STATE STATUTES
CURRENT THROUGH JUNE 2018

Standby Guardianship

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A "legal guardianship" is a judicially created relationship between a child and a caregiver that grants to the guardian specific powers and duties with regard to the child's care. While a guardianship is intended to be permanent and self-sustaining, it does not sever the child's legal relationship with his or her parent. Every State permits transfer of guardianship authority over a child from a parent, including an adoptive parent, to another adult when the child has no other parent available to assume responsibility for his or her care and custody. Parents may designate in their will a person to be their child's guardian to provide for the care of the child in the event of the parent's death or permanent disability.

Standby guardianship laws provide parents with a way to legally transfer custody of their child during their lifetime, while also allowing

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them to retain a measure of authority over the child. Many States developed these laws specifically to address the needs of parents living with disabling conditions or terminal illnesses who want to plan a legally secure future for their children. A review of statutes across States indicates that approximately 29 States, the District of Columbia, and the U.S. Virgin Islands have made statutory provisions for standby guardianships.[1]

ELEMENTS OF A STANDBY GUARDIANSHIP

Most standby guardianship laws include these provisions:

- A parent may designate a certain person (with the designee's agreement) to be the guardian for his or her children.
- The guardianship may go into effect during the parent's lifetime and may continue after the parent's death.
- The parent retains much control over the guardianship. He or she may determine when it can begin (although it may commence automatically if the parent becomes seriously ill or mentally incapacitated) and can withdraw the authority if the arrangement does not work to the parent's satisfaction.
- The parent shares decision-making responsibility with the guardian. During the parent's lifetime, the guardian is expected to be in the background, embrace responsibility when needed, and step back when the parent is feeling capable.
- The court order for standby guardianship is supported by the authority of a court that has examined facts relevant to the particular family.

ESTABLISHING A STANDBY GUARDIANSHIP

Many States allow a parent or legal guardian to nominate a standby guardian regardless of the nominator's health status. However, five States and the District of Columbia preclude such nomination unless the parent is either chronically ill or has been diagnosed with a terminal illness.[2] In seven States, the parent must be at significant risk of death or a condition of incapacity that will impair the parent's ability to care for his or her child within the next 2 years.[3]

Standby guardianship is typically established in one of two ways:

- In seven States, the nominating parent must file a petition, followed by a court hearing, prior to the circumstance (which is referred to as a "triggering event") that necessitates the standby guardianship.[4]
- In 21 States and the District of Columbia, the parent may nominate a standby guardian through a written designation that is signed by two witnesses. The nomination must be affirmed by filing a petition prior

[1] The word "approximately" is used to stress the fact that States frequently amend their laws. States that, as of June 2018, have provisions for standby guardianship include Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Maine (effective July 1, 2019), Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Tennessee, Utah, Vermont, Virginia, West Virginia, and Wisconsin.

[2] California, Nebraska, North Carolina, Virginia, and West Virginia.

[3] Colorado, Delaware, Hawaii, Maine, Maryland, Massachusetts, and Wisconsin.

[4] Arkansas, Delaware, Iowa, Michigan, Nebraska, New Jersey, and Vermont.

to or after the triggering event and by attending a court hearing following the event.[5]

- Nine States allow the parent to use either method to nominate a standby guardian.[6]
- Tennessee allows parents to designate a standby guardian through a power of attorney without court approval.

When confirming an appointment for a guardian, approximately 16 States and the Virgin Islands require that at a certain age, the child must be notified of the hearing and that the court must consider the child's preferences. The age requirement varies by State.[7]

ACTIVATING THE STANDBY GUARDIAN'S AUTHORITY

A triggering event is what must occur to activate the standby guardian's authority. Twenty-one States, the District of Columbia, and the Virgin Islands define this event as the parent's death, mental incapacity, or physical debilitation.[8] In seven States and the District of Columbia, the parent must provide consent when physical debilitation is the triggering event.[9] Nine States and the District of Columbia require that an attending physician document the incapacity or debilitation.[10] In eight States, the parent's consent alone is sufficient to activate the guardianship.[11]

Once nominated, the standby guardian is authorized to assume responsibility for the child immediately upon being notified of the occurrence of a triggering event. In 15 States and the District of Columbia, the standby guardian whose nomination was by written designation has a statutorily prescribed amount of time in which to file a petition with the court for official appointment as the child's guardian.[12] In 10 States and the Virgin Islands, the standby guardian who was previously named guardian in a petition to the court must file documents with the court to confirm the appointment of guardianship.[13]

THE NONCUSTODIAL PARENT

Approximately 12 States and the District of Columbia require that both parents, if living, consent to the appointment of a standby guardian.[14] Six States require that notice of any hearing regarding the nomination of a guardian be provided to the child's noncustodial parent.[15] In Massachusetts,

[5] California, Colorado, Connecticut, Florida, Georgia, Hawaii, Illinois, Indiana, Maine, Maryland, Massachusetts, Minnesota, New Mexico, New York, North Carolina, Ohio, Pennsylvania, Tennessee, Virginia, West Virginia, and Wisconsin.
[6] California, Illinois, Maryland, Massachusetts, New York, North Carolina, Virginia, West Virginia, and Wisconsin.
[7] In Arkansas, Idaho, Illinois, Maine, Massachusetts, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, Oklahoma, South Dakota, and Utah the court must consider the wishes of a child that is age 14 or older. In Colorado and Virginia, the court must consider the wishes of a child that is age 12 or older.
[8] Arkansas, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Illinois, Indiana, Maine, Maryland, Massachusetts, Minnesota, Nebraska, New Jersey, New York, North Carolina, Pennsylvania, Virginia, West Virginia, and Wisconsin.
[9] Arkansas, Maryland, Minnesota, Nebraska, North Carolina, Pennsylvania, and Wisconsin.
[10] Colorado, Delaware, Georgia, Hawaii, Massachusetts, New Jersey, New York, North Carolina, and Wisconsin.
[11] Illinois, Massachusetts, New York, North Carolina, Pennsylvania, Virginia, West Virginia, and Wisconsin.
[12] A petition must filed within 20 days in Florida; 30 days in Colorado, Hawaii, Massachusetts, Virginia, and West Virginia; 60 days in Illinois, Minnesota, New York, and Pennsylvania; 90 days in Connecticut, the District of Columbia, and North Carolina; 120 days in Georgia; and 180 days in Maryland and Wisconsin.
[13] Confirming documents must be filed within 30 days in Delaware, Massachusetts, Virginia, and West Virginia; 60 days in Illinois and New Jersey; and 90 days in Maryland, New York, North Carolina, and Wisconsin.
[14] California, Colorado, Connecticut, Delaware, Florida, Georgia, Illinois, Maryland, Minnesota, Missouri, Pennsylvania, and Wisconsin.
[15] Colorado, New Jersey, New York, North Carolina, Virginia, and West Virginia.

a noncustodial parent may prevent the appointment of a guardian by filing a written objection with the court within 30 days. In Maine, the noncustodial parent must file a written objection before the appointment is confirmed by the court. Some States allow the court to proceed without the noncustodial parent's consent under the following circumstances:

- The parent's parental rights have been terminated.[16]
- After reasonable efforts have been made to locate the parent, his or her whereabouts remain unknown.[17]
- The parent is unwilling or unable to assume responsibility for care of the child.[18]

AUTHORITY OF THE PARENT VS. THE STANDBY GUARDIAN

Laws in approximately 10 States and the District of Columbia provide that once a standby guardianship is activated, the standby guardian and parent, while living, have concurrent or shared authority.[19] Statutes in 17 States, the District of Columbia, and the Virgin Islands specifically state that the commencement of a guardianship does not in any way limit or terminate the parent's parental rights.[20] However, four States provide that once the guardianship is activated, the standby guardian assumes sole authority.[21] In six States and the District of Columbia, a standby guardian's authority becomes inactive upon an attending physician's written certification that the parent is restored to health.[22] In Maine and Vermont, the guardianship order includes a written agreement regarding the respective responsibilities of the guardian and the parents, as well any parent-child contact and parental involvement in decision-making.

WITHDRAWING GUARDIANSHIP

In 14 States and the District of Columbia, when a nomination of a standby guardian has been made by written designation, the parent may revoke the designation by informing the standby guardian in writing.[23] After an appointment has been approved by the court, 13 States and the District of Columbia require that a written revocation be filed with the court and that the standby guardian be notified in writing.[24] In eight States and the District of Columbia, a person may refuse an appointment to be a standby guardian by notifying both the court and the parent in writing.[25] In Indiana, a declaration of guardianship expires 90 days after it becomes effective, unless the guardian petitions the

[16] In 12 States and the District of Columbia, including California, Colorado, Connecticut, Delaware, Georgia, Illinois, Maryland, Massachusetts, Minnesota, Nevada, New Jersey, and Pennsylvania.
[17] In 10 States, including Georgia, Illinois, Maryland, Minnesota, Nevada, New Jersey, Pennsylvania, Virginia, West Virginia, and Wisconsin.
[18] In five States, including Illinois, Minnesota, Nevada, Pennsylvania, and Wisconsin.
[19] California, Delaware, Georgia, Minnesota, New Jersey, New York, North Carolina, Pennsylvania, Virginia, and West Virginia.
[20] Colorado, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Minnesota, Nebraska, New Jersey, New York, North Carolina, Pennsylvania, Utah, Virginia, West Virginia, and Wisconsin.
[21] Florida, Illinois, Indiana, and Iowa.
[22] Connecticut, Minnesota, Missouri, Virginia, West Virginia, and Wisconsin.
[23] Colorado, Connecticut, Delaware, Florida, Hawaii, Iowa, Maryland, Massachusetts, Minnesota, Pennsylvania, Tennessee, Virginia, West Virginia, and Wisconsin.
[24] Delaware, Florida, Iowa, Maryland, Massachusetts, Michigan, New Jersey, New York, North Carolina, Pennsylvania, Virginia, West Virginia, and Wisconsin.
[25] Delaware, Florida, Maryland, New Jersey, New York, Virginia, West Virginia, and Wisconsin.

court to extend the guardianship. In Vermont, the parent may file a motion with the court to terminate the guardianship at any time.

OTHER GUARDIANSHIP ARRANGEMENTS

In addition to parental arrangements for guardianship, in eight States the court may appoint a guardian for a minor if all parental rights have been terminated or suspended or limited by circumstances or prior court order.[26] In Idaho, the court may appoint a guardian for a minor upon a finding that the child has been neglected, abused, abandoned, or whose parents are unable to provide a stable home environment. In Maine, the court may appoint a guardian for a minor if the court finds by clear and convincing evidence that the parents are unwilling or unable to exercise their parental rights, including, but not limited to, evidence that the parent is currently unwilling or unable to meet the child's needs or that the parent has failed, without good cause, to maintain a parental relationship with the child.

A court also may appoint as a permanent guardian a relative or other kin when that person has been caring for the child as a foster parent. Kinship guardianship can be a permanency option for a child in the legal custody of a department of social services when reunification with the child's parents or adoption is not possible.[27]

This publication is a product of the State Statutes Series prepared by Child Welfare Information Gateway. While every attempt has been made to be as complete as possible, additional information on these topics may be in other sections of a State's code as well as agency regulations, case law, and informal practices and procedures.

SUGGESTED CITATION:

Child Welfare Information Gateway. (2018). *Standby guardianship*. Washington, DC: U.S. Department of Health and Human Services, Children's Bureau.

[26] Alabama, Arizona, Idaho, Maine, Montana, Nebraska, New Mexico, and Utah.
[27] For more information, see the Child Welfare Information Gateway publication *Kinship Guardianship as a Permanency Option* at https://www.childwelfare.gov/resources/kinship-guardianship-permanency-option/.

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