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# Standby Guardianship Legislation: At the Midway Point

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## I. INTRODUCTION

### A. What is standby guardianship legislation?

Standby guardianship legislation allows a parent or guardian<sup>1</sup> who suffers from a progressively chronic or irreversibly fatal illness to ensure the current, effective appointment of a guardian of the person or property of his or her minor children to act sometime in the future during the lifetime of the parent without affecting existing parental rights. The primary motivation behind the introduction of such legislation has been the proliferation of degenerative, incurable diseases, such as HIV/AIDS, cancer, multiple sclerosis, and muscular dystrophy, among individuals who have minor children. The need is particularly acute for single parents, typically women, who carry the child-care burden alone. Standby guardianship legislation permits parents to plan for their certain impending disability, incapacity, or death, and each state should enact legislation to enable parents to do so.

### B. Where have standby guardianship statutes been enacted or considered?

As of the writing of this article, 16 states and the District of Columbia have enacted standby guardianship legislation. Three other states have adopted the Uniform Guardianship and Protective Proceedings Act (“UGPPA”), and five more have passed statutes containing provisions similar to those contained in standby guardianship statutes.<sup>2</sup>

The year 1997 proved a watershed year for standby guardianship legislation. Congress passed the Adoption and Safe Families Act of 1997, which states, in pertinent part, “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 parents’ minor child.”<sup>3</sup> In the same year, the National Conference of Commissioners on Uniform State Laws approved the UGPPA.<sup>4</sup> Only three states—Colorado, Hawaii, and Minnesota—have adopted the UGPPA. Even so, 16 states and the District of Columbia have enacted their own standby guardian-

ship legislation or laws resembling standby guardianship statutes since the UGPPA’s approval. Prior to 1997, only eight states had any sort of standby guardianship legislation. Today, approximately half of the states continue to lack any type of standby guardianship laws, depriving chronically ill or terminally ill adults in those states of the ability to plan for the future care of their children during the remainder of their lives.

Many standby guardianship statutes exist independent of states’ existing guardianship legislation. Some states, however, have melded standby guardianship provisions into existing guardianship statutes. While the independently drafted statutes may result in some inconsistencies, the separation or melding of guardianship laws does not appear detrimental to the guardianship statute’s effectiveness. Instead, it is the procedural and substantive provisions of these laws that determine how effectively standby guardianship legislation will operate. All states, whether they have standby guardianship legislation or have considered enacting such legislation, can benefit from a study of existing laws. Additionally, states that either have not considered enacting or have opted not to enact standby guardianship legislation should study other states’ statutes to maximize the efficacy of any newly crafted statutes.

This article will begin by exploring the genesis of standby guardianship legislation. It will then compare and contrast the features of the statutes enacted thus far, identify the policies those statutes seek to foster, and analyze which existing statutory features appear to best promote such policies. The goal is for trusts and estates lawyers to be better prepared to take an active role in drafting and improving standby guardianship legislation in their respective states.

## II. BACKGROUND

### A. History and development of standby guardianship legislation

The traditional methods for designating a guardian of the person or property of a minor are by

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<sup>1</sup> Throughout this article, the word “parent” refers to the adult or adults with legal custody or parental rights over the child, whether those adults are technically “parents,” “guardians,” or

“legal custodians” under the law.

<sup>2</sup> See Appendix A.

<sup>3</sup> Public Law 105-89, 111 Stat. 2115.

<sup>4</sup> See [www.nccusl.org](http://www.nccusl.org).

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will and, in some states, deed of guardianship (an arcane procedure at best). These methods remain viable when, as in most cases, the death of a parent or guardian of a minor child cannot be anticipated, as in the case of an accident, homicide, or a sudden illness. The advent and progression of HIV/AIDS, however, has highlighted the fact that the traditional planning procedures for the care of minors are inadequate to address the needs and concerns of parents or guardians who suffer from any chronic or fatal illness and who know it is overwhelmingly likely that the time will come when they will no longer be capable of caring for their minor children. Designations of guardian by will or deed do not enable the parent or guardian to know that his or her choice of guardian will be respected because the adjudication of guardianship will not occur until after death. The designation of guardian, unlike a designation of executor or trustee, is, in fact, merely precatory because it is subject to a post-death determination of the "best interests" of the child.

While it is technically possible for a traditional guardianship proceeding to be brought during the lifetime of the parent, the awarding of guardianship to someone other than the parent would, depending upon the state, either terminate parental rights or at least confer absolute decision-making power upon someone else. This factor alone deters the overwhelming majority of terminally ill parents from availing themselves of traditional guardianship procedures. Adoption, inasmuch as it entails a permanent surrender of parental rights and child custody prior to the death of the parent, provides a similarly unsatisfactory solution. Additionally, foster care proves an inadequate solution because the parent or guardian loses custody of the child, as well as the opportunity to select their child's foster parents, a role usually left to the foster care agency.<sup>5</sup>

The glaring need for lifetime guardianship proceedings first became apparent among the indigent population, where the need undoubtedly remains the greatest. Single parents are the most in need of a standby guardianship statute; where there is not a reliable second parent to take over the child's care, the single parent bears the responsibility of childcare alone. A mother may have children by different fathers; after her death, each father or their relatives may try to reclaim that father's child, thus separating a sibling group, to the detriment of the children. Single

parenthood and half-siblings are, of course, not the exclusive province of the indigent. Therefore, the need for standby guardianship legislation exists across socioeconomic lines. There is a rising number of non-traditional, single-parent households, including those in which the parent (1) does not remarry after a spouse dies; (2) remarries after a spouse dies but the step-parent does not adopt the child; (3) adopts a child as a single parent; (4) adopts a child and the parent's companion, same sex or otherwise, is unable to adopt the child because the parent and the companion are not married; (5) bears a child as a single parent through artificial insemination from an anonymous donor; (6) bears a child and the identity of the father is unknown; or (7) bears a child and the father's whereabouts are unknown or the father refuses to acknowledge paternity of the child.

Whenever any single parent, or any parent where the other parent is available but unfit to care for a child, has a chronic or fatal illness, that parent knows that he or she has a finite amount of time to see to the welfare of his or her children. There must be a procedure to enable such a parent to ensure during her lifetime that the person she selects to care for her children in her place is empowered to act while simultaneously preserving her own parental rights.

A parent appointing a standby guardian will have different needs from a parent appointing a traditional guardian for her children. The following features are unique to standby guardianships: (1) the proceeding may be brought during the parent's lifetime; (2) the activation of the guardianship occurs at a future point in time, which may be prior to death; and (3) the parental rights of the parent or guardian who is still alive at the time the guardianship commences are in no way affected. The procedure is tantamount to a declaratory judgment that the designation of the standby guardian made by the ill parent or guardian is effective.<sup>6</sup> All of the statutes are written so as to ensure that the guardianship becomes effective immediately or soon after the occurrence of a triggering event. Most impose minimal or no procedural requirements on the standby guardian following the triggering event, thus minimizing the procedural burden. This ensures that a responsible adult will see to the child's care as soon as his or her parents become unable to do so.

Although some states give effect to a testamentary designation of a guardian while a parent is

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<sup>5</sup> Kinship foster care (where available), which permits a family member to become a foster parent, while more attractive than traditional foster care, is still not a solution.

<sup>6</sup> The concept of this legislation is not dissimilar from that of

ante mortem probate legislation, which is currently being considered by several states in order to address the needs of elderly individuals who may be facing a protracted period of incapacity and who wish to ensure that their dispositive wishes will be followed.

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living, a testamentary designation may prove inadequate to meet the child's needs during his parent's lifetime. A lifetime designation procedure, regardless of whether the confirmatory court proceeding is brought pre- or post-mortem, helps preserve the ill parent's choice and prevents unnecessary upheaval in the child's life. For example, in a world with no standby guardianship legislation, a child may spend months living with a neighbor or grandparent while his parent is too ill to care for him. Following the parent's death, the child may then be placed with a different relative in accordance with the parent's testamentary designation. This second move could be very disruptive to the child, who has already either lost a parent or seen a parent grow very ill. Standby guardianship reduces the likelihood of a child being placed in, then uprooted from, various homes. In addition to honoring the parent's wishes, standby guardianship affords the child a greater degree of continuity of care than traditional guardianship proceedings might allow.

This mechanism remains important for posthumous guardianship proceedings. In many instances, an explanation of why the child's other parent or nearest relative would be unfit for guardianship, in the opinion of the parent, may be regarded by the other parent or nearest relative as being libelous. Because wills are public documents, in many states libelous material can be excised before a will is admitted to probate with the result that no effective guardianship designation is made in the will. In addition, in many states testamentary designations of guardians require that the will be probated even if there are no assets disposed of by the will—for the tautological reason that the document is not a will until probated and therefore no effective designation has been made. A lifetime designation procedure, regardless of whether the court proceeding is brought pre- or post-mortem, will help preserve the reasoning of the ill parent or guardian as to why the chosen guardian is the most appropriate choice.

New York and Illinois developed some of the earliest standby guardianship legislation, followed by UGPPA. Most states with standby guardianship laws have followed, at least to some extent, either the New York model or the model set forth in the UGPPA. Massachusetts followed the Illinois model, and variations on all three of these models have emerged as more states enact this form of legislation.

The Illinois model contains no definitions of the illness or other conditions necessary for a parent to avail herself of a court proceeding or any definition of the incapacity or disability necessary to trigger the standby guardian's authority. The Illinois

model therefore has the attraction of being fairly simple but the drawback of inviting unnecessary judicial intervention to administer due to its amorphous applicability. Another feature peculiar to the Illinois model is that there are two different offices of guardian, depending upon whether the guardian acts pursuant to court authority or to designation by the parent or guardian.

In the New York model, medical definitions are provided both for the illness that would entitle someone to avail herself of this court proceeding and the degree of incapacity or disability that will trigger the appointment of the standby guardian. In addition, the office of standby guardian is the same whether the guardian is appointed by the court ahead of time or merely designated by the individual beforehand and later confirmed by the court. Like health-care proxy and living will legislation, the New York model is the product of the joint efforts of child welfare experts, social epidemiologists, and attorneys. The New York model is therefore more complicated, but it invites much less debate over who can avail herself of the procedure and whether or not the triggering event has, in fact, occurred.

Apart from the three UGPPA states, each state's standby guardianship legislation contains some unique feature or singular provision. Therefore, states considering the enactment of standby guardianship legislation, as well as states seeking to amend existing legislation, would benefit from a broad examination of other states' standby guardianship statutes.

#### **B. Who may avail herself of a standby guardianship statute?**

Most states with standby guardianship legislation allow the qualifying parent, legal guardian, or legal custodian to designate a standby guardian for a child in his or her care. New York's statute is unique in that it also allows for the child's primary caretaker, where the parent or legal guardian cannot be located, to petition for a standby guardianship appointment when the actual parents cannot be located. This provision recognizes that in some families the primary caretaker may be an adult with no parental or legal relationship with the child and that this category of caretakers may yet have a need to appoint a standby guardian. West Virginia's statute, which allows anyone acting on the parent's behalf to petition the court, recognizes that the parent herself may be unable to physically get to the courthouse at the time the petition is filed. Missouri's legislation is highly flexible, as it allows the "parent, legal guardian, or other court-approved party interested in the minor's welfare" to petition for appointment of a legal guardian, and Virginia's legislation allows "any person" to petition for

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the appointment of a standby guardian. Wyoming does not have a standby guardianship statute, but its emergency and temporary guardianship statute contains a provision allowing the child's caregiver to seek such a guardianship.

### **C. Additional alternative guardianship statutes**

Five states, including Wyoming, have stopped short of enacting standby guardianship legislation but have enacted laws providing for alternate guardianship forms, such as "temporary," "emergency," or "joint" guardianships. Temporary or emergency guardians cannot function concurrently with a disabled parent, and the duration of these guardianships is severely limited. California's "joint guardianship" statute enables the guardian to make decisions concurrently with the parent; however, the joint guardian is not empowered to make any decisions regarding the child without consulting the appointing parent. So as to provide comprehensive information regarding alternative guardianship forms, these guardianship statutes, along with the more relevant ones, are listed in Appendix B to this article, but they are not the focus of this article.

## **III. POLICY CONSIDERATIONS AND RECOMMENDATIONS**

There appear to be at least seven classes of interests that the existing standby guardianship statutes seek to balance: (1) the interests of the minors; (2) the interests of the parents; (3) the interests of the standby guardians; (4) the interests of attending physicians; (5) the interests of the court; (6) the interests of schools and other entities and individuals that deal with children; and (7) practicability of administration. An additional interest that should be fostered is the national interest in interstate uniformity. Without such uniformity, the statute may unwittingly encourage terminally ill parents to migrate to those states with the least onerous standby guardianship statutes. Furthermore, in view of the large number of individuals who regularly migrate for employment and other independent reasons, a standby guardianship designation validly made in another state should be valid wherever the client may move.

### **A. Appointment by the court**

A mechanism for the judicial appointment of a standby guardian by the court during the parent's or guardian's lifetime is a necessary statutory feature. The ability to settle issues relating to a child's custody as early as possible provides peace of mind to a parent or legal guardian. It also permits the preservation of the testimony of the parent or guardian, particularly when the parent's or guardian's choice of standby guardian does not seem like natural choice,

such as when the surviving parent or guardian is allegedly unfit.

### **B. The filing of the petition**

Whether expressed in terms of standing to file a petition or the court's jurisdiction to proceed upon the petition, this statutory feature should identify with clarity those who can initiate the proceeding.

All persons with parental rights should have standing to file a petition for the appointment of a standby guardian. A provision allowing a legal guardian to file a petition for the appointment of a standby guardian is a desirable statutory feature, particularly where the parents may already be dead and now the guardian is ill. A handful of states, including Florida, Missouri, New Jersey, and New York, contain this desirable feature; however, many standby guardianship provisions provide only for the parent's ability to petition the court.

Illinois permits other relatives or friends with an interest in the child's welfare to petition provided that those with parental rights are joined. While this may be a convenient measure for an ill parent or guardian, if she has capacity she should be able to be the petitioner. If the ill parent or guardian does not have capacity, the court would still be able to entertain a conventional guardianship proceeding brought during the parent's lifetime.

### **C. Notice requirements**

Almost all the statutes require that certain parties receive notice of the proceedings. Most statutes incorporate the notice requirements of their existing guardianship statutes into standby guardianship laws. Illinois, New Jersey, West Virginia, and the UGPPA states separately require notice to a minor 14 years of age or older. Wisconsin and Virginia require such notice to children aged 12 or older. In Iowa, the minor must receive notice no matter what his age, but he may receive it through his attorney or in some other manner if the court allows it. New Jersey additionally provides that younger children should receive notice at the court's discretion. Illinois additionally requires notice to the child's near relatives.

While a teenage minor ought to receive notice of such a proceeding, it is unclear whether relatives without care or custody of the minor ought automatically to receive notice. While these parties might have helpful insights, their participation may cause complications and delay. On balance, a requirement—as opposed to an option—for notice to be given to a child's near relatives may cause more problems than it solves. Ideally, standby guardianship legislation should be incorporated into each state's existing legislation for traditional, minority guardianships so that notice requirements do not differ between guardianship procedures.

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## **D. Contents of the petition**

### **1. Basic information**

The statute should require that the petition present the following information: (a) the child's identity; (b) the identity and whereabouts of persons with parental rights over the child; (c) information regarding the person to be appointed as a standby guardian; (d) limitations, if any, on the powers of the standby guardian; and (e) the reasons for the filing of the petition. In order to promote the best interests of all of the parties involved, it is necessary that the court have the information listed above. The existing statutes are generally in agreement in this respect. North Carolina also requires the disclosure of any pending court proceedings in any jurisdiction that may affect the child for whom a guardian is sought. This provision is a desirable addition. If, for example, there is a custody or juvenile court proceeding involving the child, such a matter could affect the court's designation of a standby guardian for that child.

### **2. Written designations of standby guardian**

Most of the statutes require a separate written designation of a standby guardian in addition to the petition. The execution of this designation imposes separate formalities, which appear to combine the burdens of seeking court appointment with the different burdens of appointment by document. While formalities ensure that a parent will carefully consider the decision to appoint a standby guardian, the courtroom should suffice to serve this end.

Many states have a suggested or recommended form for the written designation in their standby guardianship statutes, including Georgia, Connecticut, Maryland, New Jersey, New York, Pennsylvania, and Wisconsin. Depending on the state, the written designation may follow the general format of the designation form in the statute, or it is required to be "substantially" the same as the one contained in the statute, as is the case in Wisconsin. Illinois alone allows the written designation to be made in any form. States may want to include a suggested designation form in their statutes but may not want to require strict compliance with those forms in court. This would encourage some degree of uniformity and certainty within the state without imposing unduly rigid procedural burdens on the designating parent.

### **E. Standards for appointment by the court**

While all of the statutes provide for consideration of the child's best interests in deciding whether to appoint a guardian, the Illinois and Massachusetts statutes focus solely on whether the appointment of the standby guardian is in the best interests of the child. The other statutes also consider the illness or

incapacity of the parent or guardian. It is unclear why this procedure should be made available to a parent or guardian who is neither ill nor disabled. Indeed, it would be an abuse of limited judicial resources to permit healthy parents to bring such a proceeding for the purpose of ensuring that a relative with whom they are no longer on speaking terms will never get custody of their child in the unlikely event that they should have an accident or for some other emotional gratification. Traditional, post-mortem guardianships and existing inter vivos procedures, such as foster care and temporary care and custody, appear to meet the legitimate needs of parents or guardians who are neither ill nor disabled.

### **F. Ability to control the scope of the standby guardianship**

As parents are frequently in the best position to evaluate their needs and the needs of their child, they should be allowed a certain degree of freedom in creating the scope of the standby guardianship. On the other hand, the ability to individually tailor the scope of the standby guardianship, such as in Maryland, is likely to impose undue burdens on the court and attendant delays on the parties. Consequently, the statute should enumerate several choices for petitioners, of events or dates that will both trigger and terminate the standby guardianship, thereby enabling them to define the standby guardianship without sacrificing administrability. All of the statutes permit a petitioner to appoint a standby guardian of the person or property or both of a minor. Some statutes include the ability to designate a guardian for a "child likely to be born," which seems a desirable feature. In fact, adding the ability to make such an appointment for any after-born child might make sense. A model statute should probably not allow customization of the powers of the standby guardian in the interest of administrability.

### **G. Appointment of an alternate standby guardian by the court**

Some, but not all, of the statutes provide for the designation of an alternate standby guardian, either by the parent or the court. Ideally, all statutes should provide for the appointment of an alternate standby guardian by the court on the petitioner's request. The availability of an alternate standby guardian promotes the interest of the child and the parents or legal guardians by facilitating the settlement of custody issues in advance. The appointment of an alternate standby guardian also reduces the burden on the court by consolidating proceedings for the appointment of a standby guardian that may arise at a later date, respects the ill parent's wishes, and further protects the child. New Jersey, North Carolina, and West Virginia have some of the most comprehensive provisions

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regarding appointment of an alternate standby guardian and should serve as a model for other states.

#### **H. Commencement of the standby guardian's authority**

In almost every state with a standby guardianship statute, the standby guardian's authority commences immediately upon the occurrence of the event specified in the relevant court documents (incapacity, debilitation, or death of the parent). In Pennsylvania, when the petition to appoint a standby guardian was filed prior to the parent's incapacity, debilitation or death, the guardianship commences immediately. However, when the petition was filed following such an event, the standby guardian receives immediate authority to act as guardian or co-guardian for a period of 60 days. He must file a petition with the court within that 60-day period to avoid losing all authority over the child. This is a desirable feature because it minimizes procedural burdens where advance planning occurred; however, in the event that a parent becomes incapacitated prior to appointing a standby guardian, the statute provides for immediate child care needs and the possibility of long-term care without eliminating some level of judicial oversight of the appointment.

In Illinois, the standby guardianship does not take effect prior to court approval. Certain events, such as the mental incapacity, physical disability, or death of a parent must be verified before the court. In Florida, New Jersey, and Massachusetts, however, the guardianship takes effect immediately. In defining the allowable means of verification, drafters should be sensitive to the harmful effect of delaying the commencement of the standby guardianship. While some formality in establishing the occurrence of the triggering event may be necessary, such as the provision of a death certificate, or, as in Connecticut, the standby guardian's signed affidavit stating that the triggering event has occurred, an excess of formalities will generate delays in the commencement of the standby guardianship that are harmful to the child's welfare. If the occurrence of the triggering event must be verified by the determination of a physician, for example, the standby guardianship should commence as soon as possible after a record of that determination becomes available. None of the statutes contains model forms for verifying that a triggering event has occurred, but Connecticut's provision for a signed affidavit should serve as a model for other states seeking to introduce some degree of formality without overwhelming the court system, medical personnel, and the standby guardian with excessive procedural burdens.

#### **I. Procedure following appointment**

After a reasonable period of time (between

60 and 90 days) of the occurrence of the triggering event, the standby guardian should be required to petition the court for confirmation of the appointment. This procedure should involve, among other things, the filing of proofs of the occurrence of the triggering event. Florida's period of 20 days appears too short for this purpose.

Procedures relating to the filing of a bond or other such provisions relating to guardianship should be governed by the state's general minority guardianship statute in order to facilitate administration.

Lastly, the standby guardian should be required to inform the parent or legal guardian, provided the parent or legal guardian can understand the information, of the commencement of the standby guardianship and the right of the parent or legal guardian to revoke the appointment.

#### **J. Powers and duties of the standby guardian; legal effect of appointment**

The standby guardian should be given all of the powers of a legal guardian, unless the powers are expressly limited by the court's decree appointing the standby guardian. Most states with standby guardianship statutes grant the standby guardian power over the child's person and his property.

The majority of the guardianship statutes provide that the standby guardian will serve as guardian for the minor child's property as well as his person. Although parenting skills and financial savvy are not necessarily correlated, it is reasonable that, as a stand-in for the child's actual parent, the standby guardian should take over the full parental role, rather than divvying up tasks. If the standby guardian feels the child's assets are too complex for the guardian to manage, the guardian can appoint a financial advisor or trustee.

#### **K. Legal effect of appointment**

All the statutes provide that the designation of a standby guardian does not affect the rights of other persons with parental rights over the child. This provision serves to encourage parents and guardians who are too ill to take advantage of standby guardianship proceedings.

#### **L. Revocation of appointment by petitioner**

About one-third of states with standby guardianship statutes provide that the petitioning parent or guardian may revoke a standby guardianship by notifying the court and the standby guardian of the revocation in writing. Massachusetts requires the notification of "all necessary parties," an indeterminate standard with the potential to cause confusion and delay. Oral revocations are permitted in New Jersey and Wisconsin in the presence of clear and convincing evidence. While oral revocation may be desirable if a parent is too incapacitated to sign a written revocation,

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such a revocation is unnecessary if the parent has sufficient capacity to sign his or her name. Moreover, allowing oral revocation may not be adequate insofar as informing the child's school, doctors, and others of the revocation of authority.

Georgia and Pennsylvania's revocation provisions are among the most detailed. Georgia's rules differ depending on whether the standby guardianship is being revoked prior to or following the triggering event. Prior to the triggering event, the standby guardianship may be revoked *without notice to anyone*, either by destroying the designating document or by explicitly revoking the designation in writing. Following a determination that the parent's mental or physical condition has deteriorated to the point where a standby guardianship would be effective, the standby guardian must be notified and the revocation filed with the court. In Pennsylvania, an unwritten revocation will be considered if there is clear and convincing evidence demonstrating that the designation has actually been revoked. Where a parent executes a written revocation prior to filing the petition with the court, she may revoke the initial designation by destroying it and by notifying the standby guardian. If the petition has already been filed with the court, the parent must write and file the revocation with the court, in addition to notifying the standby guardian of the revocation.

Although allowing subsequent revocation of a standby guardian's appointment is a desirable feature of standby guardian legislation, certain procedural requirements ought to be imposed. The law should encourage serious, final decision-making with regard to appointing standby guardians. If a parent can easily revoke such an appointment, the parent may make a hasty decision when designating a standby guardian. There must be some punctilio of finality when the initial designation was made, in the interests of certainty and predictability, for the standby guardian as well as the affected child.

Arkansas, Missouri, and Nebraska have no provisions for the revocation of standby guardian appointment and should amend their statutes to add this very desirable feature. Interestingly, the UGPPA states explicitly state that once the court has confirmed the designation, the designating parent may not revoke the appointment. California, however, recognizes that at times revocation may become necessary and provides for the removal of a guardian where the court finds that the guardian has acted inappropriately or must be removed from some other reason. California's statute is a joint guardianship statute, which differs from a standby guardianship statute, but still succeeds at providing the optimal model for removal of a guardian.

#### **M. Renunciation by the standby guardian**

New York, Maryland, New Jersey, Massachusetts, and North Carolina provide that the standby guardian may renounce a standby guardianship at any time before its commencement by notifying the court and the petitioner of the renunciation. Again, in Massachusetts, "necessary" parties must be notified, and in New Jersey notice of the renunciation must also be served on a minor over age 14.

The opportunity to renounce a guardianship appointment is a desirable feature, as it is not in any party's interest to appoint a standby guardian who is unwilling or unable to be a guardian of the child. Notice to the court and alternate standby guardian should be in writing so as to settle conclusively the issue of the child's custody for the parties involved. The statute should not require the petitioner to comply with undue formalities in the execution of the written renunciation.

#### **N. Termination of the standby guardianship appointment**

In UGPPA states, the standby guardianship is terminated upon the child's death, adoption, emancipation, attainment of majority, or as ordered by the court. This allows for the child's continual care until the guardianship is no longer needed. By including the scenarios that would terminate the standby guardianship, the UGPPA ensures that guardianships will not be terminated for minor reasons or for no reason at all. Arkansas, Nebraska, Wisconsin, and West Virginia have very similar provisions relating to the standby guardianship's termination.

Missouri allows the affected child who is age 14 or older to petition the court to terminate the standby guardianship. While this provision may be desirable in certain situations, it seems unwise in the aggregate to allow teenagers to so petition. The Missouri statute contains no provision for termination of the guardianship in other situations. None of New Jersey, New York, Pennsylvania, Texas, or West Virginia provide for the termination of the guardianship in the event of death, the child's attainment of majority, or the other reasons provided in the UGPPA.

#### **O. Whether to unify or divide the standby guardian's functions**

States considering standby guardianship legislation are advised to unify the standby guardian's functions. Only Illinois and Massachusetts divide the function of the standby guardian into two separate offices—that of the standby guardian and the short-term guardian in Illinois, and the proxy and the emergency proxy in Massachusetts. This division of function is undesirable, as it adds an additional layer of

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complexity, imposes additional burdens on the court, and might potentially pose a disruptive force in the life of the minor to have two different individuals dividing the guardianship tasks.

#### **IV. NOTEWORTHY DEVELOPMENTS**

##### **A. Noteworthy provisions in standby guardianship legislation**

Many states with their own standby guardianship statutes have incorporated unique features, not easily categorizable, into their laws. Florida, for one, requires that the potential standby guardian undergo a full criminal record and credit history check. Illinois' statute covers the guardianship of the chronically ill adult's children and "children likely to be born," ensuring that children born or conceived following the designation will receive the same guardianship care as their siblings. While these are the most unusual provisions, each statute contains its own variation of the more common provisions. Each state considering legislation of this kind should look carefully to each provision and choose the one that best reflects that state's standby guardianship goals.

##### **B. States with legislation resembling standby guardianship statutes**

The designation of a standby guardian generally does not affect the rights of other persons with parental rights over the child. This encourages parents and guardians who are ill to take advantage of standby guardianship proceedings. Some states that lack standby guardianship legislation do have statutes providing for the long-term care of children in exigent circumstances. Following is a brief summary of each state's currently effective non-traditional guardianship legislation.

###### **1. California**

California's joint guardianship statute allows a custodial parent with a terminal condition to designate a guardian. The court may also appoint the custodial parent and a person nominated by the custodial parent as joint guardians of the minor. The court is free to authorize one joint guardian to act alone as to all matters within the order appointing joint guardianship if the other joint guardian is unable to act, thus terminating the joint guardianship and creating a sole guardianship. Joint guardianship is available in California when the custodial parent has a terminal condition, as defined by statute. One drawback is that the statute does not provide for revocation.

###### **2. Iowa**

Of all the non-standby guardianship statutes considered in this article, Iowa's statute most closely resembles an actual standby guardianship law. The appointing parent has a great deal of discretion as to the petition's contents, such as what sort of event or medical condition empowers the standby guardian to

act. Another notable aspect of the Iowa statute is that it requires notice to be given to the affected child. Notice under the statute may be given to the child through his or her attorney or through other methods as approved by the court. In appointing a guardian, Iowa courts will grant great weight to the preference of children aged 14 or older.

###### **3. Ohio**

Ohio allows the appointment of a limited guardian, for a specified or indefinite time period, with specific limited guardianship powers. An emergency guardian can be appointed for a period of up to 72 hours where such action is required to prevent injury to the minor. Ohio's statute is extremely limited as compared with traditional or standby guardianship legislation. It refrains from granting full parental powers to the guardian and explicitly limits the scope of the guardian's authority.

###### **4. Texas**

One key feature of Texas's statute is that it designates, in great detail, who should be appointed guardian where the parent made no such provisions. Where there is one surviving parent and he or she becomes incapacitated or dies, the court is obligated to appoint the person designated in his or her will or declaration to serve as guardian in preference to those otherwise entitled to serve. If the designated guardian is unable, unavailable, or unwilling to serve, the court is permitted to depart from the provisions of the will or declaration.

###### **5. Wyoming**

Wyoming's statute, like Ohio's, provides for emergency and temporary guardianship. Additionally, it allows a child's caregiver to petition the court for appointment as the child's temporary guardian for educational, medical, and dental care purposes. This is a well-thought-out provision, as it enables a child's actual or de facto parent to ensure that someone else is empowered to act in his or her place in case of emergency.

##### **C. Newest legislation**

Missouri passed a standby guardianship statute in spring 2006. That law went into effect August 28, 2006. In Kentucky, which also introduced standby guardianship legislation this year, the result was different. State Senator Marzian introduced HB 221, "An act relating to the standby guardianship of minors," to Kentucky's State House. The House passed the bill unanimously. The bill then came before the State Senate's Judiciary Committee, where it died when the Committee failed to hold a hearing on it. The bill may be re-filed in 2007, however. Kentucky's Law Revision Committee spokesman was unable to say why the committee did not hold a hearing and speculated that it may have been due to the



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committee chair's or the leadership's sentiments regarding the bill or simply a shortage of time.

## V. CONCLUSIONS

The past decade has seen the enactment of many new standby guardianship statutes. Currently, half of

the states and the District of Columbia have incorporated such statutes into their bodies of law. Hopefully, the remaining states will follow suit in the next decade, protecting the ability of terminally ill residents to provide and protect their children as fully as in the rest of the country.

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