AIDS Law Project of Pennsylvania
a non profit public interest law firm
serving people with HIV and AIDS

Understanding Pennsylvania's Standby Guardianship Law

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A New Era in Permanency Planning for Terminally Ill Parents: The Standby Guardianship Act of 1998

Beginning in January 1999, parents in Pennsylvania have a more effective legal tool to make long term plans for their child's future care. Thanks to the Pennsylvania Standby Guardianship Act of 1998 terminally ill parents with custody of their children can adequately ensure their children's long term care without terminating or limiting their parental rights.

The Standby Guardianship Act, now known as Act 103, became effective on January 22, 1999. Pennsylvania is the eleventh state to have such a law to protect the interests of parents who are periodically unable to care for their children due to illness like HIV or AIDS. Other states which have implemented similar laws include: California, Connecticut, Florida, Illinois, Massachusetts, Maryland, New Jersey, New York, North Carolina and Wisconsin. This article is intended to provide an overview of the Standby Guardianship Act and help establish a working knowledge of this important new law. A glossary of relevant terms and sample forms can be found at the end of this article.

Readers should feel free to call the AIDS Law Project of Pennsylvania, coauthors of the Standby Guardianship Act for assistance or additional information on permanency planning in general.

The Importance of Standby Guardianship Law

Standby Guardianship more effectively addresses a parent's needs than legal options which existed prior to its passage. Pennsylvania's legal landscape prior to Standby Guardianship left a terminally ill parent with several different options, none of which were adequate, to ensure his/her child's continuous care. Six options were previously available for permanency planning: 1) informal arrangements; 2) power of attorney; 3) Last Will and Testament; 4) shared custody; 5) foster care and 6) adoption.

Each of these legal options either required parents to give up their rights prematurely or left gaps in the child's care. For example, although a parent can designate a future guardian in a will, the necessary court approval of the designation occurs well after the parent dies. While waiting for the guardianship to be approved, children remain in "legal limbo" where potential barriers to school enrollment and medical care can arise. This "legal limbo" means that no one has legal responsibility to care for the child if the parent is incapacitated and puts the child at risk for foster care placement.

Given the choice between turning a

child over to another person's care while alive and healthy or planning for an uncertain future, many parents opted for making no plans. Parents were discouraged by inevitable delays in the judicial system, delays exacerbated by laws which were ill-equipped to deal with children's needs. In addition problems existed with determining which person had standing and the court's unwillingness to address future circumstances. Terminally ill parents, in essence, were left with the option of either terminating or limiting their parental rights while still being able to care for their kids or taking steps which lacked long term legal effect while reserving hope that difficult circumstances would not arise.

The Standby Guardianship Act significantly increases the likelihood that a child faced with the loss of a parent will at least be minimally provided for both legally and emotionally. The Standby Guardianship Act, when added to the already existing legal options, creates a mechanism that is much more flexible and responsive to the needs of children whose parents are dying.

Highlights of the Act

Who will care for my child after I am gone or unable to care for him/her? Who will be able to make important life decisions about my child if I am unable to do so myself?

Many terminal illnesses, such as HIV or AIDS, are episodic in nature with a person experiencing alternating periods of good health and severe illness. Terminally ill parents often need someone to assume care of their child when they are too sick to handle the responsibility alone or when an emergency arises. The Standby Guardianship Act resolves the common questions and concerns of a terminally ill parent by providing a useful tool in completing permanency plans to ensure his/her child's continued care.

The Standby Guardianship Act allows a parent to immediately transfer custodial authority to make parent-like decisions to a designated person upon a specified occurrence. This specified occurrence or "triggering event," determined by the parent, authorizes the designated person to act on behalf of the child until the circumstances leading to the triggering event are alleviated. A parent may select one of three triggering events: mental incapacity, physical debilitation with consent and/or death.

Thus, a designated person or "standby guardian" may share care taking responsibilities as a co-guardian with a parent whose mental incapacity impairs his/her ability to care for a child. The authority is immediately transferred to the standby guardian upon an attending physician's determination of incapacity. Once there is a determination of the parent's restored capacity, the standby guardian's authority as co-guardian ends and he/she resumes standby status. The designating parent resumes full custodial authority of the child. This is legally possible because the terminally ill parent's rights are never terminated or limited in any way.

The standby guardian may also act as co-guardian with a parent who is too sick to care for a child. In this situation, the authority is transferred to the standby guardian upon an attending physician's determination of debilitation and the terminally ill parent completing a consent form. The standby guardian's authority as co-guardian ends when the parent regains

his/her good health. Once again, the designating parent resumes full custodial authority of the child since his/her parental rights were never terminated or limited in any way.

Finally, the standby guardian may assume guardianship of a child after the parent dies. The standby guardian assumes authority immediately with no gaps or delays in his/her ability to care for the child. This assumption of authority is permanent as the terminally ill parent's authority expires upon death.

Procedure

A terminally ill parent can designate a standby guardian by completing a "designation form" and filing a "petition for approval" with the court. Legal recognition of the new relationship between parent, standby guardian and the child can occur for a temporary period without court approval but must eventually be approved by a court to have more permanent effect. The court approval process, discussed in more detail below, can occur before or after the occurrence of the triggering event.

a. Designation Form

The designation form is the essential document as it spells out the basic who, what, where, when and why as to the appointment of a standby guardian. A designation form can only be completed when: 1) the noncustodial parent's rights have been terminated or relinquished; 2) the noncustodial parent is deceased; 3) the noncustodial parent is unwilling or unable to care for the child; or 4) the noncustodial parent consents to the designation.

A designating parent or the standby guardian should be prepared to provide proof that the aforementioned requirements have been met. This proof should be made part of the Petition for Approval. The following can be attached to the Petition for Approval as exhibits: 1) a copy of the order terminating or relinquishing the noncustodial parent's rights; 2) a copy of the noncustodial parent's death certificate; and 3) a copy of the noncustodial parent's signed consent to the designation. Any allegations that the noncustodial parent is "unwilling and unable" to care for the child can be specifically spelled out in the Petition for Approval. (This would include all allegations of why noncustodial parent is unfit, i.e., physical abuse; addiction to drugs, etc.).

A completed designation form contains the following: the name of the custodial parent; the name of the standby guardian; the triggering event or events which will vest authority in the standby guardian; the name and address of the noncustodial parent; a completed checklist detailing the noncustodial parent's current circumstances; the signature of the custodial parent and standby guardian; the signature of the noncustodial parent, if consenting to the designation; and the signatures of two witnesses who are over 18 and not parties to the designation. (See sample Designation, Form A).

b. Petition for Approval

A Petition for Approval can be filed either before or after the occurrence of a triggering event. (See sample Petition for Approval, Form B). Whether the petition is filed before or after the event determines who shall be the filing party, the contents of the petition, and the terms of the final

standby guardianship decree. As the designating parent makes the decision regarding the time of filing, he or she should consider several factors.

First, the designator's own health at the time the designation is executed should be considered. A designator who executes a standby guardianship designation from his/her hospital bed may be too ill to file court papers. If that is the case, it clearly makes more sense to have the designated standby guardian file the court papers.

On the other hand, if there is a surviving non-custodial parent who has been severely abusive, a designator may want to file papers and obtain court approval before the occurrence of the triggering event in order to ensure that the court receives direct evidence from the designator about the abuse.

A third factor to be considered is the place of residence and address of the designated standby guardian. In order to avoid jurisdictional problems, the designator may want to obtain court approval for a distant designated standby guardian prior to the occurrence of the triggering event.[1]

If a Petition for Approval is filed before a triggering event has occurred, then the Petition can be filed only by the designating parent. This protects the rights of the designating parent.

If a Petition for Approval is filed after a triggering event, then either the designating parent or the designated standby guardian may be the filing party. However, in this instance, the Petition for Approval must contain documentation that the triggering event has occurred. That documentation must be one of the following: 1) a written determination of the designator's mental or organic incapacity (See sample Form C); 2) a written determination of the designator's physical debilitation accompanied by the designator's signed and dated consent to the transfer of authority (See sample Forms D & E); or 3) a copy of designator's death certificate.

c. Court Hearing

A hearing can be scheduled to review the Petition for Approval. This hearing, and any underlying issues, would be addressed consistent with current Pennsylvania Rules (i.e., notice, jurisdiction and how the hearing will be conducted). At the hearing, the best interests of the child is the standard for review of the Petition and Designation. However, the Act creates a rebuttable presumption that the standby guardian named in a designation is capable of caring for the child as co-guardian or legal guardian and that the designation itself is in the child's best interests.

The Act allows for the expedited approval of the designation when: 1) the designator is the sole surviving parent; 2) the parental rights of the noncustodial parent have been terminated or relinquished; or 3) all parties consent to the designation. In those instances, a Petition for Approval is still filed but a

[1] Note: Act 103 specifically includes the UCCJA, 23 Pa.C.S.A. Section 5341, et seq., within its scope (See Section 5612). Therefore, designators and designated standby guardians who live in different jurisdictions should consult the UCCJA for guidance about where to file and where and when to register a Standby Guardianship Decree.

judge has the authority to bypass an evidentiary hearing.

d. Assumption of Authority

A standby guardian automatically assumes authority to make decisions regarding the child upon the occurrence of any of the triggering events chosen by the designator. If the triggering event is incapacity or debilitation, with consent, the standby guardian's authority is shared physical and legal custody of the child. The standby guardian or co-guardian and the terminally ill parents, upon the occurrence of one of these triggering events, should work together as much as possible to address the needs of the child.

If a Petition for Approval was not filed before the triggering event occurred, the co-guardian will have temporary authority immediately upon the occurrence of the triggering event for a 60-day period. During those 60-days, a Petition for Court Approval must be filed. This period may last longer if the petition is filed but a court hearing has not occurred. However, if no petition has been filed by the end of the 60-day period, the co-guardian's authority will lapse. Assuming that a Petition for Approval has been timely filed, the co-guardian's authority will revert back to the designating parent upon his/her return to health.

If the triggering event is death, the designated standby guardian will assume primary physical and legal custody upon the designating parent's death. As with the other two triggering events, if a Petition for Approval is not filed before the designating parent's death, the guardian's authority is only temporary. He/she has 60 days after the designator's death to file the Petition for Approval. If the standby guardian fails to do this during the 60-day period, his/her authority will expire on the 61st day.[2]

e. Revocation

The designation of a standby guardian can always be revoked. If a Petition for Approval has not been filed with the court, the terminally ill parent can simply destroy the designation and notify the standby guardian of the revocation. If a Petition for Approval has been filed with the court, written revocation must occur in the form of either a Petition to Modify or a request to withdraw the Petition for Approval without prejudice.

Practical Considerations

The Standby Guardianship Act is drafted to create a simple procedure for parents to follow. In furtherance of that goal, certain considerations should be kept in mind. An attorney/advocate retains an important role in ensuring that these considerations are addressed. First, any attorney/advocate assisting a terminally ill parent with permanency plans should take time to discuss the parent's circumstances at length. It is important for a parent to be familiar with all seven permanency planning options so they may select an option best suited to their needs.

Second, an attorney/advocate should see that parents are working closely with both the potential standby guardian and their treating physician. The

[2] Note that if this happens the caregiver can still file for custody or adopt the child but, depending on the caregiver's relationship to the child and the length of time he/she has acted as guardian for the child, the caregiver may have standing problems in those forums.

standby guardian should be familiar with the needs of the parent and the child. The standby guardian should be a participant in the family's life. Ideally, the designated standby guardian should be a presence that is known and accepted by the physician. This is important since authority from the designating parent to the standby guardian is automatically transferred upon the occurrence of a triggering event. Only someone who is involved with the family can be aware that a triggering event has occurred and ensure a smooth transition.

Third, attorneys/advocates should also talk to the parent about signing medical release forms giving permission for medical information to be released to the standby guardian. The standby guardian would use the releases when gathering the required medical documentation to be submitted with a Petition for Approval. The release should be specific and limited, permitting the information to be released solely upon the occurrence of the triggering event.

Fourth, attorneys/advocates can be creative in designating a standby guardian based upon the needs of the custodial parent. The Act allows the designation of an alternate guardian when a parent's first choice is unable to assume authority. Designating a different guardian for each triggering event is also acceptable. Once again, the key lies in being familiar with the custodial parent's circumstances and the extent of his/her support network.

Finally, the attorney will, hopefully, also be willing to represent the standby guardian, if he/she wishes, upon the designating parent's death. Because the potential for conflict is too great, it is not wise to represent the standby guardian while the parent is still alive. However, it is possible and advisable to obtain the designating parent's permission to represent the standby guardian after the parent's death. In this manner, an attorney/advocate can help to ensure a smooth transition for the children after the death of a parent.

Conclusion

The Standby Guardianship Act creates several benefits: no termination or limitation of parental rights; an expedited court process in specific circumstances; the child's needs are more adequately addressed because of the immediate assumption of authority for a sixty-day period; and, most importantly, peace of mind for terminally ill parents who are worried about their child's long term care.

Despite these benefits, however, it is important to reiterate that advocates still need to be equipped with a working knowledge of all potential permanency planning options. Attorneys/advocates should keep in mind the needs of their clients and be aware of the relationship that exists between the client, potential caretaker, and the child. Permanency planning must be responsive to the specific and individual needs and circumstances of the client.

QUESTIONS ??? COMMENTS???

We are interested in hearing from you. **Please feel free to contact Rodney Cunningham, Esq. at the AIDS Law Project of Pennsylvania with questions, or to share your experience in representing individuals wishing to name a standby guardian.**

GLOSSARY

Co-guardian - a person who, along with a parent, shares physical and/or legal custody of a child.

Consent - a written authorization signed by the designator in the presence of two attesting witnesses. The witnesses must be 18 years of age or older and not named in the designation.

Debilitation - a person's chronic and substantial inability, as a result of a physically incapacitating disease or injury, to care for a dependent minor.

Designation Form - a written document naming the standby guardian.

Designator - a parent or a legal guardian who appoints a standby guardian.

Determination of debilitation - a written finding made by an attending physician which states that the designator suffers from a physically incapacitating disease or injury. No identification of the illness is required.

Determination of incapacity - a written finding made by an attending physician which states the nature, extent, and probable duration of the designator's mental or organic incapacity.

Incapacity - a chronic and substantial inability, resulting from a mental or organic impairment, to understand the nature and consequences of decisions concerning the care of the designator's dependent minor and a consequent inability to care for the minor.

Standby Guardian - a person named by a designator to assume the duties of co-guardian or guardian of a minor and whose authority becomes effective upon the incapacity, debilitation and consent, or death of the minor's parent.

Triggering event - a specified occurrence stated in the designation which authorizes a standby guardian to assume the powers, duties, and responsibilities of guardian or co-guardian.