



Standby Guardianship

Every State permits transfer of guardianship authority over a child from a parent to another adult when the child has no other parent available to assume responsibility for care and custody of the child. A traditional guardianship is used to provide for the care of a child in the event of the parent's death or permanent disability and is generally regarded as a permanent transfer of custody and authority from the parent to the guardian.

One of the more recent approaches to transferring custody is facilitated through standby guardianship laws. Many States developed these laws specifically to address the needs of families living with HIV, other disabling conditions, or terminal illnesses who desire to plan a legally secure future for their

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children. Approximately 23 States and the District of Columbia have made statutory provisions for standby guardianships.¹

Most standby guardianship laws share these provisions:

- A parent may designate a certain person to be guardian for his or her children.
- The guardianship may go into effect during the parent's lifetime and may continue in effect 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 well.
- 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 Guardian

Many States allow a parent or legal guardian to nominate a standby guardian regardless of the nominator's current health status. However, six States and the District of Columbia preclude such nomination unless the parent is chronically ill or has been diagnosed with a terminal illness.² In Colorado and Wisconsin, the parent must be at significant risk of death or incapacity within 2 years.

Standby guardianship is typically established one of two ways:

- Six States require the nominating parent to file a petition, followed by a court hearing, prior to the circumstance

¹ The word approximately is used to stress the fact that the States frequently amend their laws. The States that currently (as of July 2008) have provisions for standby guardianship include Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Iowa, Maryland, Massachusetts, Michigan, Minnesota, Nebraska, Nevada, New Jersey, New York, North Carolina, Pennsylvania, Virginia, West Virginia, and Wisconsin.

² Alabama, California, Nebraska, North Carolina, Virginia, and West Virginia.

(referred to as a “triggering event”) that necessitates the standby guardianship.³

- Seventeen States and the District of Columbia allow the parent to nominate a standby guardian through a written designation that is signed by two witnesses. The nomination must be affirmed by filing a petition prior to or after the triggering event and by attending a court hearing following the event.⁴
- Nine States allow the parent to use either method to nominate a standby guardian.⁵

When confirming an appointment for a guardian, approximately five States require that a child of a certain age must be notified of the hearing and that the court must consider the child’s preferences. The age requirement varies by State.⁶

Activating the Standby Guardian’s Authority

A “triggering event” is the circumstance that must occur to activate the standby guardian’s authority. Nineteen States and the District of Columbia define this event as the parent’s death, mental incapacity, or physical debilitation.⁷ In seven States and the District of Columbia, the parent must provide consent when physical debilitation is the triggering event.⁸ Nine States and the District of Columbia require that an attending physician document such incapacity or debilitation.⁹ In eight States, the parent’s consent alone is sufficient to activate the guardianship.¹⁰

³ Arkansas, Delaware, Iowa, Michigan, Nebraska, and New Jersey.

⁴ California, Colorado, Connecticut, Florida, Georgia, Hawaii, Illinois, Maryland, Massachusetts, Minnesota, Nevada, New York, North Carolina, Pennsylvania, Virginia, West Virginia, and Wisconsin.

⁵ California, Illinois, Maryland, Massachusetts, New York, North Carolina, Virginia, West Virginia, and Wisconsin.

⁶ In Arkansas, Illinois, and Nevada, the court must consider the wishes of a child age 14 or older. In Colorado and Virginia the court must consider the wishes of a child age 12 or older.

⁷ Arkansas, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Illinois, Maryland, Massachusetts, Minnesota, Nebraska, New Jersey, New York, North Carolina, Pennsylvania, Virginia, West Virginia, and Wisconsin.

⁸ Arkansas, Maryland, Minnesota, Nebraska, North Carolina, Pennsylvania, and Wisconsin.

⁹ Colorado, Delaware, Georgia, Hawaii, Massachusetts, New Jersey, New York, North Carolina, and Wisconsin.

¹⁰ Illinois, Massachusetts, New York, North Carolina, Pennsylvania, Virginia, West Virginia, and Wisconsin.

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.¹¹ In nine States, 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.¹²

The Noncustodial Parent

Approximately 13 States and the District of Columbia require that both parents, if living, consent to the appointment of a standby guardian.¹³ Six States require that notice of any hearing regarding the nomination of a guardian be provided to the child's noncustodial parent.¹⁴ 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.¹⁵
- After reasonable efforts have been made to locate the parent, his or her whereabouts remain unknown.¹⁶
- The parent is unwilling or unable to assume responsibility for care of the child.¹⁷

¹¹ A petition must be filed within 20 days in Florida; 30 days in Colorado, Hawaii, Virginia, and West Virginia; 60 days in Illinois, Minnesota, New York, and Pennsylvania; 90 days in Connecticut, the District of Columbia, Massachusetts, and North Carolina; 120 days in Georgia; and 180 days in Maryland and Wisconsin.

¹² Confirming documents must be filed within 30 days in Delaware, Virginia, and West Virginia; 60 days in Illinois and New Jersey; and 90 days in Maryland, New York, North Carolina, and Wisconsin.

¹³ California, Colorado, Connecticut, Delaware, Florida, Georgia, Illinois, Maryland, Massachusetts, Minnesota, Nevada, Pennsylvania, and Wisconsin.

¹⁴ Colorado, New Jersey, New York, North Carolina, Virginia, and West Virginia.

¹⁵ In 12 States and the District of Columbia, including California, Colorado, Connecticut, Delaware, Georgia, Illinois, Maryland, Massachusetts, Minnesota, Nevada, New Jersey, Pennsylvania.

¹⁶ In 11 States, including Georgia, Illinois, Maryland, Massachusetts, Minnesota, Nevada, New Jersey, Pennsylvania, Virginia, West Virginia, and Wisconsin.

¹⁷ In six States, including Illinois, Massachusetts, Minnesota, Nevada, Pennsylvania, and Wisconsin.

Authority of the Parent vs. the Standby Guardian

Approximately 11 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.¹⁸ Statutes in 15 States and the District of Columbia specifically state that the commencement of a guardianship does not in any way limit or terminate the parent's parental rights.¹⁹ However, three States provide that once the guardianship is activated, the standby guardian assumes sole authority.²⁰ In five 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.²¹

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.²² 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.²³ In eight States and the District of Columbia, a person may refuse an appointment to be a standby guardian by notifying the court and the parent in writing.²⁴

¹⁸ California, Delaware, Georgia, Massachusetts, Minnesota, New Jersey, New York, North Carolina, Pennsylvania, Virginia, and West Virginia.

¹⁹ Colorado, Delaware, Hawaii, Illinois, Maryland, Massachusetts, Minnesota, Nebraska, New Jersey, New York, North Carolina, Pennsylvania, Virginia, West Virginia, and Wisconsin.

²⁰ Florida, Illinois, and Iowa.

²¹ Connecticut, Minnesota, Virginia, West Virginia, and Wisconsin.

²² Colorado, Connecticut, Delaware, Florida, Hawaii, Iowa, Maryland, Massachusetts, Minnesota, Nevada, Pennsylvania, Virginia, West Virginia, and Wisconsin.

²³ Delaware, Florida, Iowa, Maryland, Massachusetts, Michigan, New Jersey, New York, North Carolina, Pennsylvania, Virginia, West Virginia, and Wisconsin.

²⁴ Delaware, Florida, Maryland, New Jersey, New York, Virginia, West Virginia, and Wisconsin.

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