event, and the court approves the standby guardian, no further court actions need be taken by the guardian once the triggering event occurs. If, on the other hand, the designation document has been prepared, but not filed, prior to the triggering event, the standby guardian has 60 days of temporary authority to file a petition for approval of the designation, along with confirming evidence. That evidence would be a physician's determination of mental or organic incapacity or physical debilitation; and/or a signed and witnessed parental consent; or a death certificate. [Dom. Rel. 23-5612(a); 5613(b)]

Once the court has approved the guardianship the standby guardian becomes the permanent guardian.

#### IV. Court Process

The Pennsylvania Standby Guardianship Act sets up a two-track process for activating the guardianship—both tracks of which begin with filing a designating document and a petition for appointment. In the first case, these documents are filed by the parent prior to any triggering event. If the court approves the guardianship, finding that the documents are all in order and the proper consents have been obtained, no further court action is required. The standby guardian's powers are activated upon occurrence of the triggering event, and if the parent dies, the standby guardian automatically becomes a permanent guardian. If all consents are in order, or if the designator is the sole surviving parent, there is a presumption that the guardianship is in the child's best interests; there may not even be a hearing. [Dom. Rel. 23-5612(e)] If there is a hearing, the presence of the designating parent may be waived if she is ill. [Dom. Rel. 23-5612(g)]

The second possible track is that the designating document will be prepared ahead of time, but not filed in court until after a triggering event occurs. In that case, it will usually fall upon the standby guardian to file the designation and a petition for appointment along with confirming evidence that the event has

occurred. After court approval, court process moves in the same way: no further court action is required to convert the guardianship to permanency.

1998 Pennsylvania Legislative Services Act 1998-103 (SB 1051)  
182 Reg. Session of General Assembly  
Amends: Title 23 (Domestic Relations)  
Chapter 56: Standby Guardianship Act  
Sec. Domestic Relations **23-5601; -5602; -5603; -5611; -5612; -5613; -5614**; Probate 20-2519

#### Resources

*Pennsylvania Enacts Guardianship Law with Novel Features*, AIDS Policy and Law (March 5, 1999) at 6.

## VIRGINIA

### I. Designation of Standby Guardian

At any time, a parent who is “afflicted with a progressive or chronic condition caused by injury, disease or illness” that “to a reasonable degree of medical probability” will be terminal, may designate a standby guardian for the children. The designation shall include these triggering events to activate the guardianship: (1.) incompetence; (2.) debilitation plus consent; and (3.) death. [Juv. 16.1-352]

Before a triggering event, the parent may file a petition for court approval of the standby guardian. The petition must be accompanied by documentation supporting the parent’s eligibility for a standby guardian: a physician’s written diagnosis of the parent’s “progressive or chronic condition caused by injury, disease or illness from which, to a reasonable degree of medical probability” she cannot recover. [Juv. 16.1-349; 16.1-351] In addition to the triggering events permitted in a designation, upon request, the court may provide in its order that written consent alone can activate the guardianship. [Juv. 16.1-349; 16.1-351]

### II. Agreement of the Non-Custodial Parent

The other parent is required to be notified and served with summons “promptly” if his identity and whereabouts are known.” [Juv. 16.1-350.C] If the other parent is located, the court is required to hold a hearing. The non-custodial parent’s request for a hearing must be received by the court within 10 days of the time the notice was sent—a very short turn-around. [Juv.16.1-350.C] However, the non-custodial parent may petition the court at any time for review of whether the standby guardianship is in the child’s best interests. [Juv. 16.1-355]

There are a number of cases decided under the Virginia Juvenile code that describe parental unfitness, particularly relating to termination of parental rights. For example, unfitness is indicated by abandonment

of a child without justification. [*Robinette v. Keene*, 347 S.E. 2d 156 (1986)] Extended imprisonment, when combined with other evidence, can also support a court's finding that a child's interests are not best served by continuing a parent-child relationship. [*Ferguson v. Stafford County Dept. of Social Servs.*, 417 S.E.2d 1 (1992)]

### III. Role of Standby Guardian

The standby guardian's tenure is described specifically as "temporary," meaning that a separate petition would be required after the parent's death to convert it to a permanent status. [Juv. 16.1-349; 16.1-353]

The standby guardian is required to act in a manner "consistent with the known wishes of a qualified parent." [Juv. 16.1-349] Whether or not court process has approved the standby guardianship at the time a triggering event occurs, the standby guardian has 30 days within which to file the proper documents.

Those documents would be a determination of incompetence, or determination of debilitation with consent, or a simple consent (if those were included in the court order)—or, of course, a death certificate. If only a designation—not a judicial appointment—is in effect at the time the triggering event occurs, the standby guardian must also file a petition for judicial approval of the guardianship. [Juv. 16.1-351]

The standby guardian carries both the powers of guardian over the minor's person as well as guardian of the minor's property, unless the terms of an order delimit it. [Juv. 16.1-351] The standby guardian enables "the parent to plan for the future care of a child" in a way that is "consistent with known wishes" of the parent. [Juv. 16.1-349]

### IV. Court Process

Court process begins whenever a petition for a standby guardian is filed. That can be before a triggering event, [Juv. 16.1-350; 16.1-351], or after it. [Juv. 16.1-352]

If there is an identified non-custodial parent or any other interested relative, there must be a hearing. The parent does not have to appear if she is too ill. [Juv. 16.1-350C] The court will make its decision based on the best interests of the child. [Juv. 16.1-352] A guardian *ad litem* may be appointed to help the court make this decision. [Juv. 16.1-350] At any time following approval of the standby guardianship, a non-custodial parent (as well as a “step parent, adult sibling, or any adult related to the child by blood, marriage or adoption”) may petition the court to review the guardianship at any time. [16.1-355]

Within 90 days after the parent’s death a petition to determine permanent guardianship must be filed.  
[16.1-353]

Code of Virginia Title 16.1 Courts not of Record Chapter 11. Juvenile and Domestic Relations District Courts Article 17. Standby Guardianship Sec. Juv. 16.1-227; <b>16.1-349</b> ; <b>-350</b> ; <b>-351</b> ; <b>-352</b> ; <b>-353</b> ; <b>-354</b> ; Probate 31-9.
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#### Resources

James T. Butchma and Ronald P. Geiersbach, *Standby Guardianship, and the Use of Written Designations*, 48 Virginia Lawyer 46 (Dec. 1999).

## WEST VIRGINIA

### I. Designation of Standby Guardian

A parent who is “afflicted with a progressive or chronic condition” that is caused by “injury, disease, or illness” and likely to lead to “debilitation of incompetence” may designate a standby guardian at any time.

[Probate 44A-5-2(h); 44A-5-5(a)]

The designation must describe the triggering events that will activate the guardianship, specifically (1.) incompetence, (2.) debilitation plus consent, and (3.) death. [Probate 44A-5-5(b)] If there is a court order approving the standby guardianship, and if such request was made of the court at the petition stage, consent alone may also be a triggering event. [Probate 44A-5-4(c)] If the parent chooses to petition the court for approval of the standby guardianship before any triggering event occurs, she must establish her eligibility by asserting facts that show she is at imminent risk of dying or becoming physically or mentally incapable of caring for the child as a result of a “progressive chronic condition or illness.” However, she need not submit medical documentation. [Probate 44A-5-3(b)(5)]

A standby guardian is to act as a “coguardian” in accordance with the parent’s wishes. [Probate 44A-5-2(d)(5)] A parent may revoke the designation in writing. [Probate 44A-5-7(a)]

### II. Agreement of Non-Custodial Parent

As soon as the petition is filed, notice must be given “promptly” to non-custodial parents “whose identity and whereabouts are known.” [Probate 44A-5-3(c)] The notice passes on the information that a standby guardianship does not alter custody or the non-custodial parent’s legal rights, and that it is not required that the parent appear at the hearing. [Probate 44A-5-3(c)(2)] The non-custodial parent has a right to request review of the standby guardianship at any time to examine whether it is in the child’s best interests. [Probate 44A-5-8]

### III. Role of Standby Guardian

The standby guardian only “temporarily” assumes duties, meaning that after a triggering event activates the guardianship, there must be a filing for a permanent guardianship or a formal custody determination. [Probate 44A-5-2(l); 44A-5-6] If the triggering event is death, the standby guardian has 90 days to accomplish that. If it is any other triggering event, the law requires that it be done “promptly.” [Probate 44A-5-6]

The other documents—physician’s written determination of incompetence or debilitation and the parent’s consent (where applicable) or a death certificate—are to be filed no later than 30 days after the triggering event. [Probate 44A-5-4(f); 44A-5-5(d)]

The duties that the standby guardian assumes may include both the child’s person and property, or may be limited to the person. [Probate 44A-5-2(l)] The tasks are those of a “coguardian,” and shall be carried out “in a manner consistent with the known wishes of a qualified parent regarding the care, custody and support of the minor child.” [Probate 44A-5-2(l)]

### IV. Court Process

Court process begins when a petition for approval of the standby guardianship is filed. This can occur before the triggering event [Probate 44A-5-3(a)] or up to 30 days after it. [Probate 44A-5-5(d)] Notice is sent to each parent and to any children more than 14 years old. [Probate 44A-5-3(c)] The court is required to hold a hearing if one is requested by a parent within 10 days of the notice being sent, or if there is pending custody litigation. [Probate 44A-5-3(d)] The court may appoint a guardian *ad litem* to represent the child. The custodial parent need not appear if she is “medically unable.” [Probate 44A-5-3(e)]

Once the triggering event occurs and the proper documents have been filed, a petition for permanent guardianship is to be filed to formally determine custody. [Probate 44A-5-6] A request to review the standby guardianship to determine if it is in the child's best interests may be made at any time by a parent, stepparent, "functional parent," adult sibling, or any adult related to the child by blood or marriage. [Probate 44A-5-8]

West Virginia Code Annotated.  
Chapter 44: Administration of Estates and Trusts  
Article 5: Standby guardianship  
Sec. 44A-5-1; 5-2; 5-3; 5-4; 5-5; 5-6; 5-7; 5-8

## WISCONSIN

### I. Designation of Standby Guardian

Following a two-track model, in Wisconsin a parent may choose either of two strategies: (1.) early on in her illness she may petition the court to appoint as standby guardian the person she nominates [Children's 48.978(2)]; or (2.) she may designate the standby guardian in a written attested document, but not immediately file that document with the court—waiting instead until a triggering event occurs, and thus shifting the task of petitioning the court to the standby guardian. [Children's 48.978(3)] The same information must be presented to the court in either case, and the same court events occur after the petition is filed. The difference in timing means that if the early-filing strategy is chosen, the parent participates fully in each stage. If the designation plus late-filing strategy is chosen, the process remains private for a while.

Under the early-filing strategy, there is no particular form for the nomination of the standby guardian. The parent simply includes in the petition the name of the proposed guardian along with the other required information, including the triggering events that would commence the guardianship and a statement that there is significant risk that the parent will become incapacitated, debilitated, or die within 2 years. The triggering events are to include all or some of the following: incapacity, debilitation plus consent, and death.

Under the late-filing strategy, the contents and form of the written designation are precisely laid out in the law. No doubt that is necessary, as the designation document itself grants temporary authority for the guardianship for up to 180 days after the triggering event occurs, prior to court approval. [Children's 48.978(3)(c) 4] The document must be witnessed and signed by the parent, the standby guardian, the witnesses, and the non-custodial parent if he agrees. It must include the same triggering events that would be included in a petition for judicial approval: mental incapacitation, physical debilitation plus parental consent, and death. It must describe the duties that the parent wants the guardian to exercise,

which may be limited to the child's person, or also include the estate. There is full guidance in the statute, amounting to an optional form. [Children 48.978 (3)(b) 2]

The parent shares what probably amounts to concurrent authority with the standby guardian after the guardianship is activated. In describing the duties of the standby guardian, the law states that activation of the guardianship "does not in itself divest a parent of any parental rights." [Children 48.9978(6)(a)] The designation form states it more fully as retaining "full parental rights over my children." [Children 48.978 (3)(b)2] If she recovers her health after the petition for appointment has been filed or the appointment has been made, the parent can file a physician's determination to that effect with the court to suspend the guardianship. [Children 48.978(3)(d)] She may also simply revoke the guardianship in a writing filed with the court.

## II. Agreement of Non-Custodial Parent

A non-custodial parent who is willing and able to exercise guardianship duties will have preference over a guardian. If the non-custodial parent agrees instead to appointment of a guardian, he must join in the petition or sign the designation. [Children 48 .978 (3)(b)3] If he cannot be located with "reasonable diligence" on the part of the parent, the petition can describe the efforts that the petitioning parent or standby guardian made. For example, the law says notice must be sent to the non-custodial parent at least 7 days before a hearing, and mail, personal service, and publication should all be tried. [Children 48.978(2) (c)(a) 2. and (c)2] If the non-custodial parent is located but refuses to join the petition, the parent or standby guardian will state that. The court will approach it as an issue of fact to be determined in the hearing. [Children 48.978(2)(f)4]

## III. Role of the Standby Guardian

The proposed standby guardian signs the written designation or receives notice of the petition, so he presumably understands what is required of him. The parent retains “full parental rights” over the child, so, in practical terms, the guardian is exercising concurrent authority. [Children 48.978(3)(b)2] In broad terms, that is described as “the duty and authority to make important decisions in matters having a permanent effect on the life and development of the child and the duty to be concerned about the child’s general welfare....” [Children 48.023] Authority will be over the child’s person, or also over the property, as set out in either the court’s order [Children 48.978(2)(k)1] or the parent’s designation. [Children 48.978(3)(b)1]

Under the late-filing written designation strategy, the standby guardian has significant administrative responsibilities. When the triggering event occurs, the standby guardian must gather confirming evidence and file a petition for appointment with the court. Evidence will include an attending physician’s statement as to the parent’s incapacity, debilitation plus written parental consent, or a death certificate. [Children 48.978(4); (3) (c) 2; 3] The written designation itself is temporary authority for up to 180 days, after which a court order governs. [Children 48.978(3) (c) 4] In the court hearings that follow the petition, the standby guardian, rather than the parent, will carry most of the burden of getting notices to the parties and proving the facts.

The standby guardian’s authority can be revoked at any time by the parent in writing. [Children 48.978(3)(j)]

#### IV. Court Process

The court process is one typical of Juvenile Courts, which is where these issues are resolved, rather than in Probate Court, where most guardianships are formed. [Probate 880.36(1)]

Under the early-filing strategy, a petition for appointment of a standby guardian is filed by the parent before a triggering event. Notices go out to all of the parties, summoning them to court. [Children 48.978(2)(c)] Three in-court events can take place: (1.) a plea-hearing where the court determines if there are any matters in controversy; (2.) if there are contested facts, a fact-finding hearing where the court decides issues in controversy; and (3.) a dispositional hearing where the judge decides the terms of the guardianship. [Children 48.978(2)(d)-(k)] The law lays out the factors the judge must consider at both the fact-finding and dispositional hearings. Findings of fact are to be based on “clear and convincing” evidence. [Children 48.978(2)(c); (f); (g)] If there are no matters in controversy, there might be only one in-court event, which would combine the plea hearing and disposition. [Children 48.978(2)(d)2]

Under the late-filing strategy, the same court events take place, but only after a triggering event occurs as described in the written designation document. The standby guardian files the petition, along with confirming evidence, within 180 days of the triggering event. [Children 48.978(3) (c) 4] If the parent is “medically unable” to appear in court, she may be excused. [Children 48.978(2)(l)]

No further court actions are required. However, if the parent files a written revocation or the standby guardian files a physician’s determination of the parent’s recovery, the court might wish to make further inquiry.

West’s Wisconsin Statutes Annotated  
Probate  
Chapter 48. Children’s  
Subchapter XIX. Adoption of Minors, Guardianship  
Sec. **Children’s 48.978**; Probate 880.36

## WYOMING

### I. Designation of Standby Guardian

Wyoming guardian laws are brief and simple. A parent is permitted to petition the court to appoint a standby guardian. [Probate 3-2-108 on guardianships, referring for process to 3-3-301 on conservatorships] The only document to which the laws refer is the petition to the court, so, in effect, it becomes the designating document. [Probate 3-3-302.] A guardian petition must contain facts that show it would be in the best interests of the child to have a guardian. [Probate 3-2-101] A parent could fit her description of plans for the child within that “best interests” context.

In Wyoming, a parent is not limited to a few triggering events to activate the guardianship. The law states only: “Any adult who is of sound mind may execute a petition for the voluntary appointment” of a guardian for his child “upon the express condition that the petition shall be acted upon by the court only upon the occurrence of a specified event or on the existence of a described condition of the mental or physical health of the petitioner. The occurrence of the specified event or the existence of the described condition shall be established in the manner directed in the petition.” [Probate 3-3-301 as referred to in 3-2-108] Thus, the parent is free to decide how the guardianship should commence and how it should be proved.

Wyoming laws do not include the concept of concurrent decision-making. Perhaps that idea could be introduced by the parent in the “best interests” section of the petition; a judge might approve it. The petition may be revoked any time before the guardian is appointed. [Probate 3-3-304]

### II. Agreement of Non-Custodial Parent

Notice that the petition for appointment of a standby guardian has been filed in court is to be served on parents “who are known or who can be known with due diligence.” [Probate 3-2-102] Wyoming Rules of

Civil Procedure set the process for serving notice. Notice provides a non-custodial parent with the opportunity to appear in court and agree or object to the guardianship.

### **III. Role of Standby Guardian**

No special duties for the standby guardian are described, such as gathering evidence of the triggering event or asking the court for confirmation. Nevertheless, some duties can be implied. For example, the law states that the court is to act on the petition once the specified event occurs. [Probate 3-3-301] It may well have to be the standby guardian who informs the court that the event has occurred. This would be particularly true if the petition had been deposited with him. [Probate 3-3-303; 3-3-305] The law also states that the petition itself will describe how that triggering event will be established. Again, it may well be the standby guardian holding the petition who must gather evidence such as physician's statements.

Once appointed, the standby guardian has general guardianship powers, unless these have been limited by the court. Duties include providing for the child's education and social activities; authorizing care, treatment, and advice; and taking reasonable care of the child's personal property. In broad terms, "the guardian of a minor has the powers and responsibilities of a parent who has not been deprived of custody of his unemancipated minor child." [Probate 3-1-201]

### **IV. Court Process**

A standby guardianship in Wyoming follows the process laid out for standby conservatorships over property. Reading the guardianship and conservatorship statutes together, as we are asked to do [Probate 3-2-108], it appears that the following are the court steps. (1.) The parent drafts a petition that describes why a guardianship is in the child's best interests [Probate 3-2-101], nominates a guardian [Probate 3-3-302], and describes the triggering event and how it will be proved. [Probate 3-3-301]. (2.) She then deposits the petition with the standby guardian, and/or perhaps with an attorney or with another

responsible person or agency. The law describes the depository as “any person, firm, bank, or trust company selected by the petitioner.” [Probate 3-3-303] When the triggering event occurs, the standby guardian or some other responsible person who has a copy of the petition files it with the court along with confirming evidence. [Probate 3-3-301; 305] Notices then are sent to parents and other persons named in the petition [Probate 3-2-102] and a hearing is held. If a “preponderance of the evidence” shows that the guardianship is in the child’s best interests, the standby guardian will be appointed. [Probate 3-2-104] No further court action is described.

Wyoming Statutes (1985 & Supp. 1995)

Probate

Chapter 2: Guardianships

Articles 1 (Appointment of Guardian); 2 (Powers of Guardians); and 3 (Standby Conservatorships)

Sec. Probate **3-2-101; 102; -104; -108; -201; 3-3-301; -302; -303; -304; -305**

**APPENDIX A**

***COMMON ELEMENTS OF STANDBY GUARDIAN LAWS***

## Common Elements of Standby Guardian Laws

### I. Designation of a Standby Guardian

#### A. There is a process, similar to writing a will, for designating a person to be a standby guardian for a child.

- Variations: CA, VA, WY: No requirement that document be witnessed.
- IL: Witnessing creates a presumption of validity. Designation can be in any written form.
- IA: Term used is “verified” rather than “witnessed.”
- AK, NE: No designation process is described in the standby guardian laws. The States’ other guardianship laws do describe written designations and probably would apply here.
- WY: A petition that includes a nomination may be kept as a private designation until it is filed.

#### B. The designation document indicates that the parent qualifies to establish a standby guardianship because he or she has a “terminal” or “chronic” illness.

- Variations: CT, FL, IL, IA, MA, PA, and WY do not limit use of standby guardianships to those who can show initially that they are very sick.

#### C. The standby guardianship will become active when a “triggering” event or condition occurs.

- Variations: CA: There is no triggering event. “Joint Guardianship” begins as soon as a guardian is appointed.

#### D. The future events that are likely to occur to the parent are mental incapacity, physical disability or death.

- Major Variation: In IL, MD, MA, NC, NY, PA, VA, and WV, parental consent alone, in addition to the above, can be enough to trigger the standby guardianship.
- Other Variations: FL: Incapacity or death are the only bases for standby guardianship.
- IL, MA: Parent’s inability to make day-to-day decisions for the child activates guardianship.

CT, IA, OH, and WY permit addition of triggering events other than illness and death.

#### E. The parent’s consent—insofar as he or she is able to give consent—controls many aspects of the guardianship.

## II. AGREEMENT OF THE NON-CUSTODIAL PARENT

**A. Through notice of a court hearing, the non-custodial parent has an opportunity to be heard on the issue of guardianship.**

**B. Reasonable or diligent efforts must be made to notify the non-custodial parent.**

Variation I: Certain States explicitly eliminate the need to contact certain kinds of non-custodial parents.

NJ, PA: Notice need not be given if parental rights already terminated.

NY: Notice to the non-custodial parent need only be given if he is in the State, his residence is known, and he hasn't been deprived of guardianship rights through abandonment of the child, loss of civil rights, or divorce.

AK, PA, VA, WV, and WY: Notice goes to non-custodial parents whose "whereabouts are known" or that can be known.

Variation II: Many States permit search to be governed by Rules of Civil Procedure, or processes set forth in another statute of different part of the legal code. These amount either to "reasonable efforts" (the usual standard for notice of court hearings) or diligent search (the more stringent standard in termination of parental rights, adoption, and other custody cases).

MD: Only State to specify a standard of "reasonable efforts" in the law.

WI: Specifies a standard of "reasonable diligence" in locating a non-custodial parent.

WY: refers to "due diligence."

## III. ROLE OF THE STANDBY GUARDIAN

**A. The guardian's tasks will begin when a future event or condition occurs to the parent.**

Variation: CA: There is no triggering event. Guardian duties are assumed as soon as the court appointment is made.

**B. The standby guardian has responsibility to bring to the court evidence that the "triggering" event or condition has occurred.**

Variations: Many States explicitly assign this task to the standby guardian: AK, IL, MD, MA, NY, NJ, NC, PA, VA, WV, WI. In other States the task tends to fall upon the standby guardian simply because he or she is closest to the family's situation: e.g., CT, WY.

CA: No evidentiary confirmation is needed because the guardianship is established upon appointment.

FL: Evidence is produced by an Examining Committee of experts.

NE, OH, and WY: Law does not state any duty to file evidence of triggering event.

**C. Once the guardianship is activated by a triggering event, the standby guardian and the parent share decision-making for the child.**

Variations: CT, IA, OH and WY: Law is silent on concurrent decision-making.

FL: Standby guardianship is activated only after parent is incapacitated (as determined by a committee of experts) so there is no sharing of decision-making. The guardian takes full control as soon as appointed.

IL: Parent decides when to activate guardianship. Statute does not impose concurrent decision-making.

## IV. COURT PROCESS

**A. A judge (or designated court officer) will determine whether a standby guardianship is in the best interests of the child.**

Major Variation: A guardian *ad litem* or attorney can be appointed for the child to help the judge determine “best interests.” The following States explicitly provide for that, though in other States, courts also may have the power to do that: CT, IL, NE, NJ, VA, and WV.

Other Variations: CA: Refers judge to family court in matters of child welfare.  
 CT: Specific guidance on best interests is given in probate code.  
 IL: Best interest factors are listed in family code and in case law referenced in the probate code.  
 AK: Probate laws silent on best interests standard.

**B. The court determination occurs after the designating document is filed.**

Major Variation: In some States a parent can choose between an early-petition process where the hearing would occur at the stage of filing the designation document (the rule), and a late-filing process where documents are not filed until a triggering event has occurred.

NC, PA, and WI follow NY model, but with modifications.

FL: Has two tracks in sense that it has two laws. Under one law, a hearing occurs when designating document is filed; under other law, it does not occur until after triggering event.

Other Variations: NC: Court clerk has been delegated judicial authority for guardianships and presides at any hearing.

VA, WV: Designation document to be filed at any time, up to 30 days after triggering event has occurred.

CT, IA: No hearing requirement stated in law.

**C. The guardianship can be confirmed officially only after evidence is filed with the court that the triggering event or condition has occurred.**

Variations: CA: Joint guardian begins tasks as soon as appointment is made. No triggering event.

CT, IA, NE, and OH: No court process for approval is stated.

NY (including NC, PA, and WI): In States following New York model of a two-track process, a full hearing would occur at this post-triggering event stage for persons choosing a late-filing strategy.

VA and WV permit designating document to be filed any time, even after triggering event. Thus, a full hearing would come when filing

occurred, possibly at this stage.

**D. A physician's statement is required to be filed as evidence, if the triggering event is the parent's mental incapacity or physical debilitation.**

Variations: CT: Law requires affidavit by guardian or other person that triggering event has occurred.

FL: Standby guardian files Petition of Incapacity and a cross-disciplinary committee of experts looks at evidence. In all probability, a physician's statement would be part of the evidence.

IA: Law just states the evidentiary standard: event or condition must be proved by "clear and convincing evidence."

AK, WY: Law does not specify what evidence must be filed to prove triggering event.

**E. After a parent's death a standby guardianship converts to a permanent guardianship.**

Variation: CT, IL, VA, and WV: separate petition specifically required to establish a permanent guardianship after parent's death.

MA: Standby guardian must file petition for permanent guardianship within 90 days of triggering event.

CA: Joint guardianship is permanent as soon as established.

PA: Specifically states that standby guardianship will be permanent.

IA, MD, NE, NJ, NY, NC, and WY: Standby guardian law silent as to any extra step to convert guardianship to permanency, although probate rules or practice may require it.

VA and WV: Standby guardian petitions court to make formal guardianship determination.

AK: The court “shall enter” an order of guardianship after standby guardian informs of triggering event.

**APPENDIX B**

***LEGISLATOR'S CHECKLIST***

## LEGISLATOR'S CHECKLIST

### GENERAL ISSUES

1. Should the standby guardian law be placed in the probate code \_\_\_\_\_ [majority], the domestic relations code \_\_\_\_\_ [FL, PA], or the juvenile code \_\_\_\_\_ [VA, WV, WI]?
2. Should the law be one that most parents can read and understand \_\_\_\_\_ [CT, MD, WY], or one that comprehensively describes the steps to be taken and provides for many contingencies \_\_\_\_\_ [IL, NJ, NY, WI, VA]?
3. Should the law aim to create a guardianship that is essentially permanent and will withstand most legal assaults, \_\_\_\_\_ [IL, NJ], or aim instead to fill a parent's lifetime need until a permanent guardian is appointed \_\_\_\_\_ [CT, VA]?
4. Should a parent be able to use the law only if chronically or terminally ill \_\_\_\_\_ [majority], or should there be broader criteria for the law's use \_\_\_\_\_ [CT, IA, IL, MA, PA, WY]?

### DESIGNATION PROCESS

5. Should a designation form be printed in the statute for the parent's optional use \_\_\_\_\_ [CT, IL, MD, NJ, NY, PA]?
6. Should the law require that the designation document be filed in court prior to the triggering event \_\_\_\_\_ [majority], or may the filing take place any time (either before or after the triggering event) \_\_\_\_\_ [VA, WV], or should there be a two-track process through which the parent chooses either to file before the triggering event or after the triggering event \_\_\_\_\_ [FL, NY, NC, PA, WI]?
7. Should the law require the document's signing to be witnessed \_\_\_\_\_ [majority], or leave that choice to the parent \_\_\_\_\_ [CA, IL, VA]?
8. Should the parent have a free hand to choose and describe the triggering events \_\_\_\_\_ [CT, IA, OH, WY], or should the law prescribe the triggering events \_\_\_\_\_ [majority]?
9. If the law is prescriptive, should the triggering events include mental incapacity \_\_\_\_\_ [majority], physical debilitation plus parental consent \_\_\_\_\_ [majority], and death \_\_\_\_\_ [majority]?
10. Whether or not the law is prescriptive, should the parent's consent alone be permitted to activate the guardianship \_\_\_\_\_ [IL, MD, MA, NY, NC, PA, VA, WV]?
11. Should the parent be permitted to revoke the designation at any time \_\_\_\_\_ [majority] and if so, if revocation occurs after the designation document has been filed in court, must the revocation be in writing \_\_\_\_\_ [majority]?

### AGREEMENT OF THE NON-CUSTODIAL PARENT

12. Should the law describe a standard for notifying the non-custodial parent of a court hearing (for example, "reasonable efforts") \_\_\_\_\_ [MD], or should specific notification steps be listed in the law \_\_\_\_\_ [WV], or only the exceptions to notification \_\_\_\_\_ [NJ, NY]?

13. Should there be an absolute requirement for the parent to secure the agreement of any fit and able non-custodial parent \_\_\_\_\_ [CT, FL, IL, MD, NE, PA], or should there only be an opportunity for the non-custodial parent to appear in court and argue in opposition to the guardianship \_\_\_\_\_ [majority]?

14. Should the law provide that the non-custodial parent may request review of the court's decision at any time \_\_\_\_\_ [VA, WV]?

### **ROLE OF THE STANDBY GUARDIAN**

15. Should the law provide that the parent and guardian will have concurrent decision-making power \_\_\_\_\_ [majority], and if so, should there be a specified process for resolving differences between them \_\_\_\_\_ [CT]?

16. Should the standby guardian's duties include informing the court when the triggering event has occurred \_\_\_\_\_ [majority], and gathering and filing evidence of the triggering event (physician's statement, death certificate, etc.) \_\_\_\_\_ [majority]?

17. Should the law require the standby guardian to petition for permanent guardianship when the parent dies \_\_\_\_\_ [IL, VA, WV]?

18. Should there be a presumption that the standby guardian will become the permanent guardian \_\_\_\_\_ [IL, PA]?

### **COURT PROCESS**

19. To determine the "best interests of the child," should the court hold a hearing in every case \_\_\_\_\_ [majority], or only if necessary after the judge reviews the documents in-chambers \_\_\_\_\_ [NC, PA, VA, WV]?

20. Should there be an opportunity for a guardian *ad litem* to be appointed for the child to help the court determine the child's "best interests" \_\_\_\_\_ [CT, IL, NE, NJ, VA, WV]?

21. Should the law specify the time of the court hearing (for example, after the designation documents are filed and before the triggering event occurs) \_\_\_\_\_ [majority], or should the parent control the timing by being permitted to file early or late \_\_\_\_\_ [FL, NY, NC, PA, WI, VA, WV]?

22. Should the law express an evidentiary standard (such as "clear and convincing evidence") for proof that events have occurred or conditions are present \_\_\_\_\_ [IA], or should certain documents be required to be filed (for example, physician's certificate, death certificate, or guardian's affidavit) \_\_\_\_\_ [majority]?

23. Should the law include a process for converting a standby guardianship into a permanent guardianship (for example, filing a separate petition, holding an additional hearing) \_\_\_\_\_ [IL, MA, VA, WV], or should the presumption be that the standby guardian automatically becomes the permanent guardian, absent a parental challenge \_\_\_\_\_ [IA, PA]?

**APPENDIX C**

***SELECTED BIBLIOGRAPHY OF LEGAL LITERATURE***

## SELECTED BIBLIOGRAPHY OF LEGAL LITERATURE

### Law Reviews, Articles, Essays

Brink, Rhonda H., *New Realities in Guardianship Selection*, 41 No.4 Prac. Law 15 (1995).

Useful guide to testamentary options for young, terminally ill parents who wish to provide for their children after the parent's death. Does not address standby guardianship laws, however, it does explain how to create *inter vivos* guardianships, how to preserve rights of the child, how to maintain adoption actions that are begun before death, and what legal elements and human relationships an estate lawyer should be aware of.

Butchma, James T. & Geiersbach, Ronald P., *Standby Guardianship and the Use of Written Designations*, 48 Virginia Lawyer 46 (Dec. 1999).

A Virginia practitioner's guide to applying the Virginia Standby Guardian Law.

Coon, Linda S., *Illinois Standby and Short-Term Guardianship Law* (Families & Children's AIDS Network, 1998).

Compares standby guardianship law to other guardianship alternatives in Illinois: i.e. short term guardianship, guardianship through juvenile court, subsidized guardianship in juvenile court. Succinctly describes processes for obtaining standby guardianship in that State.

McConnell, Joyce E., *Securing the Care of Children in Diverse Families: Building on Trends in Guardianship Reform*, 10 Yale J. L. & Feminism 29 (1998).

Sets forth a proposal for "concurrent guardianship" to cover problems that single mothers have in providing for their children when the mother is sick or dies. Describes the existing legal strategies upon which the proposal is based: standby guardianship, inter vivos testamentary provisions, durable power of attorneys, etc. Author argues that these do not go far enough toward offering the flexibility, access, and concurrent decision-making single mothers need—but by borrowing elements from each, a sufficient regime can be developed. Good analysis of standby guardianship laws to early 1997.

McConnell, Joyce E., *Standby Guardianship: Sharing the Legal Responsibility for Children*, 7 Md. J. Contemp. Legal Issues 249 (Fall/Winter 1995–1996).

Article is strongest in describing Maryland's standby guardianship law and in analyzing that law's shortcomings. It offers proposed amendments to the law that would broaden its reach by eliminating a risk of death provision, and developing the idea of "joint concurrent guardianship" of minor children.

Molee, Lenore M., *The Ultimate Demonstration of Love for a Child: Choosing a Standby Guardian: New Jersey Standby Guardianship Act*, 22 Seton Hall Legis. J. 475 (1998).

A thorough comparative analysis of standby guardianship State laws up to early 1997. Also covers availability of benefits (SSI, TANF) and a few other options that are alternatives to standby guardianship (like short-term and joint guardianships). Describes the New Jersey law in detail.

Mueller, Kristin, *The Evolution of Guardianship Law in Iowa: A Search for Fairness and Justice in Guardianship Proceedings*, 45 Drake L. Rev. 943 (1996–1997).

A broad discussion of guardianship in Iowa, describing its history and current and projected future uses.

*Pennsylvania Enacts Guardianship Law with Novel Features*, AIDS Policy & Law (March 5, 1999) at 6.

A guide for lawyers and social workers to applying the new Pennsylvania standby guardian law.

Retkin, Randye; Stein, Gary L.; Draimin, Barbara Hermie. *Attorneys and Social Workers Collaborating in HIV Care: Breaking New Ground*, 24 Fordham Urb. L. J. 533 (Spring, 1997).

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Roopenian, Laura J., *Family; Guardians and Conservators—Removal of Two Year Requirement of Pending Death or Terminal Condition*, 27 Pac. L. J. 799 (1996).

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Rosenfeld, Sunny, *Developments in Custody Options for HIV-Positive Parents*, 11 Berkeley Women's L. J. 194 (1996).

Student note analysis of Congresswoman Maloney's "National Standby Guardianship Act" introduced Jan. 26, 1995, which would amend Part E, Title IV of the Soc. Sec. Act. Compares Maloney's Act (modeled on the New York law) to California's Joint Guardianship law. Applauds removal from the National Act of the 2-year risk-of-death provision.

Rozmyus, Kelly C., *Representing Families Affected by HIV/AIDS: How the Proposed Federal Standby Guardianship Act Facilitates Future Planning in the Best Interests of the Child and Family*, 6 Am. U. J. Gender & L. 299 (1998).

Contains useful comparison of testamentary, custody, guardianship and foster care proceedings. Analysis predates ASFA. Its central thrust is a critique of the proposed Federal Standby Guardianship law that would have been modeled on New York's standby guardianship law (Congresswoman Maloney's bill).

Sarmiento, Marina T. *The Legal Needs of Women with HIV*, 9 Berkeley Women's L. J. 155 (1994).

Author is director of outreach for an HIV clinic in the Bay area. She advocates use of wills, durable power of attorney, and guardianship as a package that should be introduced for HIV mothers. Critiques the California Joint Guardianship Act.

Schwartz, Meryl, *Reinventing Guardianship: Subsidized Guardianship, Foster Care, and Child Welfare*, 22 Review of Law & Social Change 441 (1996).

Article predates ASFA, so parts relating to subsidized adoptions are not relevant. Describes "subsidized guardianship." Explains its flexibility, frequent cultural appropriateness, and where it fits in to the permanency planning hierarchy. Refers to 10 States currently having programs and how they are principally tailored to fit teens who resist adoption.

Selbin, Jeffrey & Del Monte, Mark, *A Waiting Room of Their Own: The Family Care Network as a Model for Providing Gender Specific Legal Services to Women with HIV*, 5 Duke J. of Gender L. & Policy 103 (Spring, 1998).

An outstanding description of the special needs of HIV-affected single women who provide for families under poverty conditions—and how to serve them with law-social service partnerships.

Selbin, Jeffrey & McAllister, Carolyn, *Issues in Family Law for People with HIV*, in David W. Webber, ed., *AIDS and the Law* (sched. pub. Summer 2000, Supplement to 3<sup>rd</sup> Ed., 1997).

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Shapiro, Lauren, *An HIV Advocate's View of Family Court: Lessons From a Broken System*, 5 Duke J. of Gender L. & Policy 133 (Spring, 1998).

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Taylor-Brown, Susan; Teeter, Judith Ann; Blackburn, Evelyn; Oinen, Linda; and Weddrburn, Lennard. 1998. Parental loss due to HIV: caring for children as a community issue—the Rochester New York experience. *Child Welfare League of America*. 77(2) (March/April). 137–161.

Describes a collaborative model for delivery of aid to families. Cross-disciplinary service group developed a 5 year plan targeting “children of the community” (public health model). Uses pro bono attorneys. Based in medical clinic.

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Describes devastation wrought on African-American population in D.C., and what the typical family arrangement is in that culture. Argues for legal tools that would avoid putting children in foster care. Seeks ways to channel benefits to grandparents who are caring for their grandchildren.

Weimer, Deborah, *Implementation of Standby Guardianship: Respect for Family Autonomy*, 100 Dickinson Law Review 65 (1995).

Author argues that poor people have been stigmatized by courts as potentially unfit parents and their testamentary and other wishes about their children often have been over ridden. Standby guardianship laws are an improvement, in that the parent does not have to give up exercise of decision-making for the children, and the court-approved designation of a guardian makes it more likely that the parent's choice will be respected.

## Manuals and Handbooks

Abrandt, Jeffrey G. and Retkin, Randy. *The Non-Traditional Family: Planning for the Elderly and Those with a Life-Threatening Illness*. 242 Practising Law Institute/Est 405 (1995).

Handbook on tax law and estate planning. Brief description of legal tools to implement temporary care for minors.

*Joint Guardianship in California: A Manual for Providers* (East Bay Community Law Center Berkely, CA, sched. pub. Spring 2000).

Handbook on uses of California Joint Guardianship Law.

McGovern, Theresea and Stewart, Zelda E. *Permanency Planning Worker's Handbook: Legal Permanency Planning Options*. (1995)

Developed by New York HIV Law Project. Provides good comparative analysis of legal options for permanency planning, i.e. guardianship, standby guardianship, custody petition, foster care, early permanency planning (through child welfare office), temporary care and custody, power of attorney, deed of guardianship, and will and adoption. For each option, addresses role of case manager and critiques benefits and liabilities.

**APPENDIX D**

***Guardianship of a Minor***

***Uniform Guardianship and Protective Proceedings Act (1998)***

## Guardianship of a Minor

### SECTION 5-202, PARENTAL APPOINTMENT OF GUARDIAN

#### UNIFORM GUARDIANSHIP AND PROTECTIVE PROCEEDINGS ACT (1998)

To obtain the entire Act, contact the National Conference of Commissioners on Uniform State Laws, 211 E. Ontario Street, Suite 1300, Chicago, IL. 60611. Telephone: (312) 915-0195.

(a) A guardian may be appointed by will or other signed writing by a parent for any minor child the parent has or may have in the future. The appointment may specify the desired limitations on the powers to be given to the guardian. The appointing parent may revoke or amend the appointment before confirmation by the court.

(b) Upon petition of an appointing parent and a finding that the appointing parent will likely become unable to care for the child within [two] years, and after notice as provided in Section 5-205(a), the court, before the appointment becomes effective, may confirm the parent's selection of a guardian and terminate the rights of other to object.

(c) Subject to Section 5-203, the appointment of a guardian becomes effective upon the appointing parent's death, an adjudication that the parent is an incapacitated person, or a written determination by a physician who has examined the parent that the parent is no longer able to care for the child, whichever first occurs.

(d) The guardian becomes eligible to act upon the filing of an acceptance of appointment, which must be filed within 30 days after the guardian's appointment becomes effective. The guardian shall:

(1) file the acceptance of appointment and a copy of the will with the court of the [county] in which the will was or could be probated or, in the case of another appointing instrument, file the acceptance of appointment and the appointing instrument with the court of the [county] in which the minor resides or is present; and

(2) give written notice of the acceptance of appointment to the appointing parent, if living, the minor, if the minor has attained 14 years of age, and a person other than the parent having care and custody of the minor.

(e) Unless the appointment was previously confirmed by the court, the notice given under subsection (d)(2) must include a statement of the right of those notified to terminate the appointment by filing a written objection in the court as provided in Section 5-203.

(f) Unless the appointment was previously confirmed by the court, within 30 days after filing the notice and the appointing instrument, a guardian shall petition the court for confirmation of the appointment, giving notice in the manner provided in Section 5-205(a).

(g) The appointment of a guardian by a parent does not supersede the parental rights of either parent. If both parents are dead or have been adjudged incapacitated persons, an appointment by the last parent who died or was adjudged incapacitated has priority. An appointment by a parent which is effected by filing the guardian's acceptance under a will probated by the State of the testator's domicile is effective in this State.

(h) The powers of a guardian who timely complies with the requirements of subsections (d) and (f) relate back to give acts by the guardian which are of benefit to the minor and occurred on or after the date the appointment became effective the same effect as those that occurred after the filing of the acceptance of the appointment.

(i) The authority of a guardian appointed under this section terminates upon the first to occur of the appointment of a guardian by the court or the giving of written notice to the guardian of the filing of an objection pursuant to Section 5-203.