

The Legal Intelligencer

THE OLDEST LAW JOURNAL IN THE UNITED STATES 1843-2022

PHILADELPHIA, FEBRUARY 8, 2022

An **ALM** Publication

Standby Guardianship: An Easy and Essential Part of the Estate Planner's Toolkit

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As we all know, Pennsylvanians may designate testamentary guardians of their minor children. Generally, upon the testator's death, if there is no other surviving parent, the appointed guardian is authorized to assume guardianship of the minors. What if that same testator is alive but becomes incapacitated due to illness or injury? Or what if the testator intends to travel abroad and wishes to appoint a trusted friend or relative as temporary guardian? In either case, the guardianship designation in the testator's will has no effect since he or she is still living.

In 1998, the Pennsylvania General Assembly ratified the Standby Guardianship Act, 23 Pa.C.S. Section 5601, et seq. (the act). The act allows parents, legal guardians, and legal custodians of minor children (designators) to designate one or more standby guardians (SGs) who may assume custody and guardianship of minor

children upon the occurrence of certain predetermined events (triggering events).

A designator may appoint an SG of a minor child if the minor's other parent consents in writing to the appointment. A designator may also appoint an SG if the other parent is deceased, cannot be located, is unwilling or unable to make and carry out day-to-day childcare decisions concerning the minor, has relinquished parental rights, and/or (e) has had parental rights terminated. The designation of an SG does not divest the designator or anyone else of existing parental, guardianship, or custodianship rights. Different SGs may be designated for different minors within the same document.

To comply with the act, an SG designation must include the following information:

- The name of the designator;
- The names of the minors to whom the standby guardianship designation applies;
- The names of the SGs and any alternates;



Courtesy photo

Andrew J. Barron, associate at White and Williams.

- One or more triggering events that will cause the appointment of the SGs;
- Signed consents from the SGs;
- The names of the other parents of the identified minors; and
- Signed consent of the other parents or an indication of why such consent is not necessary (e.g., the other parent is deceased, cannot be located, has had parental rights terminated, etc.).

The act defines triggering event as a "specified occurrence stated in the designation which empowers a standby guardian to assume the powers, duties and responsi-

bilities of guardian or co-guardian.” Commonly used Triggering Events include (but are not limited to):

- Mental incapacity (as determined in writing by an attending physician);
- Physical debilitation (as determined in writing by an attending physician);
- Absence from Pennsylvania for ____ days;
- Death.

The designation of standby guardianship must be a written document signed by the designator and two witnesses who are not named in the document. Notarization is not required but including a notary block is recommended in case the law changes.

Upon the occurrence of a triggering event, the SG shall have temporary legal authority to act as guardian without court approval for a period of 60 days. If the SG wishes to extend the temporary designation into a permanent guardianship, the SG must file a petition during that period. The petition shall include the designation of standby guardianship and proof of the designator’s death, mental incapacity, or physical debilitation. If the SG fails to file a petition, the standby guardianship is automatically terminated after 60 days. In the case a petition is filed but the court does not

issue a ruling within the 60-day period, the standby guardianship shall continue until the court rules otherwise.

Alternatively, the designator may file a petition prior to the triggering event. After the petition is granted, the appointed SG is preapproved to serve indefinitely as guardian of the named minors after the occurrence of a Triggering Event. In this case, the SG is not required to file a petition.

The act requires petitions be filed with Family Court Division or domestic relations section of a Common Pleas Court unless local rules provide otherwise. In comparison, traditional guardianship petitions are typically filed in Orphans’ Court. Consult your local rules to determine the proper venue for filing.

An SG’s authority ends if the designator revokes the standby guardianship and a licensed physician determines that the designator has regained capacity.

The act does not require the designator to specify whether the SG is the guardian of the minor’s estate, person, or both (i.e., plenary guardian). However, Section 5613(a) does provide that an SG’s authority following the death of the designator is limited to “physical and legal custody of the child” as defined in 23 Pa.C.S. Section

5321, et seq. To avoid ambiguity, it is good practice to specify the extent of the SG’s guardianship authority within the document.

Estate planners should draft designations of standby guardianship for their clients as a matter of course. The designation is quick to draft, easy to understand, and can make a nightmare situation slightly less nightmarish.

A sample standby guardianship form is provided in 20 Pa.C.S. Section 5611(c).

Andrew J. Barron is an associate with White and Williams where he focuses his practice on estate and tax planning, wealth transfer, asset protection and estate and trust administration. He is experienced in drafting wills, revocable and irrevocable trusts, powers of attorney, health care directives and pre- and post-nuptial agreements.