Guide to Future Care and Custody Planning for Children

with Recommendations for State Legislation

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National Abandoned Infants Assistance Resource Center
University of California at Berkeley
The National Abandoned Infants Assistance Resource Center’s mission is to enhance the quality of social and health services delivered to children who are abandoned or at-risk of abandonment due to the presence of drugs and/or HIV in the family. The Resource Center provides training, information, support, and resources to service providers who assist these children and their families.

The Resource Center is based at the University of California at Berkeley and is located at 1950 Addison Street, Suite 104 #7402, Berkeley, CA, 94720-7402. The Resource Center can be contacted by phone at (510) 643-8390, by email at aia@berkeley.edu or through its web site at http://aia.berkeley.edu.

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Beginning in the fall of 2002, we volunteered to co-chair an effort to write a document that would detail legislative and policy issues surrounding future care and custody planning. Since that time, we have worked collectively and individually to put together a monograph that addresses the usefulness and limitations of both traditional planning tools (e.g., foster care and wills) and innovative planning tools (e.g., standby guardianship and standby adoption); identifies issues of concern in creating or modifying legislation; and makes recommendations on how to best meet the needs of families who want to make voluntary permanency plans.

The intended audience for the monograph is legislators, legislative staff, and practitioners (e.g., lawyers, nurses, and social workers) who want to advocate for or create legislation to expand and improve the legal options for families who wish to make future care and custody plans for their children. It is our hope that this document will ultimately benefit all families who wish to plan for their children.

Much of the information in this monograph is the result of the collaborative work of a select group of experts who agreed to participate in a review of future care and custody planning, and to share their knowledge, time, and energy for this project. This Technical Expert Group (TEG) (see p. iv) helped to develop many of the ideas discussed in this monograph and to review the document before publication. We are greatly indebted to their contributions.

We wish to express our gratitude to the National Abandoned Infants Assistance Resource Center for organizing the TEG, and sponsoring this effort. The Resource Center provided support on many levels, including facilitating numerous teleconference calls, arranging and financing face-to-face meetings, and, not least, reviewing and publishing this document. In particular, we want to thank the Director, Jeanne Pietrzak, and John Krall for their commitment and support during the process of completing this document.

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Parents facing life-threatening or debilitating health conditions, or other events that can affect family stability (e.g. drug treatment and military deployment), must make choices about the care of their children. And yet, while planning for the future care and custody of children is an important parental duty, it is also among the most difficult. No parent wants to imagine leaving a child behind, yet this painful possibility exists every day through illness, accident, or other traumatic experience. Preparation is critical. Under ideal circumstances when another parent is available, willing, and fit to assume care, the planning process can be simple. When a second parent is not an option, however, due to domestic violence, chemical use, criminal activity, incarceration, absenteeism or death, relatives, friends, and, occasionally, the state must step in and assume care of the child. A parent should anticipate the likely scenarios and plan accordingly. The parent’s decision-making and implementation process, known as voluntary permanency planning, is the subject of this monograph.

Voluntary permanency planning has developed significantly over the past two decades, particularly in response to the HIV crisis and the resulting increase in children left orphaned due to the illness of one or both parents. Disease, however, is not the only cause of family displacement; more and more children are raised in single-parent households. Changes in the configurations and needs of families have prompted lawmakers to take a more varied approach to planning, one that includes traditional wills and guardianships but also encompasses other tools as well. In 1997, for example, Congress passed the Adoption and Safe Families Act (ASFA) and urged states to implement standby guardianship laws (discussed extensively in this monograph). The Children’s Bureau, aware of the growing use of standby guardianship laws and other planning approaches, asked the National Abandoned Infants Assistance Resource Center to research these developments further, and in February 2001 the Resource Center convened a group of experts from across the United States for a series of meetings to discuss legal and social trends in permanency planning. This monograph reflects the collective knowledge of this Technical Expert Group (TEG), and reports on the best practices implemented in a wide variety of jurisdictions. Through the accumulation of practice-based information and the use of case studies the TEG has created a monograph that should prove helpful to policymakers, advocates, and service providers who work with parents and their children in the permanency planning process.

Parents are in the best position to make decisions for their children. Planning is a positive act; it demonstrates responsibility, not a willingness to let go of parental duties. In uncomplicated situations, a written document outlining a parent’s wishes may be enough to carry out a plan. Sometimes, however, the courts or social services will become involved, and parents will often need the help of social and legal advocates. Some authorities may question a parent’s fitness in such situations and it is incumbent upon advocates to help families find the best possible arrangement to keep relationships intact and the child’s interests served.

This monograph explores a number of different approaches to planning, ranging from private documentation to the more public judicial processes. There is no single correct approach. Every family presents a
unique set of facts and therefore it is important for parents to have a broad array of legal tools to choose from. These include such traditional tools as voluntary foster care, testamentary guardianships, powers of attorney, custody and guardianship procedures and adoption. Innovative tools encompass standby guardianship, standby adoption, joint guardianship, short-term guardianship or short-term transfer of custody, and voluntary foster care. Each tool presents potential positive outcomes and pitfalls, all of which are detailed within the chapter discussions and put into practice through case study examples. In some instances the history and development of a particular tool is presented in order to aid advocates who wish to lobby for changes in the law, as well as inspire legislators seeking ways to improve a state’s various planning methods and systems.

This monograph advances a number of broad policy points, and also makes specific recommendations with regard to the development and implementation of specific permanency planning tools. It also discusses critical secondary issues including the transfer of benefits meant to support the child between caregivers. The monograph presents an overview of permanency planning as it stands today and describes how community coalitions can achieve innovative legislation. Working together, lawmakers, social workers, lawyers, and parents can create a system that rewards responsibility, addresses critical concerns about the best interests of children, protects due process rights, and achieves the ultimate goal of stability for families.

**Overarching Recommendations**

- Future care and custody planning is a positive and proactive step on the part of the planning parent.
- Having a variety of custody planning tools available is the best way to ensure that each family’s distinct needs can be met.
- Future care and custody planning should be open to anyone with a legal, custodial relationship to a child—e.g., birth and adoptive parents, guardians, and custodians.
- Future care and custody planning should be available to all parents, not limited only to those with particular conditions, such as terminal illness.
- Future care and custody planning mechanisms should support the concept that the parent will make a plan that is in the best interests of the child, including through explicit legal presumptions wherever applicable.
- Individualized assessments of future caregivers should be based on the best interests of the child. Factors such as the caregiver’s criminal history should inform the analysis but not be an absolute bar to designation as a future caregiver.
- Information about future care and custody planning and the available options should be readily accessible in courts, hospitals, clinics, government offices, and other appropriate public spaces. Multidisciplinary assistance and other resources are necessary to encourage and support effective planning.

**Standby Guardianship**

- Standby Guardianship is considered to be the most useful future care planning tool. Whichever other options are in a state’s toolbox, this one should be among them.
Standby Guardianship should be broadly available for the benefit of all children, whether in the care of their parents or other persons with a legal, custodial relationship.

Standby Guardianship should not be limited to the children of persons with illness.

Legislators should carefully consider where to place Standby Guardianship within their statutory scheme. This can greatly impact the law’s accessibility and the way in which the law is carried out.

Parental consent should be included among specific conditions that will trigger a Standby Guardianship to become active.

Whether through statutory provisions or court procedures, courts should have the ability to hear Standby Guardianship cases on a priority basis when immediate action is needed.

Standby Guardianship statutes should include a rebuttable presumption that the parent’s plan and choice of caregiver is in the child’s best interests.

Standby Adoption

Standby Adoption is considered to be the most secure planning tool and is highly recommended as a vital part of a state’s permanency planning toolbox.

Standby Adoption should be broadly available for the benefit of all children, regardless of their parents’ health status.

Standby Adoption laws should provide for the rebuttable presumption that the plan and the parent’s choice of adoptive parent are in the best interests of the child.

Standby Adoption laws should provide for specific consents to adoption (those in which consent is limited to adoption by a specific person named by the parent).

Joint Guardianship

Joint Guardianship should be broadly for the benefit of all children, whether in the care of their parents or other persons with a legal, custodial relationship.

There should be a rebuttable presumption that the plan and the parent’s choice of joint guardian is in the best interests of the child.

Joint Guardianship statutes should clarify roles and lines of authority in the relationship between guardians.

Short-Term Guardianship

Short-Term Guardianship should be broadly available for the benefit of all children, whether in the care of their parents or other persons with a legal, custodial relationship.

Statutes should provide for triggering events to activate and terminate the Short-Term Guardianship.

Statutes should provide example forms, but not require such forms, for maximum accessibility.
Adoption

- States should provide for pre-approved adoption plans through standby adoption.
- States should provide for open adoption agreements between birth and adoptive families.
- States should provide for the use of specific consents to adoption (those in which consent is limited to adoption by a specific person named by the parent).

Custody

- Custody laws should allow joint custody arrangements between parents and non-parent caregivers.

Wills

- Probate laws concerning the confirmation of a parent’s testamentary appointment of a guardian should provide a rebuttable presumption that the parent’s choice of guardian is in the best interests of the child.

Powers of Attorney

- States should adopt the Uniform Guardianship and Protective Proceedings Act, or otherwise provide that Powers of Attorney can delegate to agents the power to exercise certain parental responsibilities.
- Powers of Attorney that delegate parental powers should exclude narrow time limits to extend their utility to parents with episodic needs.
- Statutes should suggest and provide examples of Power of Attorney forms, but not require that such forms be used, in order to maximize accessibility.

Public Benefits

- State and local laws regarding the delivery of public benefits should facilitate the smooth, expedient transfer of benefits when a child joins a new caregiver’s household.
- Benefits for which the child was directly eligible in the parent’s household should continue in the new caregiver’s household.
- The child’s eligibility for benefits within the new caregiver’s household should be based on a legal, custodial relationship, not a biological relationship.
- States should provide for transitional benefits and services to children and families when death or disability has necessitated a change in legal custody.
- Subsidized guardianship programs should be made available. Where possible, eligibility for these programs should not require that the child first enter foster care.
- States and localities should disseminate information for caregivers on public benefits and how to access them.
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Introduction

CASE EXAMPLE

Kim, 35, is HIV positive. She wants to make sure that her children will be safe in the event of her death or incapacitation from AIDS-related illness. John is 14 and Cathy is 10. Cathy has special health and educational needs.

The children have different fathers, neither of whom lives with Kim. John often visits with his father, Hector, and his paternal relatives. Cathy’s father, Len, has never had any involvement with her, does not pay child support, and is not listed on her birth certificate.

Kim believes her mother Betty, 60, would be the best person to take care of her children if she, herself, could not. Betty lives down the street and baby-sits for John and Cathy at least two days a week while Kim works part time.

Kim is concerned because she is certain that Hector will disagree with her plan, wishing for his mother or another family member to raise John. However, Kim thinks it is important for John and Cathy to grow up together. She wonders what legal options are available to her. Can she do something without telling Hector? Would Hector be able to successfully intervene and make his mother John’s future caregiver? What monetary and other supports might be available to Betty? Who will make the ultimate decision and how will they decide?

The above, fictionalized account describes an important issue faced by parents who have been diagnosed with life-threatening conditions. All parents are concerned with protecting and providing for their children, but parents with potentially debilitating conditions, in particular, may wonder: “If I die or become disabled, what will happen to my children?” Often, this concern does not result in any specific action or the development of any formal contingency plan. Unfortunately, the lack of a plan can leave children in limbo when something does happen to the parent.

Future care and custody planning—which is sometimes referred to as voluntary permanency planning—enables parents to nominate caregivers who can assume custody of their children in the event that the parents die or become incapacitated. Future care and custody plans protect children, both physically and emotionally, by ensuring that an appropriate adult will care for them in the event their parents cannot. Much has been learned about future care and custody planning over the past decade. This experience and knowledge creates an excellent opportunity to evaluate current future care and custody planning processes and the tools available to make such plans, and to discuss the expansion of future care and custody planning to all families as a proactive measure to protect children.

In the Adoption and Safe Families Act of 1997 (ASFA), Congress urged states to adopt standby guardianship laws (a discussion of this planning option begins on p. 36) to help parents with chronic illness to make future permanent plans for their children. In response to this suggestion, the United States
Department of Health and Human Services (DHHS) Children’s Bureau began to develop resources, information, and programs to assist families in making future care and custody plans. For example, the Children’s Bureau has funded several direct service programs to provide social work and legal services to families affected by HIV who want to make voluntary permanency plans, e.g., through the Abandoned Infants Assistance (AIA) program (National AIA Resource Center, 2005).

In addition, the Children’s Bureau asked the National AIA Resource Center to develop information and resources on this topic. Beginning in February 2001, the Resource Center convened a group of experts from around the U.S. to discuss key issues involved in future care and custody planning. This Technical Expert Group (TEG) was comprised of legal, health, and mental health professionals with extensive experience writing, advocating for, and implementing laws in the area of future care and custody planning.

This monograph presents the deliberations and recommendations of the TEG. After briefly introducing the need for various and widely accessible future care and custody planning tools, the document provides a description and analysis of both traditional and newly created planning tools, analyzes the impact of financial entitlements on planning, and makes recommendations on how to improve the utility and efficacy of future care and custody planning. The intent of these recommendations is to inform the development of new legislation, as well as the revision of existing laws, regulations, policies, and practices. It is our hope that this document will be useful to policymakers, advocates, and legal and other direct services providers.

NOTES

1 In this monograph, the term “parent” will be used to describe the current primary caregiver of a child. It should be understood that this would include any person providing primary care to a child, such as a guardian, grandparent, other relative, custodian, or friend, and is not limited to biological parents.
Overview of Future Care and Custody Planning

The Need for Future Care and Custody Planning

Traditional means of providing for the care of children by persons other than their parents, through guardianship, adoption, foster care, or as specified in testamentary directives, have long been established throughout the U.S. (Stein, 1998). Recently, however, attention to future care and custody planning has increased in response to the growing number of parents infected with HIV (Coon, 2000; Palmer & Mickelson, 2001). In the past, there was an expectation that if one parent died, the other parent would be available to provide care for their children. But epidemiological research found that the large majority of children born to mothers infected with HIV were in the sole care of their mothers and at risk of becoming orphans (McConnell, 1998; Michaels & Levine, 1992; Schable et al., 1995).1

Discussion about the increased need for planning is not limited solely to HIV disease. More children now are living in single parent households than ever before, many of whom do not have the benefit of the other parent's involvement. Since 1970, the percentage of children living with one parent has doubled, leveling off by the mid-1990s (U.S. Department of Health and Human Services, 2002). As of 2002, 28% of children in the U.S., or approximately 20,328,000 children, lived in single parent homes (Fields, 2003). Many situations, including untimely death or disability due to illness or accident, and planned or unplanned absences for reasons including incarceration or inpatient drug rehabilitation programs, could prevent these parents from caring for their children. In addition, an increasing number of children are being raised by caregivers other than their parents. Older persons caring for young children may be prevented from continuing to provide care to the children due to advancing age and/or poor health (Coon, 2000). For example, approximately 2,400,000 children in the U.S. reside in the primary care of their grandparents (Simmons & Dye, 2003). Many of these relatives face the possibility of not being able to provide custodial care until the children reach adulthood, and need to consider permanency planning.

Overarching Issues in Voluntary Permanency Planning

— Theoretical Framework —

At a minimum, a future care and custody plan involves the parent choosing a caregiver to provide care and custody for the children in the event the parent becomes unavailable. The simplest planning tool is a written document made privately by the parent. More involved planning tools require court petitions, with notice to interested parties, hearings, and judicial approval. Regardless of the tool used to set up a plan, the following tenets serve as a theoretical framework for current practices in voluntary permanency planning, and for policymakers and advocates developing new legislation.
I) **A parent is in the best position to make choices that are in the best interests of his or her children.**

The concept of “the best interests of the child” is a central component in all judicial determinations regarding the care and custody of children (Stein, 1998). Although the best interests standard may require courts to look beyond the parent when that parent’s desires conflict with the well-being of the child, it should be initially presumed that the parent will make decisions consistent with what is best for his or her child. In order to overcome this presumption and reject a parent’s plan, there should be compelling evidence that the plan is not in the child’s best interests.

II) **A parent making a future care and custody plan is voluntarily and proactively working to protect and provide for his or her children.**

Voluntary permanency planning processes should eliminate barriers to planning and encourage parents to come forward and plan for their children’s care. Although this may seem obvious, in practice parents and caregivers accessing Family Courts and child welfare systems have been treated as if they were under investigation for child abuse and neglect. For example, in New York City, during the early implementation of standby guardianship legislation, investigations were routinely performed on both caregivers and parents in connection with standby guardianship petitions, despite the fact that such investigations were not statutorily required (Ambia et al., 1998). In addition, clerks and judges routinely requested additional documents and hearings that were not required by the statute, which delayed proceedings and unnecessarily interfered with the privacy of parents and caregivers (Ambia et al., 1998).

III) **A parent’s desire to make a future care plan should not be interpreted as a current inability to care for his or her children.**

In the early years of the HIV/AIDS epidemic, it was often incorrectly assumed that infected parents were, or would soon be, unfit to fulfill their roles as parents. Although HIV illness has become more like other chronic illnesses, a parent may, at times, still need additional assistance with day-to-day tasks due to opportunistic infections or other issues. However, this intermittent need for extra help should not equate to the need to permanently move the children to another caregiver. Along with the recommendation that all parents make a plan is the insistence that a parent should continue to care for her or his children until the parent is no longer able.

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**Private Documents versus Judicial Intervention**

Planning tools fall into two broad categories: those which are created by the parent’s execution of a written document, and those which involve judicial consideration in court proceedings, often in Family or Probate court. In general, planning tools which do not require judicial intervention at the time of their formation can be prepared more quickly and are procedurally less onerous to complete. Because they do not entail court petitions (which trigger notice provisions and establish a court record), they are inherently more private: the parent may choose to whom and when to disclose the existence and details of the plan. Written documents have an additional advantage in that they are more easily amended or revoked by parents who wish or need to change their plans. Because no judicial intervention was used to create the plan, no judicial oversight is necessary to change it, as opposed to court-approved plans, which cannot be withdrawn or amended without further court intervention. New documents may simply supersede previously prepared ones, although some statutes have specific provisions for written revocation.

Unfortunately, the tradeoff for ease of use is that private planning tools are less secure than planning tools that require judicial intervention. Public policymakers prefer that permanent changes in authority or
responsibility for children receive judicial or administrative oversight. Thus, many private plans are temporary or time-limited. Conversely, court-approved plans will generally not expire until the subject children reach the age of majority.

Any caregiving arrangement transferring custody of a child to another adult eventually needs to be examined by a court of law, the sole exception being transfers between parents. Hence, when a parent who has privately documented her plan becomes permanently unable to care for her children, the new caregiver must act to have her status judicially confirmed. In contrast, a parent who has used a court-approved planning tool will eliminate the need for a new caregiver to confront the court process alone. Persons with standing to speak against or otherwise intervene in the plan will have had their opportunity to do so, and the proposed caregiver will have had occasion to fully consider her promise to the parent. The parent will be secure in the knowledge that a judge has considered and accepted her choice of caregiver.

Although the security of full investigation and a court order may create a preference among professionals and parents for judicially-approved plans, for some families judicial intervention is not desirable, or could lead to conflict or unintended consequences. Some parents may avoid a process that could reintroduce an abusive or neglectful non-custodial parent back into the family's life, or a procedure that involves investigation by child welfare personnel. Some parents may know they will revise their plans as their children (and prospective caregivers) grow older. And some parents may be unable to use a plan requiring judicial intervention due to time constraints or the reluctance of the caregiver to undertake the process. It is important that lawyers and social workers help parents to carefully weigh the pros and cons of both private processes and court proceedings. Clearly, the availability of a variety of planning tools, including both private and judicially-reviewed options, will promote planning by the greatest number of parents.

— Using Multiple Plans —

Depending upon the family's situation, a parent may benefit from using a combination of planning tools. A parent may complete a written plan to ensure there is something documented while she undertakes a more complicated and lengthy court process. For example, a parent may make a written designation of standby guardianship while awaiting the hearings and background checks associated with a standby adoption proceeding. Or, a parent may choose to write a will explaining her choice of caregiver and thoughts about child-raising to supplement the short and formulaic order of standby guardianship. Furthermore, a parent may complete a private plan such as a short-term transfer of custody, or a power of attorney, to confer temporary authority to the child's caregiver, in addition to a court-approved plan. The temporary plan can then be used for respite and other short-term child care without the need for a formal transfer of legal custody to the caregiver and back again.

There are potential problems, however, with multiple plans. A parent's plans may conflict, or be perceived as conflicting, ultimately requiring litigation about the parent's intent and the children's best interests. This is especially true when the parent has changed her prospective caregiver or has made plans involving more than one caregiver. Conflicts are particularly problematic when the parent is incapacitated or has passed away and cannot explain her intent. Lawmakers should consider specific provisions for amending or revoking custody plans, as well as guidelines for interpreting conflicts in custody planning.
Involvement of the Non-custodial Parent

A frequent dilemma in future care and custody planning involves the rights and responsibilities of “non-custodial parents,” or parents who do not have legal or physical custody and do not provide day-to-day care for the children. Biological legal parents have equal rights and responsibilities toward their children, and may retain all or some of these rights even when they have not remained involved in their children’s lives.²

There is a legal presumption that if one parent becomes unable to care for her child, then the second parent continues to care for the child or, in the case of separated parents, assumes care of the child (McConnell, 1998). Accordingly, reflecting U.S. constitutional protections for family and parenting, notice to the child’s other parent is required in actions that have the potential to impact parental rights, such as changes in custody and guardianship, and adoption (Stein, 1998).³ In many states, notice to mature siblings may be required. Persons entitled to notice of the proceeding may offer testimony and other evidence as to the child’s best interests. However, it is unrealistic to expect that all, or even most, uninvolved parents will step in and take custody of the children if the custodial parent dies or becomes incapacitated (McConnell, 1998). Then too, many custodial parents prefer to appoint someone other than the non-custodial parent as the future caregiver for their children. They may opt to do this privately because they do not wish to notify the non-custodial parent (Casey Family Services, 1999).⁴ Other parents take their chances in court, risking adversarial litigation with the potential to negatively impact the subject children.

The tension between the rights of a non-custodial parent and the wishes of a custodial parent can disrupt the voluntary permanency planning process. While it is inappropriate to compromise parental rights in order to ameliorate a disincentive to court-ordered plans, it may be possible to clarify procedures around notification and consent within legislation so that planning parents can better predict the non-custodial parent’s involvement in and influence over planning proceedings. In addition, to the extent possible, planning parents should be encouraged to seek agreement from the non-custodial parent before initiating court proceedings. Court forms and procedures could help to enable this. This is an area in which mediation programs could be helpful.

Children’s Participation in Planning

The success of a future care and custody plan will be impacted by the children’s feelings about the caregiver. Particularly with regard to older, more independent children, future care and custody plans stand a greater chance of success if the children have been involved in the planning process. Children will then have an opportunity to communicate with their parents as to how they feel about the proposed caregiver. Without this opportunity, parents may inadvertently create a situation in which their children will be unhappy in or may leave the home of the new caregiver, causing the plan’s failure. Legislators should facilitate children’s participation in the planning process, to the extent that that they are willing and able.

One way to accomplish this is to ensure children’s participation in court proceedings considering future care and custody plans. Beginning in 1974, as a prerequisite to receiving federal funds for child abuse prevention and treatment, states have been required to appoint guardians ad litem or law guardians for all children involved in child abuse/neglect judicial proceedings, to represent and protect their rights and best interests (Heartz, 1993; Stein, 1998). Some states extend this protection to children involved in court proceedings for appointing future caregivers.⁵
— Social, Legal, and Financial Support —

Coordinated, multidisciplinary services are necessary to assist families in making future care plans. Because of the emotional, social, and legal complexity associated with future care and custody planning, parents require a continuum of services. Legal services can detail the range of permanency options for the family, assist with the completion of the future care and custody plan, and advocate to ensure the activation of the plan (Selbin & Del Monte, 1998). Social workers help parents address the emotional difficulty of preparing for the possibility of death, assist in the identification of potential caregivers, facilitate any family meetings necessary to complete the plan or enhance its effectiveness, and where applicable, educate families about HIV illness (Larsen, 2000; Retkin, Stein, & Draimin, 1997). Children may need clinical services to cope with the loss, or potential loss, of their parents (Taylor-Brown, 1998). Case management services may be needed to provide assistance with concrete needs including housing, income support, and respite care (Selbin & Del Monte, 1998). These various service providers can work cooperatively and ideally are located together to provide maximum accessibility and continuity of care (Selbin & Del Monte, 1998).

Barriers to Planning

Despite the large number of children at risk of losing their parents, relatively few parents make future care and custody plans. A recent survey found that only 34% of parents have a will, perhaps the most common legal form of voluntary permanency planning (FindLaw.com, 2001). The fact that a parent is terminally ill does not substantially increase the likelihood of planning. A small study of oncology patients who were single parents found that 50% died without a custody plan for their children (Willis, Peck, Sells, & Rodabaugh, 2001). Forehand et al. (1998) found that of 25 HIV positive mothers, only 35% made any legal plans for their children before they died. Additionally, Boxer et al. cited in Forehand et al. (1998), found that only 25% of HIV positive parents in their study completed legal custody arrangements.

While few parents make formal arrangements for their children, informal planning, with no legal or paper work, is common. In a study of 151 parents with HIV, Rotheram-Borus, Draimin, Reid, and Murphy (1997) report that 81% of mothers and 75% of fathers initiated future custody discussions with family and friends immediately after being diagnosed with HIV. For the large majority of children in the study (76%), parents had spoken to a potential caregiver, and 99% of them agreed to care for the children. However, only 24% of parents had discussed this same issue with social service staff and only 30% had initiated legal planning.

The lack of any type of legally recognized relationship between the informally chosen caregivers and the children places such plans in jeopardy. If a parent dies or becomes incapacitated, there is little or no evidence of the parent’s wishes. Children may be shuttled back and forth while family members, child welfare representatives, and others struggle to determine with whom they should live. They may end up in the care of someone other than the parent’s preferred choice, or in the foster care system. Even when the children do go to the parent’s choice of caregiver, simply having physical custody of a child does not create a legally recognized relationship. Caregivers without a legal relationship to the children in their care may meet with difficulty enrolling the children in school or consenting to needed medical interventions.
The low percentage of planning parents can be attributed, in part, to the inadequacy of traditional planning tools; difficulty in accessing and using planning tools; societal stigma associated with HIV illness; cultural traditions of informal family arrangements; and lack of social, legal, and financial support (Casey Family Services, 1999; Geballe, 2000; Mellins, Ehrhardt, Newman & Conrad, 1996). These factors, in combination with the emotional strain associated with planning, deter many parents from undertaking the process and leave many children without secure plans (Taylor-Brown, 1998).

— Inadequacy of Traditional Planning Tools —

Over the past two decades, as advocates worked with HIV positive parents to ensure their children’s safety should they die or become incapacitated, it became clear that traditional tools and processes for planning future care and custody often were inadequate to deal with the special situations present among this population. Because some existing means of planning limit parental rights and responsibilities, HIV positive parents may delay planning while asymptomatic, often becoming too ill later on to see the planning process through to completion. Furthermore, many people living with HIV experience periods of relative health punctuated by periods of acute illness related to opportunistic infection. As a result, parents living with HIV may need episodic, short-term caregivers in addition to persons to provide care for the children in case of their death (Mellins et al., 1996). Parents with other illnesses, or who face a period of temporary absence may also have this need. Finally, parents who are not ill but want to plan in case of their accidental death or incapacity are in an analogous situation.

— Difficulty Accessing and Using Planning Tools —

Any person providing day-to-day care of a child may need to plan for an alternative caregiver, but traditional planning laws rarely give standing to non-parents. Several states have amended their child welfare statutes to allow persons acting as parents to someone else’s child to use future care and custody planning tools previously limited to biological parents, recognizing a more modern and flexible concept of family.7

Even where states have provided viable planning tools, there may be several obstacles to their access and use. Laws should be written in a clear and straightforward manner in order to make them accessible to parents who may not be able to retain a lawyer. The purpose and availability of future care and custody planning has also not been widely publicized. Dissemination of information and, if applicable, straightforward forms, at key sites including courts, medical offices, hospitals, schools, and community centers, as well as their corresponding websites may encourage greater planning rates. Education efforts are also needed within the legal system, as family law practitioners and court personnel encounter new planning tools or creative uses of existing tools.

This strategy has proven successful in raising awareness and use in the area of advanced directives for health care planning. In 1990, the Federal government passed the Patient Self-Determination Act (PSDA), which promotes the use of “advanced directives.”8 Due to the PSDA, discussion with patients about their medical wishes, advanced directives, and end-of-life care is now standard practice in medical institutions (Demornay, 2000). Similar legislation would be useful in advancing the discussion about and use of future care and custody planning.

Court approved plans generally offer more certainty that children will have a long-term home. However, many families will not attempt court plans due to reluctance to work with the court and child welfare
systems. Laws and policies can be implemented in such a way as to make court processes for the appointment of future caregivers user-friendly. One approach is to use designated court personnel throughout voluntary permanency planning proceedings. This would ensure these professionals’ familiarity with future custody planning concepts and specific tools, knowledge of the legal processes and requirements, and respect for the voluntary nature and emotional charge of this type of proceeding. Expedited hearings may be useful for situations in which the petitioning parent is ill.

A parent who has chosen a caregiver with a criminal history, a history of abuse and/or neglect, or who is an immigrant to the U.S. may be unable to convince the caregiver to submit to formal legal processes, and may be barred from using many planning tools. Some states prohibit non-citizens and persons with certain felony convictions or neglect or abuse findings from becoming guardians, foster parents, or adoptive parents. Following in this line, the Adoption and Safe Families Act (ASFA) of 1997 prohibits states receiving Title IV-E funds to allow persons convicted of certain felonies to become foster or adoptive parents.9

A potential caregiver’s criminal history should not serve as an absolute bar to planning. The standard of fitness is more appropriately the caregiver’s present and future ability to provide appropriate care for the child. Potential caregivers should be allowed to present evidence to contextualize the impact of criminal history on their child caring ability, such as type of conviction, the time elapsed since conviction, completion of substance abuse treatment, or other mitigating circumstances. Similarly, prior involvement with the child welfare system and immigration status should inform but not prohibit judicial consideration of a proposed caregiver.

— Cultural Traditions of Informal Family Arrangements —

Cultural and religious practices impact the use of future care and custody planning. For example, within the African American community, children have historically been cared for during times of family instability through flexible and adaptive family roles that extend informally to both relatives and non-kin (Brown, Cohon, & Wheeler, 2002; Chatters, Taylor, & Jayakody, 1994). Within many religious groups, parents select “godparents” for their children, who are expected to care for their godchildren if something were to happen to the parent (Vidal, 1988; Williams 1990, as quoted in Lopez, 1999). In Latino communities, the tradition of compadrazgo, or “co-parenting,” develops extended support networks, frequently with non-relatives, to assist in all areas of childrearing (Vidal, 1998).

Parents from communities with such long-established cultural practices may see little reason to make formal future care plans, holding the belief that if the need arises other adults, kin or otherwise, will fill the role of caregivers to the children (Lopez, 1999; Vidal, 1998). Efforts should be made to educate parents about the risks of having no legal plan to supplement a family or community’s custom. It can be of particular importance in addressing this issue that social and legal service providers are available who identify with a family’s cultural background and can communicate in the family’s first language.
In September 1992, researchers from the Centers for Disease Control estimated that, as of December 1991, 19,300 children had been orphaned due to AIDS (Caldwell, Fleming, & Oxtoby, 1992). They predicted that “… caring for these AIDS orphans will require substantial economic and social resources in the coming decade.” In December 1992, Michaels and Levine estimated that at least 80,000 youth would be orphaned due to AIDS by the year 2000. In a recent reassessment of her 1992 estimates, Levine found that by the year 2000, “… roughly 82,000 children lost their mothers to AIDS” (The Family Center, 2001). There are currently an estimated 88,815 women living with AIDS and an estimated additional 87,940 women living with HIV in the 33 areas in the U.S. that report HIV infections to the Centers for Disease Control (CDC, 2004). Most women (76%) seeking treatment for HIV are also mothers (Kaiser Family Foundation, 2004).

See Santosky v. Kramer (1982) noting a parent’s fundamental interest in custody of his or her child.

For example, in Chicago, even when the non-custodial parent has not legally established parentage, (s)he may be entitled to notice if the child uses his last name or if the child has lived with him or her for any significant period of time. State statutes and court rules can provide for notice to be served in a variety of ways, including by mail, by publication (when the whereabouts of the person entitled to notice are unknown) and in person.

A study done at Montefiore Hospital in New York City interviewed 200 mothers with HIV, who had a total of 378 children. Most of the mothers reported that the children’s fathers had little or no involvement with the children, and few of the mothers wished to involve the children’s fathers in future care or custody planning. The study found that the women feared: “… (1) giving the father an opportunity to take the children away from the mother, (2) re-initiating contact with someone who may have been abusive in the past, or (3) alerting the father to a custody agreement he may not like and therefore increasing the chance that he will contest the plan.” (Casey Family Services, 1999).

States may statutorily permit a court to appoint a guardian ad litem for specific proceedings involving a child; e.g., standby guardianship (Conn. Gen. Stat. Ann. Probate s.45a620). Even without an authorizing statute, in all courts there is implied authority to appoint a guardian ad litem based on the interests of the child. Whether or not the court does so may depend on court resources, the practices in that jurisdiction, and how seriously the child’s interests are affected. In addition, several states (e.g., AR, CO, FL, IL, NE, NJ, OH, VA, and WI) specifically require that the wishes of older children be considered in proceedings that could potentially result in a change of custody (National AIA Resource Center, 2003).

Willis, Peck, Sells, & Rodabaugh (2001) found that of the children in their study whose parents died due to cancer, “in 40% of the cases, the children ultimately went to people to whom the deceased parents were adamantly opposed.” However, in an evaluation of 20 children whose parents died due to HIV, Forehand et al. (1999) found that while legal arrangements had only been made for 35% of children prior to their mothers’ deaths, 80% of the children were living with their mothers’ preferred caregivers.

For example, an August 2001 amendment to the Illinois Children and Family Services Act greatly expands the definition of “relative” for the purposes of identifying alternate care for children in the custody of the child welfare system: “For the purpose of this subsection, ‘relative’ shall include any person, 21 years of age or over, other than the parent, who (i) is currently related to the child in any of the following ways by blood or adoption: grandparent, sibling, great-grandparent, uncle, aunt, nephew, niece, first cousin, second cousin, godparent, great-uncle, or great-aunt; or (ii) is the spouse of such a relative; or (iii) is the child’s step-father, step-mother, or adult step-brother or step-sister; ‘relative’ also includes a person related in any of the foregoing ways to a sibling of a child, even though the person is not related to the child, when the child and its sibling are placed together with that person.”
Advanced directives, like health care proxies and living wills, allow people to make arrangements in case of their future incapacitation, to direct their healthcare through an appointed agent or a detailed document. The PSDA requires each state to develop a written description of the rules and regulations surrounding the use of advanced directives and requires health care providers to give this information to patients admitted to their facilities, along with a written description of the patient’s rights, including the right to formulate an advanced directive.

Under ASFA (1997), unless a state opts out of the provision, criminal background checks must be performed for all prospective foster and adoptive parents. Persons who have been convicted of rape, sexual assault or homicide, or crimes against children, or have physical assault, battery, or drug-related offenses within the past 5 years, shall not be approved. ASFA provides that states may ask for an exemption from this requirement, but a 1998 Child Welfare League of America survey found that no state intended to ask for this exemption (CWLA, 1998). However, In the Matter of Adoption of Jonee and Others, Infants (1999), found the New York adaptation of the ASFA prohibition unconstitutional because it did not allow for an individualized determination, thereby violating the right to Due Process.
Developing a future care and custody plan can be extremely complex. For example, a single mother with several children by different fathers may need to take into consideration whether and how to keep the children together, the level of current and anticipated future involvement of each father, identifying one or more caregivers, whether and how to involve the children in the process, and the amount of financial support that any particular plan could provide, among other factors. Even the least complicated family situation raises a number of financial, legal, and emotional issues. Having a variety of planning tools available would allow a parent, preferably with the assistance of legal and social service providers, to evaluate unique circumstances and choose the planning method that best meets the family’s needs. The lack of such an array of planning methods limits a parent’s ability to develop an individualized plan.

The traditional and innovative planning tools discussed in this monograph are briefly outlined below. Not every state provides each tool, nor applies them in the same way. The tools overlap in terms of intent, but their applications, limitations, and outcomes present a wide array of options.

Overview of Traditional Tools

**Foster Care:** The state assumes custody of a child through foster care when a parent is found by a court to be unfit due to abuse, neglect, or incapacitation. State-licensed foster parents, including kinship foster parents, care for the child. Foster care outcomes vary depending on the parent’s ability to reclaim custody of the child. Foster care may be the default event for parents who do not make permanency plans for their children. Voluntary placement in state custody may be useful for parents who do not have relatives or other responsible adults available to care for their children. Parents may have some control over the circumstances and timing of the child’s transition from parent to foster parent.

**Will (Testamentary Guardianship):** Wills are utilized in all states and are the most familiar planning tool. A parent’s will may contain a clause appointing a guardian for minor children. Wills may be kept private by their authors, to be read and acted upon only after their deaths. The guardian must be confirmed by a judicial order after the parent’s death.

**Power of Attorney:** Powers of Attorney are convenient short-term planning tools that do not require judicial intervention. They are useful for short-term, *inter-vivos* planning but do not survive the parent’s death. Powers of Attorney have recently been used innovatively in relation to child custody.

**Custody and Guardianship:** In custody and guardianship proceedings the legal responsibility for a child is transferred from a parent to another caregiver. The parent’s rights are not terminated but may be superseded by the custodian or guardian, who has the authority and duty to act in the child’s best interests.
Adoption: In an adoption proceeding, the court creates a legal relationship between two individuals who are not biologically parent and child. The parental rights and responsibilities of the biological parent are terminated and such rights and responsibilities are invested in the adoptive parent.

Overview of Innovative Tools

Standby Guardianship: A pre-appointed standby guardian steps into the place of the parent upon the occurrence of a named triggering event such as the parent’s incapacity or death. Commonly, the standby guardian assumes the care and custody of the child when the parent cannot provide care, although many state statutes permit concurrent decision-making.

Standby Adoption: Similar to standby guardianship, standby adoption (which is currently available only in Illinois and Iowa), allows a pre-approved adoptive relationship to be triggered by the biological parent’s death or earlier consent that the arrangement become final.

Joint Guardianship: A caregiver is appointed to share custody with the parent. Parental rights and responsibilities are retained and are exercised concurrently with the joint guardian.

Short-term Guardianship/Short-term Transfer of Custody: The parent appoints a caregiver to exercise control over a child on a temporary basis. The arrangements do not survive the parent’s death. As with other tools grounded in agency law, these appointments may be made without judicial intervention.
Traditional Tools

— Foster Care —

As stated in the Public Welfare Code (2003), foster care is the state-sponsored, state-monitored placement of children in substitute settings when they cannot continue to live with their parents. It has not historically been used as a planning tool because of the involuntary nature of most placements. Parents whose children are in foster care often face charges of neglect or abuse. Placement is not under the control of the parent or prospective caregiver; it is controlled by the state child welfare agency. However, foster care is often the default event when parents fail to make permanency plans during their lifetimes: Children for whom a successive guardianship, custody, or adoptive relationship is not arranged or expeditiously begun following a parent’s death may be referred to the child welfare system.

VOLUNTARY PLACEMENT

Pursuant to federal guidelines, states may allow parents to voluntarily place their children in care if they are at risk of having their children removed and need time to correct whatever is causing that risk.1 Parents with serious illness could use voluntary placement in foster care to arrange for the future care of their children. In most cases, voluntary placement is effective immediately, with custody moving from parent to state as soon as the parent makes the arrangement, a drawback for parents who do not wish to cede rights or custody during their lifetimes. However, inasmuch as voluntary placement requires the affirmative action of the ill parent, it allows the parent some degree of control over the circumstances and timing of her child’s transition to a new caregiver. In addition, parents are more likely to be able to predict their child’s caregiver when making a voluntary placement in states with a preference for kinship foster care.2

One reason a parent might choose voluntary placement is the availability of monetary benefits and other services to the child. States pay foster parents a monthly stipend for the children in their care, regardless of family income. The Adoption and Safe Families Act (1997) states this stipend is a fixed amount per child, whether the foster parent is caring for one or many children. Foster parents may receive larger payments for children with special needs. In contrast, in implementing Temporary Assistance for Needy Families (TANF), for which children in guardianship, custody, or adoptive relationships may be eligible, states may employ a system of decreasing per capita benefits within beneficiary households. Thus, caregivers caring for more than one child may receive much higher payments through foster care than through the private relationship of a guardianship, custody, or adoption (Geballe, 2000). States also provide medical care through Medicaid to almost all children in foster care, according to Grants to States for Medical Assistance Programs (2002). In addition, based on the Family Preservation and Support Services Program (1993), foster care may provide an assortment of non-monetary services geared towards keeping families intact, such as social services, respite care, assistance in locating housing, parenting skills classes, career counseling, and transportation assistance.

Voluntary foster care widens the pool of potential caregivers a parent might choose. The availability of monetary benefits and services enables caregivers to assume responsibility for children when they could not otherwise do so through private arrangements. Parents also have the resource of the state’s pool of licensed foster care parents in the case that they do not know anyone willing or able to care for their children.
Parents do not have to go to court with a voluntary placement unless their situation fails to resolve within 180 days. Parents sign a contract with the child welfare agency that may later be entered in court. The voluntary placement form outlines the parent’s rights with respect to the placement, and the circumstances under which the child will return to the parent. A sample Voluntary Placement form is attached hereto as Appendix I.

Voluntary placement significantly limits parental autonomy in daily decision-making, visitation, and reunification. The arrangements are closely monitored by state administrative agencies and overseen by state courts. For example, the parent promises to adhere to visitation schedules and, where appropriate, to make efforts to plan for the return of the child. If the parent fails to fulfill these obligations, the state may refuse to return the child. Voluntary placement regulations give parents visitation rights, but even if the parent and caregiver are in close, cooperative contact, visitation usually must be arranged through the state, which often takes time and effort to coordinate. Ideally, a parent could use voluntary placement fluidly, with a pre-arranged foster parent stepping in at various intervals when the parent needs respite or is episodically ill.

Stigma and prejudice can interfere with ill parents’ involvement with their children. It is easy to imagine that caseworkers might have difficulty discriminating within their high caseloads between planning cases and the more prevalent cases of abuse and neglect. Biased or underinformed child welfare workers and court personnel may presume that the fact of a parent’s illness renders her unfit to resume care of the child.

System procedures and requirements also burden and limit the autonomy of caregivers. For example, foster parents must complete training and background checks in order to become licensed to accept foster child placements, as stated in the Adoption and Safe Families Act (1997) and the Adoption Assistance and Child Welfare Act (1980). They must get permission to travel outside of the state with the child, and are not empowered to make decisions regarding the child’s health care. One might argue that this is in many cases unnecessary and inappropriate with regard to kinship or voluntary placements. A further complication arising out of the state-foster parent relationship is the relative lack of protection over the relationship, as compared to a private arrangement. It would be much more difficult for the state to remove a child from the care of his grandparent-guardian as opposed to his grandparent-kinship foster parent, whose contract the state could terminate at will.

**NEW YORK STATE’S EARLY PERMANENCY PLANNING PROGRAM**

New York State has a unique voluntary placement program designed specifically for ill parents planning for their children. The Early Permanency Planning (EPP) program was originally begun as a demonstration project in New York City and in 2000 was added to the statewide law governing foster care (Families in Transition Act of 2000 (FITA)). Through this program, the parent is able to set up a future voluntary foster care placement while he or she is still well enough to care for the children. As with standby guardianship and standby adoption arrangements, parents retain custody of their children until such time as they are unable to care for them, or desire for the placement to begin. The parent chooses the future caregiver, who becomes the foster parent. The program even enables the parent to use the foster parent as a temporary caregiver for short periods of respite or during episodic bouts of illness.
Parents using the program contact a designated child welfare worker to enroll. They may specify a desired future caregiver. If this person is not licensed as a foster parent, the worker will facilitate licensure. If the parent knows of no one willing or able to act as the future caregiver, the worker will seek to match a licensed foster parent from the state’s existing pool with the parent and her family.

Unlike most foster care arrangements, in EPP open and fluid contact between biological parent, child, and future foster parent is encouraged in order to strengthen the plan and provide for a smoother transition when placement is necessary. Efforts to build relationships between child and future foster parent can include visits in the foster parent’s home. These visits serve a second purpose of providing the parent with respite care.

When the parent becomes too ill to continue caring for her children, the children move to the custody of the foster parent, and placement begins. The mechanisms of foster care are put into place, including monthly payments to the foster parent, the contractual obligations of foster home monitoring, and parental visitation if applicable. The foster care placement period is also tolled, with the placement expected to end within 22 months.

New York’s program statutorily limits eligibility to those parents who will need their children to be in placement within eighteen months, barring parents from proactive and well-considered planning while they are healthy (FITA, 2000). This is meant to conserve resources for those most in need, and to avoid repeating preparatory work such as home studies or licensing, which could go stale by the time placement occurs. However, due to the nature of many terminal illnesses, the determination of parental disability or death within eighteen months may be difficult to make from a medical standpoint, and emotionally difficult for parents to concede. Thus, the requirement is a deterrent to all but the most ill. Ironically, planning, certification, and finding a successful placement can take longer than 18 months.

**POTENTIAL PITFALLS**

There are other issues that limit the applicability of voluntary foster care as a permanency planning tool. For example, even if the parent is certain that her preferred caregiver will be identified as a resource by child welfare officials, she must also be confident that the caregiver will be permitted to serve as a foster parent. The proposed caregiver may be preempted from licensure by a prior criminal record or may not complete the requisite training. A licensed foster parent may not be permitted to care for a specific child when that parent already is caring for the maximum number of children permitted or has space issues within the home. Finally, if the state requires biological relatives to be explored as prioritized resources, voluntary foster care may not be appropriate when biological family members are interested in caring for the child, and the parent does not want this.

Further, it may be inadvisable for families to introduce foster care personnel into their lives if their home situations are substandard. Child welfare personnel may find cause to remove children, and initiate abuse or neglect proceedings. In theory the parent’s actions towards placement should be viewed as a positive step, and the parent’s current situation should not be implicated at all. In practice, however, the system considers the child first.

Voluntary placement may be inappropriate if the caregiver is not willing to permanently commit to the child outside of foster care. Foster care, whether voluntary or not, is envisioned as a short-term arrangement after which a child will either be reunified with the parent, or will be permanently placed with new caregivers who are better able to provide for the child. Foster parents may be asked to adopt the children in their care. Exceptions may allow the caregiver to continue caring for the child in a private
guardianship, but in any case the foster care placement will not be allowed to continue much beyond a year, according to AFSA (1997) and Family Preservation and Support Services Program (1993). If foster parents do not agree to adopt or become guardians, children may be transferred to another placement where adoption is more likely.

Voluntary foster care cannot be used if a court-appointed permanency plan has been previously arranged. Because the foster care system is meant to provide a safety net for children who otherwise would not receive adequate care, a caregiver who has affirmatively accepted legal responsibility for a child outside of the system, such as through standby guardianship, will not be able to rescind that responsibility in order to accept the child within a foster care placement. For this reason, parents and caregivers considering planning options should avoid court-approved plans if there is any possibility that voluntary placement might be desired or necessary in the future.4

Finally, voluntary placement cannot be used if the parent has already died or become mentally incapacitated. Caregivers presently caring for children in informal relationships may be prevented from hosting those children as foster children, simply because there is no one with existing legal responsibility to sign them into care, or from whom the children can be removed.

LEGISLATIVE ISSUES

States should explore amending their child welfare laws to allow for programs like New York’s, which uses dedicated personnel, and has a clear statement of the reason parents might use the program, as separate from abuse and neglect situations. The legislation should allow for parental designation of placement resource, and include a provision for expediting the licensure of caregivers chosen by planning parents. The program should not be limited to the most critically ill parent, but should allow parents to take proactive measures while they are able-bodied. Finally, those responsible for the program’s administration should be mindful that in some situations, private guardianship can be pursued as a permanency goal.

Foster care as a planning tool is a costly proposition. States will wish to save scarce resources for children in danger of imminent personal or emotional harm. This should make subsidized guardianship more palatable to states as an alternative to voluntary foster care (see pp 59-60). Essentially, if the only reason parents and caregivers choose foster care is the availability of higher benefits, subsidies in the same amounts would enable children to receive care outside of the system and save states the costs of oversight and administration (Testa, Salyers, Shaver, & Miller, 2004).

In conclusion, foster care is not typically used due to significant drawbacks for both caregiver and parent, but may be the default event for children whose parents are unable to make other permanency planning arrangements. Voluntary placement has some utility in the context of permanency planning, and may be the only choice for some families due to the additional benefits available, or when parents must look outside their families and friends for potential caregivers. Parents and caregivers should be aware of the potential loss of autonomy within their relationships with their children, and lack of support from the workers administering the system. State legislators and advocates are advised to look to New York State’s program as a baseline model for voluntary placement programs. In general, states that offer a greater number and range of private planning options should experience fewer unnecessary placements. The following sections describe in detail the tools parents may use to create contingent custody plans as alternatives to foster care placement.
CASE EXAMPLE

Kim shared with her mother, Betty, her desire that Betty care for John and Cathy if Kim becomes too ill to do so herself. Betty wants to do this for her family but does not have the financial means to do so, especially considering her granddaughter Cathy’s special needs. Kim and Betty decide to explore voluntary foster care. The child welfare caseworker informs them that the fathers must be contacted to see if they will take custody before voluntary placement can be pursued.

With some trepidation, Kim speaks with Hector, who as expected is unable to care for John himself, but wants his mother to raise him if Kim cannot. Gradually, however, Hector recognizes that John would prefer to stay together with his sister Cathy, and decides it would be okay for John to live with Betty so long as she promises to let John visit his family as he has done in the past. Cathy’s father has been incarcerated and so cannot be considered a resource by the state child welfare agency.

Kim and Betty meet with a caseworker and Kim signs voluntary placement papers, which specify that John and Cathy will go into placement upon the occurrence of Kim’s disability. Betty enrolls in a foster parent training program and her home is evaluated for licensure.

A short time later, Kim is hospitalized. The children stay with Betty, and the placement becomes effective. Betty begins to receive a stipend. A foster care caseworker visits them to monitor the placement and assess any need for additional services. Within two months Kim is home and ready to take custody of the children, which she does, and the placement goes dormant.

RECOMMENDATION

Create voluntary foster programs that respect the parent’s ability and right to plan for future incapacity, such as New York’s voluntary placement program.

NOTES

1 An example is when a parent is contemplating inpatient substance abuse treatment, or is in need of adequate shelter for her family. In accordance with SSA provisions in the Adoption Assistance and Child Welfare Act of 1980, within 180 days the child must either be returned, or a neglect/abuse case must be filed in court, if the state wishes to collect Federal money.

2 ASFA (1997) states a preference for kinship placements. Many states have statutorily mandated that biological relatives be explored as placement resources following a child’s removal. Foster care by persons related to the children they care for is known as “kinship care.”

3 ASFA (1997) requires states to limit the amount of time children remain in foster care placement as a condition to federal aid.

4 Extrajudicial plans such as powers of attorney, short-term guardianships, wills, or written designations of standby guardianship may be prepared and revoked before voluntary placement arrangements are made.
Parents who do not have much money or own major assets sometimes make the mistake of believing that wills would not be useful to them. To the contrary, although a will is traditionally used to allocate personal assets after death, it also can be an important tool for parents who wish to nominate caregivers for their children.

Wills are widely recognized and accepted by the courts, and can be effective tools for permanency planning under the right circumstances (Bissell, 1999; Hanson, 1998; Merkel-Holguin, 1994). A will should be prepared by an attorney in order to assure compliance with state law. Relatively easy to complete and private in formation, wills are signed by the parent and witnessed by two “non-interested” persons. Through one or more written clauses in the will, the parent names a future caregiver, commonly referred to as a “testamentary guardian,” as well as any desired alternates or successors.

A will can protect family assets through the appointment of fiduciaries to manage the parent’s estate, and to manage any funds and/or property belonging to the children. Under the Minnesota Uniform Transfers to Minors Act (2003), for example, “a person having the right to designate a recipient of property transferable upon the occurrence of a future event may revocably nominate a custodian to receive the property for a minor beneficiary upon the occurrence” of the nominator’s death.

The parent selects a personal representative, the “executor,” who is in charge of the estate after the parent’s death. This person is responsible for making sure all of the parent’s wishes expressed in the will are carried out. In many states guardians of property, custodians, or conservators are appointed in the will to manage any assets or funds given to or held by the children. To strengthen the plan, the executor, testamentary guardian, and any custodian, conservator, and/or guardian of property, should know of and accept their roles at the time the will is executed. A will can be revoked or amended throughout the parent’s life.

A will transfers no immediate rights or responsibilities with respect to the children it concerns. Testamentary guardianship takes effect only after a parent’s death and the will’s review by the appropriate court. State laws differ as to types of notice and timelines testamentary guardians must follow in order to formalize their appointments. If both parents are dead or the surviving parent is incapacitated, a testamentary guardianship may be effective as soon as the guardian files an acceptance of his or her appointment with the probate court, unless an objection is filed. The guardian’s authority and responsibility, which are generally the same as that of a parent (although some states place limitations on consent for certain medical or psychological procedures without first obtaining court approval), last until the death, resignation or court-ordered removal of the guardian, or the child’s death, adoption, marriage or attainment of the age of majority.

If the testamentary guardianship is challenged, a hearing will be necessary. Since the parent cannot state his or her preferences in person, testify to the reasons for choosing the caregiver, or provide evidence of the unfitness of the person contesting the will, a thoughtfully composed will serves as “testimony” that survives the parent’s death.

To formalize the appointment of a testamentary guardian, the court must find that the guardianship arrangement is in the best interests of the child. A parent’s explanation in the will as to why he or she has selected a particular guardian may provide the only evidence to this effect. Sometimes a parent may
elect to explain why she has not chosen a specific individual, who others might identify as a potential caregiver. For example, a grandparent may have been abusive to the parent or child, engaged in dangerous or illicit behaviors, or never have been involved in the child’s life. Additionally, the parent can ask that persons who agree with his or her position make themselves known to the court in order to provide supporting evidence in any future proceeding. A sample clause appointing a testamentary guardian is attached as Appendix II. Even so, if a parent anticipates a will contest, it is best to combine the will with other planning tools, if available.

In sum, a will is a useful custody planning tool when created with care and considerable thought. Wills are widely recognized and easily created and signed. Unconstrained by the formal language of court and legal forms, wills are especially effective in memorializing a parent’s thoughts about why she chose a particular caregiver. However, the utility of wills as planning tools is limited because their guardianship appointments are not confirmed until after the parent’s death, requiring action on the part of the caregiver, and making them vulnerable to challenge by other parties. Therefore, wills should be used in concert with other planning tools, especially if the potential for conflict exists.

LEGISLATIVE ISSUES

To improve the effectiveness of wills as voluntary permanency planning tools, legislative and policy changes that support a parent’s choice for caregiver should be implemented, working from the basic tenet that the parent’s choice is in the best interests of the child. Unless the caregiver can be shown to be unfit, the parent’s wishes should be carried out. The Texas Probate Code provides a good example of this type of legislative protection, by establishing a presumption of the parent’s ability to make the best choice for his or her child (Texas Statutes).³

CASE EXAMPLE

Kim is considering writing a will as part of her permanency plan. She would like to name her mother, Betty, as testamentary guardian for her children John and Cathy. However, she knows that her son’s father, Hector, will contest Betty’s appointment as John’s guardian. This does not mean that Kim should not write a will, especially if she wants to use it to distribute her assets and personal effects. She should work with an attorney to draft a document that fully sets forth and explains her choice of Betty as a caregiver, and consider other planning tools to supplement the will. In her will, Kim should state that it is important to her that the children grow up together. She knows that Hector would never consider taking care of Cathy because she is not his child. Kim should also outline in the will the relationship between the children and Betty, so that it is clear that they have a significant bond because of the quality time they spend together. Finally, if Kim has any specific concerns about Hector or his family’s ability to parent, she should state those as well. The will becomes a record of Kim’s reasons for her appointment of Betty as testamentary guardian and through the inclusion of specific detail becomes a useful evidentiary tool in the event that the appointment is contested.
■ Probate laws concerning the confirmation of a parent’s testamentary appointment of a guardian should provide a rebuttable presumption that the parent’s choice of guardian is in the best interests of the child.

NOTES

1 In Minnesota’s Uniform Probate Code (2003) for example, a three-year time limit is set on proceedings unless one of the statutory exceptions is met.

2 LaBelle v. LaBelle, 207 N.W.2d 291 (Minn. Ct. App. 1973) gives an early consideration of the best interests factors test in Minnesota. “The central and overriding consideration in determining the question of a change in custody is the child’s welfare and best interests. The court should review all relevant factors to determine whether a change in custody is warranted.” Id.

3 The statute provides that “the court shall appoint the person designated in the will or declaration to serve as guardian of the person of the parent’s minor children in preference to those otherwise entitled to serve as guardian under this chapter unless the court finds that the designated guardian is disqualified, is dead, refuses to serve, or would not serve the best interests of the minor children” (Emphasis added).
Powers of Attorney

A power of attorney is a written document that authorizes one person to act on behalf of another. The person making the document, the “principal,” gives the person authorized, the “agent,” or “attorney in fact,” the power to act as his or her representative in performing specified acts or transactions. Generally, powers of attorney are given formality by the requirement that they be signed and notarized; no court action or oversight is required.

All states have statutorily authorized powers of attorney, the forms and types of which are usually specified within the statute (e.g., Uniform Durable Power of Attorney Act, 8A U.L.A. 309-330 (1993 & Supp. 1999)). There are three common types of power of attorney: durable, non-durable, and springing. Durable powers of attorney commence upon the document's signing and remain in effect until the principal's death or revocation of the power, even if the principal becomes mentally incapacitated; non-durable powers of attorney cease to be effective upon the principal's mental incapacity; and springing powers of attorney are not effective unless and until the occurrence of a condition or conditions specified within the document (such as mental incapacity).

Powers of attorney are widely used as business and financial planning documents. Statutes typically list such delegable powers as banking, real estate, estate, and business operating transactions. More recently, powers of attorney have been used to allow the agent to consent to health care on the principal's behalf (e.g., Uniform Health-Care Decisions Act, 9 U.L.A. Part IB 143-182 (1999)). There has also been a move to create powers of attorney covering delegation of parental responsibilities.

INNOVATIVE USES OF POWER OF ATTORNEY

Specifically, several states have adopted the Uniform Guardianship and Protective Proceedings Act of 1982 (UGPPA), which provides that “a parent or guardian of a minor or incapacitated person, by a properly executed power of attorney, may delegate to another person...any power regarding care, custody or property of the minor child or ward, except the power to consent to marriage or adoption” (Uniform Probate Code §5-102, 8 U.L.A. Part II 326-327 (1998)). The UGPPA has been adopted by at least 14 states, including Alabama, Alaska, Arkansas, Colorado, Idaho, Maine, Michigan, Minnesota, Montana, Nebraska, New Jersey, New Mexico, North Dakota, and Utah. Most limit the duration of the delegation to six months, as proposed in the model statute. Alabama, Alaska, and Colorado provide for slightly longer periods. No state allows the delegations to remain active for longer than a year. A sample power of attorney form, consistent with the UGPPA, is attached as Appendix III.

Louisiana has adopted “Provisional Custody by Mandate,” permitting a parent or guardian to authorize an agent to “provide for the care, custody and control of a minor child” (La. Rev. Stat. Ann. §§9.951-954 (West Supp. 1999)). The authorization includes actions with respect to school, medical care, and the day-to-day needs of the child. The duration of the delegation is limited to one year.

In states that have not adopted the UGPPA, powers of attorney have been interpreted to exclude delegation of child custody. The reasoning often cited for this is that parental rights and responsibilities are not privately assignable under common law. However, a power of attorney does not transfer parental responsibilities. In accordance with the principles of agency law, it merely authorizes the agent to act as the parent’s representative. The agent's authority is not only concurrent with the parent’s, it is also limited to the parent’s explicit instructions, or actions consistent with the parent’s known values.
McAllaster, 2000). It seems reasonable, therefore, to extend power of attorney statutes to encompass child care as modeled by the UGPPA.

Certain states, including Colorado, Delaware, Kansas, Maryland, Missouri, North Carolina, Texas, and the District of Columbia, have enacted statutes empowering parents to authorize agents to make health care decisions on behalf of their children in case of the parent’s absence or incapacity at the time the decision is needed. In the absence of such a statute, most states allow for delegation of parental authority for decisions on emergency treatment of a child. In addition, some practitioners have interpreted the category “personal relationships and affairs,” included on power of attorney forms, to allow agents to provide for the principal’s dependents in keeping with the lifestyle to which they are accustomed. This, of course, is a much narrower scope of authority than that of a guardian, and cannot be considered a permanency plan for the principal’s children.

Parents and advocates in states that have not adopted the UGPPA have also created ad-hoc documents in the style of powers of attorney for child care planning purposes. These documents are short writings signed with some degree of formality by the parent (witnessed, notarized, or both) to establish an agency relationship between parent and caregiver. For example, a parent going out of town might write a letter authorizing a temporary caregiver to take a child to the hospital and consent to medical treatment, or to pick up the child from school. Another unorthodox way of conveying this intention is by adding a rider discussing child care and custody to a durable power of attorney form. The advantage to these creative solutions is that the parent may specify exactly what he or she wants the caregiver to be able to do, as well as other ideas the parent believes are important to encourage reliance on the document, including the caregiver’s qualifications and relationship to the child.

ADVANTAGES AND LIMITATIONS

The advantage to making a power of attorney is that it clearly communicates the parent’s intention that the named person be able to provide some degree of care to the child. Furthermore, the parent does not give up any authority in making the document: an agent’s authority to make decisions exists concurrently with the principal’s, and the principal’s autonomy in decision-making always controls. The agent does not have independent decision-making power, only the ability to do for the principal what the principal would have done. Powers of attorney are also quite simple to make—they do not require an attorney, can be completed in minutes, and can even be handwritten. They are private and informal in the sense that they are not reviewed in court. Thus, they are easy to change and do not require public disclosure of illness or a parent’s need to plan. Finally, a power of attorney could serve as evidence in a later custodial proceeding.

The major disadvantage of powers of attorney is their lack of customary usage in the area of child care planning. Even in states that have adopted the UGPPA, the parental delegation provisions have been interpreted to confer something less than guardianship. The commentary to the UGPPA suggests that the model act was primarily intended to enable a temporary caretaker to access emergency medical care while a parent was absent due to travel (comment to 1997 Main Volume, Uniform Probate Code §5-102, 8 U.L.A. Part II 326-327 (1998)). The time limitations associated with parental delegation statutes limit their usefulness except to parents facing a predetermined absence. Parents living with chronic illness would need to renew their delegations and redistribute them to their agents every six months to a year, depending upon their state of residence. Additionally, it is unclear whether, and to what extent, powers of attorney and parental delegation instruments are effective in the face of disagreement by others having rights and responsibilities with regard to the child, such as a non-custodial parent.
In states that have not adopted the UGPPA or an analogous device, informal documents that are not statutorily authorized are of uncertain value. Although these documents have proven to be successful for parents who occasionally need another person to pick their kids up from school or take them to the doctor, it is doubtful that they would survive legal scrutiny if needed to confer custody for extended periods of time.

Finally, a disadvantage of any power of attorney is that the authority does not survive the parent’s death (Selbin & McAllaster, 2000). Powers of attorney delegating parental roles need to be used in conjunction with other tools to truly provide a secure plan for a child’s future care.

**LEGISLATIVE ISSUES**

States should amend their power of attorney statutes to specifically include delegation of child care responsibilities. If they have not done so already, states should consider adopting the UGPPA. Alternatively, the issue could be addressed under a separate statute, as in Louisiana (see also, the chapter on Short-Term Transfers of Guardianship or Custody, pp. 59-61). States should, however, exclude the time limitation set forth in the model act, congruent with other types of powers of attorney. Finally, in crafting their statutes, states should enumerate execution and other requirements designed to deter fraud and convey formality, and suggest but not require prescribed forms in order to broaden accessibility to parents.

A springing power of attorney can be very useful to an episodically-ill parent, by outlining the conditions under which the agent is needed. The document could specify that the agent-caregiver’s authority take effect after a triggering event such as the parent’s hospitalization, and lapse once the parent has recovered. This could be particularly effective when used in conjunction with other tools conferring more permanent arrangements. A sample Springing Power of Attorney form is attached as Appendix IV.

**CASE EXAMPLE**

Kim has written a will nominating her mother, Betty, as the guardian for her children John and Cathy in the event of her death. However, Kim wants to do something to cover Betty when she currently cares for the children, in case she needs to pick them up from school or take them to the doctor. Kim also wants to allow Betty to run errands, including banking and paying bills, for her when she is too sick to do it herself. Kim executes a springing power of attorney naming Betty as her agent.

Kim’s state of residence has not adopted the Uniform Guardianship and Protective Proceedings Act, nor does it have a special statute concerning powers of attorney for healthcare or other decision-making for dependents. She is advised by her attorney that in the absence of these instruments she can do the next best thing to demonstrate her intent to delegate child care authority. She initials the space on the form that authorizes her mother to conduct personal relationships on her behalf, and further writes in, as a rider, her intention that Betty have power to make decisions impacting the children’s care and custody. In the event that the power of attorney is not honored, Kim also writes a letter specifically authorizing Betty to transport John and Cathy to and from school, and make emergency and routine health care decisions on their behalf. Kim signs this letter, which she titles “Temporary Care and Custody,” in front of a notary, just as she has signed the power of attorney. Kim gives Betty the original documents and informs the children’s school administrators and pediatricians about the documents.
RECOMMENDATIONS

- States should adopt the Uniform Guardianship and Protective Proceedings Act, or otherwise provide that Powers of Attorney can delegate to agents the power to exercise certain parental responsibilities.
- Powers of Attorney that delegate parental powers should exclude narrow time limits to extend their utility to parents with episodic needs.
- Statutes should suggest and provide examples of Power of Attorney forms, but not require that such forms be used, in order to maximize accessibility.
- Parents should be able to designate triggering events or conditions that would activate or terminate the agent’s authority, such as in a Springing Power of Attorney.

NOTES

1 The California Designated Caregiver Affidavit, which was developed to assist grandparents caring for young grandchildren, allows a caregiver who has physical custody of a child to make decisions about school and health care (Selbin & McAllaster, 2000). Note that the parent is not making the appointment in this case; the tool is used when the parent is absent and someone must exercise authority. Essentially, the caregiver simply completes and signs a form, without judicial review or the consent of the parent. The caregiver can then present the form as needed to secure services for the children.
A permanent transfer of custody or guardianship is the legal transfer, through a court proceeding, of the care and custody of the child from a parent to another caregiver. States differ in their preferences for appointing non-parent caregivers as “custodians” or “guardians.” The intent and meaning of the terms is similar, with the main difference being the areas of law or courts of jurisdiction applicable to each statutory mechanism. For example, in many states “custody” relates to family or juvenile courts and statutes, while “guardianship” applies to probate courts and codes. With regard to future custody planning, however, the practical effect of both custody and guardianship is the same. A custodian or guardian has the power and responsibility to make any decision for the child that the parents could make, including medical, educational, and place of residence, making this a very powerful and secure planning tool (e.g., Minn. Stat. §518.003 (a) & (c) (2003)).

Either the parent or the proposed caregiver is authorized to bring a court petition for custody or guardianship. All interested parties, including non-custodial parents, are notified of the proceeding and invited to appear before a judge for a final determination on the child’s best interests. When parties are able to make agreements prior to the hearing, courts may approve stipulations made between the parties in order to expedite the process. For example, the proposed caregiver and non-custodial parent may agree to an open communication and visitation arrangement. A sample petition and custody consent decree form, for use in the New York court system and representative of many states’ custody forms, is attached as Appendix V.

All custody and guardianship determinations are made under the rubric of a best interests analysis, encompassing such factors as the preferences of the parent and child (if the child is old enough to indicate a preference); the relationship between the child and the proposed custodian; relationships to other family members including siblings; the child’s relationship to the community, school, faith, and other formative factors; and the presence of domestic abuse or other negative factors in either the current home or the proposed home. A guardian ad litem may be appointed to represent the child. The authority of a custodian or guardian lasts until the child reaches the age of majority, or the earlier death, incapacity, resignation, or court-ordered removal of the custodian or guardian.

Unlike in the case of adoption, where all rights are relinquished, a transfer of custody does not terminate the rights of the parent. Custody or guardianship arrangements may give the parent opportunity for communication and/or visitation with the child, whether scheduled through the courts or left to the parties’ discretion. The parent retains the right to petition the court for a modification of the custody or guardianship arrangement if circumstances have changed to the extent that the parent is able to care for the child again, or if the parent wants to name a new caregiver. However, if the custodian contests such a petition, a parent may have to prove that the current arrangement endangers the child’s emotional or physical well-being. To help prevent this, parents electing transfers of custody or guardianship as planning tools should discuss their expectations with potential caregivers, including any contemplation of a return of custody to the parent, and memorializing the discussion and points of agreement if possible.

It is important to note that parents also retain the responsibility for the child’s financial support. If a parent transfers custody or guardianship to someone other than a non-custodial parent, the non-custodial parent will owe any previously-ordered child support to the caregiver. Further, the planning parent may also owe support to the caregiver. This issue should be addressed early in the planning stages, especially...
if the planning parent has little income. Difficulties can arise when the custodian applies for public benefits for the child and the county or state administering the benefits seeks reimbursement from the parents.

Custody or guardianship transfers can be effective planning tools under the right set of circumstances. Due to the parent’s loss of day-to-day responsibility for the child, parents should ensure that their proposed caregivers understand and are in agreement with the parent’s plan for continued involvement and contact with the child after the court order is made. There are many situations in which a more temporary arrangement will be better suited to the parent’s situation. If a parent is ill but her prognosis for recovery looks good, a permanent change is not usually advised. But if a parent is critically ill or faces irreversible debilitation that will require inpatient or residential care, and wishes to make secure plans that will extend beyond her death, a permanent transfer of custody or guardianship may best suit her needs.

**LEGISLATIVE ISSUES**

States should strive to include more flexibility within their custody and guardianship statutes. For example, states can consider explicit legislation authorizing the appointment of joint custodians or guardians and standby arrangements. Legislators should structure statutes so as to eliminate confusion, whenever possible, as to who is the controlling decision maker in a child’s life, while at the same time protecting parental rights, should the parent wish to amend or terminate a custody or guardianship arrangement.

**CASE EXAMPLE**

Kim’s HIV has progressed to AIDS. She is extremely weak and requires home health care part of the day. Kim’s doctor has stated that she may need to enter institutional care in order to receive the daily assistance she requires. It is very unlikely that Kim will be able to care for her children, John and Cathy, on a consistent basis. Kim asks Betty, her mother, to take permanent custody of the children. Hector, John’s father, must receive notice of the court proceeding to transfer custody. Len, Cathy’s father, is not on named on the birth certificate and has never established a parent-child relationship with her, so it is not necessary to give him notice. Custody transfer papers are drawn up and when Hector is served he immediately hires a lawyer who answers that Hector will contest the custody transfer to Betty. An evidentiary hearing is held so that the court can determine which placement will be in the children’s best interests. After weighing testimony and evidence, including a report from a guardian ad litem, the court issues an order granting Betty custody of the children and granting Hector visitation with John. The court considered, among other factors, Kim’s wish that the children remain together, as well as their significant relationship with one another and Betty.
RECOMMENDATIONS

- Custody and guardianship statutes should provide for innovative applications such as joint and standby arrangements.

- Statutes should be structured so as to eliminate confusion, whenever possible, as to who is the controlling decision maker in the child’s life.

NOTES

1 Many states have legislation allowing third parties to bring custody actions, although some, such as Minnesota, have attempted to limit this ability to individuals who can either prove de facto custodianship after a statutorily determined time period or in instances of abandonment, neglect, or abuse (Minn. Stat. Chap. 257C). The issues of parental rights and third party access were addressed extensively in the U.S. Supreme Court Case Troxel v. Granville, 530 U.S. 57 (2000), which upheld parents’ fundamental rights to rear their children and allowed for court interference in the parent-child relationship only when there is a threshold showing of harm or potential harm to the child.

2 Proof of endangerment generally includes evidence that the child’s present environment poses a threat to the child’s physical or emotional health, or impairs the child’s emotional development. In Minnesota, for example, the court also considers whether “the harm likely to be caused by a change of environment is outweighed by the advantage of a change to the child” (Minn. Stat. §518.18(d)(iv) (2003)).
Adoption is a legal process in which the birth parents’ rights and duties toward a child are terminated, and parental rights of adoptive parents to the child are established. Adoption is authorized by state statute, and has no basis in common law. State statutes, regulations, and court opinions each play a part in establishing adoption law and practice. Most states share general principles of adoption law, but there are also many variations, and the reader is encouraged to explore the adoption statute and regulations available locally for more information (National Adoption Information Clearinghouse (NAIC), 2002).

Adoptions may be done through a licensed private agency or public agency responsible for adoptions, through the child welfare/juvenile court process, or privately without the assistance of an agency. The method by which parental rights are terminated for one person and then created in another depends on the kind of adoption involved. Rights of birth parents may be voluntarily or involuntarily terminated. Voluntary termination occurs when the birth parent consents to or surrenders the child for adoption. In some states, the parent may specify in the surrender of parental rights that the consent is conditional, dependent on a specifically named person's qualification and approval as the adoptive parent. Involuntary termination occurs if a court finds the birth parent to be unfit according to standards set out in state statute (North American Council on Adoptable Children (NACAC), n.d.).

BENEFITS AND LIMITATIONS OF ADOPTION AS A PLANNING TOOL

Adoption may be appropriate in circumstances in which the child's parent wants a permanency status that is secure, immediate, and final. Adoption is the most secure of all permanency plans because the rights of the child's parents are permanently terminated, and this termination is unalterable absent a showing of fraud or duress. It is immediate in that the child becomes the legal child of the adoptive parent as soon as the court enters the order for adoption. At that point, care and custody of the child are transferred to the adoptive parent. Once the court’s order for adoption is entered, the child's birth parent and the adoptive parent cannot change their minds about the plan.

Because adoption requires termination of parental rights, including the right to communicate and visit with one's child, it is infrequently used by parents as a planning tool. It is, however, a useful alternative for families in which the parent has already died or parental rights are terminated because of child abuse or neglect. Adoption has also been useful for families in which a step-parent wishes to adopt a child and is willing to serve as sole caregiver if something happens to the child’s birth parent.

Adoption has also been a “default” tool in cases in which a child has been in foster care and is adopted through the child welfare system by a relative or foster parent, often with the parent's consent. The decision to pursue these adoptions may be influenced by statutory timeframes for foster care placement and permanency decisions. In this type of case, adoption has the advantage of providing permanency for the child. Benefits, including a monthly cash adoption assistance payment and medical coverage, may also be available. A disadvantage is that traditional family relationships are disrupted when a relative becomes the new “legal parent,” and the birth parent becomes a “legal stranger” to the child. For example, the child may continue to have a relationship with the birth parent, yet the relative or foster parent who adopts will legally be considered to be the birth parent.
The availability of financial assistance to adoptive parents, when no similar assistance is available to caregivers in other legal relationships, places pressure on some families to choose this option. The long-term consequences of adoption by relatives, who would not legally take on parental status but for available financial assistance, are unknown. As children in kinship adoptions reach adolescence, adoption disruptions may increase (Smith & Howard, 1999). The ability of older caregivers, in particular, to provide care may be impacted by illness or the caregiver’s death.

In sum, adoption is among the most secure planning options in that, once complete, it establishes a permanent relationship between the child and caregiver, and is not vulnerable to modification challenges, even by the child’s biological parents. However, these qualities also make it unattractive to planning parents who, with few exceptions, are unwilling to permanently sever all rights to their children. Adoption should not be considered by families who are not willing to permanently, immediately and finally transfer all legal and custodial rights vis-à-vis their children to a new caregiver. For families in which the birth parent is willing and able to continue to parent the child, adoption is inappropriate. Thus, adoption is an imperfect custody planning tool for most parents.

**LEGISLATIVE ISSUES**

In recognition of adoption’s increased stability, security, and permanence for children, legislators may wish to encourage the use of adoption as a planning tool. The immediate termination of parental rights, and legal assumption that there will be no future interaction between the adopted child’s biological parents and/or family, creates a major stumbling block to accomplishing this goal.

**Standby adoption** involves a court appointment of a person who “stands by” until the birth parent’s death, after which the court finalizes the adoption unless it can be shown that the adoption is no longer in the child’s best interest. Standby adoption provides a legal future adoption plan for the child of a terminally ill parent, while allowing the birth parent and child to stay together for as long as possible. (See pp. 48-54 for more information.)

**Open adoption** is a type of adoption that “allows adoptive parents, and often the adopted child, to interact directly with the birth parent” (NAIC, 2003). This interaction can take place before, after, and/or during the child’s adoptive placement, and can be in the form of information sharing or other interaction that is direct or mediated. The type and frequency of communication are arranged by the parties. Open adoption’s goals are: (1) to minimize the loss of relationships with the child to the birth family; (2) to “maintain and celebrate the adopted child’s connections with all the important people in his or her life,” and (3) to facilitate children’s resolution of losses “with truth, rather than fantasy” (NAIC, 2003). Open adoption is practiced, with different levels of official recognition, in many states but is legally sanctioned in very few (NAIC, 2003). Where it is not legally sanctioned there is no way to enforce open adoption terms. Open adoptions may make adoption more attractive to planning parents who would otherwise reject it due to their loss of ability to see or communicate with their children.

Innovative applications allowing for pre-approved adoption plans and continued family involvement after adoption, such as standby adoption and open adoption, may encourage broader use of adoption in planning.
**CASE EXAMPLE**

Kim wants to have the most secure legal plan in place for her children, John and Cathy. She would like to eliminate any threat of intervention by the children’s fathers, Hector and Len, respectively, by having her mother, Betty, adopt the children. As part of the adoption process, Hector’s and Len’s parental rights would be terminated. Adoption would be the most legally secure plan for the children, but it could be difficult, as Kim doubts that either Hector or Len would consent to surrender their rights. In addition, in Hector’s case, there is little evidence to support termination. It also would mean that Kim’s rights as a parent would be terminated, and that complete custody and control of the children would go to Betty. Even though Kim trusts Betty, she wants to keep her rights and responsibilities as a parent for as long as possible. Thus, adoption is not a viable legal plan for Kim.

**RECOMMENDATIONS**

- States should provide for pre-approved adoption plans through standby adoption.
- States should provide for open adoption agreements between birth and adoptive families.
- States should provide for the use of specific consents to adoption (those in which consent is limited to adoption by a specific person named by the parent).

**NOTES**

1. A difficulty experienced in many states is the conflict between the amount of time needed to effectively resolve the birth family’s issues (for example, mental health, and substance abuse problems) and the short permanency timeline requirements of AFSA regarding termination of parental rights and permanency (U.S. Department of Health and Human Services (DHHS), 2001; DHHS, 2003).

2. Alternatives to adoption are available through state child welfare systems, but most states require that adoption be “ruled out” before other, less permanent options are considered. In many states, subsidized guardianship programs can make it possible for relatives or foster parents who meet state requirements to become private guardians with financial and medical assistance. However, eligibility requirements and the level of financial assistance available vary. See pp. 65 for more information on subsidized guardianship.
Innovative Tools

— Standby Guardianship —

Standby guardianship provides for the appointment of a future legal guardian for children whose parents may soon be unable to care for them. The guardianship goes into effect only at the point at which a parent cannot care for the children, thus, until such time, the appointed person “stands by.” The guardianship arrangement may be subsequently activated by the occurrence of a “triggering event.” Some states’ standby guardianship laws define triggering events; the most common three are death, mental incapacity, and physical debilitation coupled with parental consent. Laws in other states permit the parent to describe the triggering event, or allow for the guardianship to go into effect on the parent’s consent alone or according to a broad standard like the inability to make day-to-day parenting decisions. Once the guardianship is active, the parent usually retains the right to make parental decisions to the extent health permits, concurrent with the guardian’s power to do so. Almost all standby guardianship laws provide for pre-approval of the appointment by a court so that transferring care of the children is seamless from parent to guardian. Many standby guardianship laws also allow parents to appoint standby guardians through signed and witnessed documentation, subject to future confirmation by a court in a traditional guardianship proceeding. In many states standby guardianships are available not just to parents but to any adult who has legal custody of children.

Though there are a few standby guardianship laws that predate the 1990’s, the process came into wide use in response to the HIV crisis. Existing laws for guardianship and adoption had a great drawback: they required parents who were still able to care for their children to give up a parental role. Standby guardianships have the great advantage of going into effect on a future date so that parental caretaking can continue as long as possible, and in many states even after a triggering event, permitting continued participation in the child’s life.

In the 1997 Adoption and Safe Families Act, Congress stated in the preamble:

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 parent’s minor children, whose authority would take effect upon —
the death of the parent;
the mental incapacity of the parent; or
the physical debilitation and consent of the parent

[Section 403, 11 Stat.2124; PL 105-89]

There are now 18 to 23 states (depending on what criteria are used to define standby guardianship) that have these laws. A listing of all state statues is attached as Appendix VI.

COMMON ELEMENTS

There are many variations, but ten of the most common elements of standby guardianship laws are as follows (see Appendix VII for a “Chart of Common Elements of Standby Guardianship Laws):
1. **Written designation of a standby guardian**

A parent chooses a suitable adult to care for the children. The standby guardian is named in a written document. The document may also include names and ages of the children and other pertinent information like the reason for the parent's designation of a standby guardian, why the parent chose the nominated person, and the names and whereabouts of the non-custodial parent. Often the parent's signature on the designation document must be witnessed by two adults, just as a will is witnessed. Many states require the signature of the proposed standby guardian, as well. A sample designation provided is in Appendix VIII.

2. **Parental illness as a basis for appointing a standby guardian**

Several of the earliest standby guardianship laws required a parent to provide medical evidence of a terminal disease—even of death likely to occur within two years—to establish eligibility. Only Maryland and Colorado have not yet discarded the two-year rule. However, all but nine states still use chronic, debilitating disease as an eligibility standard. In some cases, the parent's sworn testimony suffices in lieu of direct medical evidence of illness (Ambia et al., 1998).

3. **Parental control of designation**

An important concept within standby guardianship is facilitating parental participation in the process. A significant aspect of this is the parent's right to select the future guardian, and the right to withdraw the selection. In many states, withdrawal can be oral if it occurs before documents are filed in court. After documents are filed in court, withdrawal typically has to be in writing with notice to the court (e.g., Maryland, Massachusetts, North Carolina, and Pennsylvania). Courts may be more accepting of a withdrawal if it is accompanied by the submission of a successive designation. In any event, the court likely would insist on re-examining the issues.

4. **Filing the petition in court**

The court process to obtain approval of a standby guardianship begins with filing the petition. The written designation may be attached to the petition. In addition to presenting information about the standby guardian, children and non-custodial parent, the petition may contain other information, including statements regarding the parent's medical condition, a description of the triggering event(s), status of notice to the non-custodial parent, consents to the guardianship, and other information relevant to the child's best interests. Once the petition is filed, the court schedules a hearing to determine whether the standby guardianship is in the child's best interests, settle any matters in controversy, and issue an order of approval if warranted.

Several statutes that developed early in the HIV crisis contain a two-part court process. First, the parent files documents in court before any triggering event occurs. A hearing is scheduled at which the parent appears. If all goes well, the court issues an approval order and, once a triggering event occurs, the guardianship would begin. If, however, a triggering event occurs after the written designation but before documents are filed in court, or before an approval order is issued, a different court process would ensue, led by the designated standby guardian whose duty it would be to submit evidence (e.g., New York, North Carolina, Pennsylvania, and Washington). Some states have simplified the process for “before” and “after” filings by simply stating that the documents can be filed any time up to a certain number of days after the triggering event. Either the parent, or if the parent is not well or has died, the standby guardian, can file (e.g., Virginia and West Virginia).
At the court hearing the judge hears from the petitioning custodial parent, any non-custodial parents who appear, and any witnesses. The judge examines the documents and either grants or dismisses the petition. There is no shift of custody until one of the triggering events listed in the petition occurs.

5. Notice to the non-custodial parents
As the rights of fit, willing, and able parents to raise children are protected by U.S. Constitutional law, notice to non-custodial parents of the proposed standby guardianship is exceptionally important (e.g., *Meyer v. Nebraska*, 262 U.S. 390 (1923), *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), *Prince v. Massachusetts*, 321 U.S. 158 (1944)). Notice can be a barrier to using standby guardianship, as custodial parents may be unwilling to re-engage the other parent in their lives. Usually “reasonable efforts” are required to locate and give notice of the standby guardianship proceeding to the non-custodial parent, although some states require a “diligent” search (e.g., Pennsylvania and Wisconsin). If the non-custodial parent’s rights have been terminated in a prior court action, no notice is required.

6. Non-custodial parent’s opportunity to consent or object
Once informed of the hearing, the non-custodial parent can consent to the arrangement either in writing or in person, object, or do nothing (in which case consent may be implied). If there is an objection, the judge can determine whether it is well-founded. However, even after the standby guardianship is approved, the rights of the non-custodial parent are not extinguished. If the non-custodial parent is not located before the hearing, but later learns of the standby guardianship (or, if there has been a triggering event, the guardianship) he or she can file a new petition for custody. In order to maintain a standby guardianship against a parental challenge, the non-custodial parent’s unfitness would have to be proven by clear and convincing evidence (*Stanley v. Illinois*, 405 U.S. 645 (1972)).

7. Child’s best interests
Every court action that affects custody of a child implicitly, if not explicitly, requires a judge to consider the child’s best interests. If a judge decides that the plan is not in the child’s best interests, the arrangement would be precluded. Some states include in their standby guardianship statutes a presumption that the parent’s decision to appoint a standby guardian, and the parent’s choice of a standby guardian, is in the child’s best interests (e.g., Alaska, District of Columbia, Georgia, Illinois, Pennsylvania, and Texas).

8. “Triggering events” that begin the standby guardian’s duties
As previously indicated, the three common triggering events are mental incapacity, physical debilitation coupled with consent of the parent, and death. There is an emerging trend in recent statutes to provide a choice of additional triggering events so the law can be more widely and easily applied. In seven states parental consent alone can trigger guardianship (Maryland, Massachusetts, North Carolina, New York, Pennsylvania, Virginia, and West Virginia). That is, the parent, recognizing that she or he has reached the limit of energy or capacity to care for the children, simply consents to the guardianship’s commencement. In most of the states that permit consent alone to be a triggering event, it is in addition to the usual trio. In Illinois and Massachusetts, however, the very standard for the law is the parent’s inability to make day-to-day decisions. Four states with older laws not tied to the HIV epidemic permit parents to design their own triggering events (Connecticut, Iowa, Ohio, and Wyoming). Finally, in Florida and Texas the laws have a narrower applicability than elsewhere. Only two triggering events are permitted: incapacity or death.
9. **Informing the court about triggering events**

The standby guardianship is converted to “active” guardianship upon the occurrence of a triggering event. If the court has previously approved the standby guardianship, some states permit the guardianship simply to begin without further court process. More often, the standby guardian is given a certain amount of time, generally 60 to 90 days after the event, to file evidence of its occurrence. This might include a death certificate, consent from the parent based on physical debilitation, or a physician’s diagnosis of mental incapacity. During the time allowed for this evidence to be gathered, guardianship is automatically in effect. Depending upon the state and jurisdiction, the court may make a final order of guardianship based solely on the documentation submitted if it appears there are no issues in controversy (e.g., District of Columbia, North Carolina, Minnesota, Pennsylvania, Virginia, and West Virginia). Typically, though, the court will require the standby guardian and other parties to appear at a hearing before making the final order. In North Carolina, judicial authority to preside at standby guardianship hearings has been delegated to a court clerk.

10. **Concurrent decision-making**

The concept of shared decision-making between parent and guardian is a significant factor for parents who elect to use standby guardianship. Not every statute provides for concurrent decision making after a triggering event, but most do, and it is an element in the Preamble to the Adoption and Safe Families Act of 1997 (Preamble, § 403; 11 Stat. 2134, P.L. 105-89). The idea is that an active parenting role should continue as health permits, and the parent should have as much contact with the child as is wished. Florida and Texas laws only go into effect after the parent is incapacitated, so by default there is no shared decision-making. The District of Columbia’s law encourages the parent to be involved in the child’s life and maintain contact, but as there is a complete custody shift to the guardian, it is the guardian that implicitly maintains authority. Illinois does not impose concurrent decision-making once the guardianship is activated. Several statutes—the older laws not tied to the HIV crisis—are silent on this issue (e.g., Connecticut, Iowa, Ohio, and Wyoming).

**ADVANTAGES AND LIMITATIONS**

Standby guardianship can assure a safe and stable future for a child. The parent gains peace of mind because the plans for the child are approved and the parent’s role can continue to the extent that health permits. These are clear advantages for a single parent who is seriously ill, and who primarily is concerned about the future care of a child. There are, however, circumstances under which standby guardianship is not available or appropriate. For example, standby guardianship is not available when there is another parent who is fit, willing, and able to care for the child, if that parent objects to the standby guardianship. If a parent’s need for standby guardianship is very short-term—for example, a one month hospital stay—the family might be more appropriately served by medical and school consents, short-term transfers of guardianship, or powers of attorney. If the parent and potential standby guardian are unwilling to have their plans examined in a court, perhaps because they do not wish to re-engage an absent non-custodial parent in their lives, or if one or the other of them has a prior court record, then this would not be an effective tool. Parents who do not want their illness to be a matter of public record might also choose to avoid standby guardianship if they are in a state that requires diagnoses or statements about illness. Furthermore, if an older child objects to having a guardian, it may be impractical to force the standby arrangement; teenagers “vote with their feet.” Finally, if a parent can accept the legal termination of all rights and relationship to the child, adoption would provide a more permanent, stable future.
LEGISLATIVE ISSUES

Advocates and legislators in states that do not have standby guardianship laws have a number of choices to consider in drafting a statute. Primary among these is which law code should lodge standby guardianship: probate, domestic relations, or juvenile. The earliest standby guardianship laws arose in probate, where most guardianship laws are found. Following New York’s law, which was a model for states during the deepening HIV crisis, a majority of other states also placed their laws in the probate code. New York City practitioners have found, however, that standby guardianship cases are heard almost exclusively in family courts, both because of those courts’ extensive case law on child custody, and because judges in those venues had experience with custody. Pennsylvania legislators broke away from the probate code to place the state’s standby guardianship law in the domestic relations code. Minnesota and the District of Columbia followed. Finally, while some states have placed their statutes in a juvenile code, a drawback is that juvenile judges are used to giving heightened scrutiny to neglectful parents, and may not distinguish parents appointing standby guardians as a distinctly different group (e.g., Virginia, West Virginia, and Wisconsin).

A second choice concerns whether standing to use the law should be narrow or broad. One element that narrows the applicability of some laws is their limitation to parents who have a chronic, debilitating disease. Currently, the majority of states with standby guardianship laws make this option available only to parents with illness. Only Connecticut, Iowa, Illinois, Massachusetts, Pennsylvania, and Wyoming have broader criteria. Advocates and legislators need to consider whether standby guardianships should be available to parents who are not ill but who are likely, for other reasons, to be unable to care for their children. For example, should a parent who is engaged in a life-threatening profession such as a soldier or firefighter, or one who is forced to live where children are not permitted, be allowed to designate a standby guardian? How about standby guardianship for parents who are incarcerated, or who are entering inpatient drug treatment? Rather than tying standby guardianship to any particular event, Illinois legislators established a standard of “inability to make day-to-day decisions” for a child. Parental consent, when possible, should be included as a triggering event.

Similarly, it must be determined whether non-parental caretakers who have legal custody of children should be permitted to appoint standby guardians. Adult caretakers who are not parents cannot access the law in a few states. Non-parental caretakers include people who have legal custody or guardianship of children, and those who are caring for children outside of a legal arrangement. Except for a parent-child biological relationship, these caretakers can share all of the characteristics of parents—including potentially incapacitating factors and a need to plan for the future. Certain states permit any person in a custodial relationship with a child to initiate a standby guardianship petition (e.g., Iowa, New Jersey).

A further concern is whether and what type of medical evidence should be required for standing to use the law. When illness and incapacity are part of a state’s scheme for standby guardianship, then evidence of those conditions may have to be filed with the court. The issue is the degree to which medical evidence is useful to establish that a parent has a chronic, debilitating disease, or that the guardianship can begin because the parent is mentally incapacitated or physically debilitated. With medical evidence comes the potential for controversy due to differences between medical and legal standards and vocabularies for concepts such as “incapacity,” and the risk of release of confidential, protected, personal health information. Lack of confidentiality can be a barrier to obtaining a standby guardianship for people who do not want their diagnoses, or even the fact that they are ill, to come to anyone’s attention. An emerg-
ing trend is to remove or pare down requirements for medical evidence. In addition, eight states have opened use of standby guardianship to persons other than those who are ill, removing the need to present such evidence (Connecticut, Florida, Illinois, Iowa, Massachusetts, Minnesota, Pennsylvania, and Wyoming).

Drafters of legislation need to consider the mechanisms for converting standby guardianship to active guardianship. Illinois requires a permanent guardianship petition to be filed when any triggering event occurs, thereby making the standby stage a status that exists only prior to the triggering event. A few states permit standby guardianship to convert automatically to permanent guardianship after a triggering event, without further court review, for example Pennsylvania and the District of Columbia. Similarly, Arkansas law instructs the court to enter a permanent guardianship after the parent dies. In one sense, if a court has already made a finding that the standby guardianship appointment serves the child’s best interests, it seems unnecessary to revisit this after the triggering event. However, depending upon how much time has elapsed since the standby guardian’s appointment, it is possible that circumstances may have changed, impacting the child’s best interests and the suitability of the arrangement. Then too, a permanent guardianship has a deeper effect on the rights of the non-custodial parent, and states may consequently determine that a further hearing with notice is desirable.

This issue is tied to the determination of whether to require a “reasonable” or “diligent” search for a non-custodial parent prior to any hearing. If every effort is made to find the non-custodial parent at the standby guardianship stage, it is more likely that objections will be dealt with, clearing the way for a shift to permanent guardianship. At the same time, however, the more onerous the procedural requirements, the more likely that some parents, whether due to their increasing illness or other reasons, will fail to see the court process through to completion. A number of statutes combine “reasonable” notification efforts during the standby guardianship process with a separate petition for permanent guardianship requiring more extensive notice procedures to be filed after a parent’s death.

A problem experienced in some states is that many courts are backlogged with cases, and cases can take a long time to come to hearing. Some designations are made in the hospital or in an ambulance on the way to a hospital, even as the patient is dying. Moreover, if the petition is filed after the triggering event, the law will impose a limited time for the standby guardian to submit evidence and complete paperwork —usually between 60 to 90 days. Court personnel need to act quickly if there is to be a smooth transition for the child. Standby guardianship laws may indicate that cases should be scheduled on an expedited basis when emergency circumstances exist.

An additional court-based issue concerns the voluntary nature of standby guardianship. Standby guardianship cases are brought by parents who are planning thoughtfully for their children’s futures. However, in states that provide for standby guardianship hearings in courts that also hear child welfare cases, parents may find that judges apply the stringent scrutiny of neglect-abuse law. Experience shows that sometimes when standby guardianship cases are heard in family court, judges will order home evaluations of the parent as well as the proposed standby guardian, as if the family had come to the court’s attention through faulty parenting (Ambia et al., 1998). A well-drafted statute may cure this tendency. Through use of statutory presumptions of fitness and good judgment like those found in testamentary laws, judges can be encouraged to respect the petitioning parent and the plan.
Finally, in geographical areas where a number of states are contiguous, it can be common that a designating parent is in one state and the standby guardian is in another. Multi-jurisdictional problems could arise, but probably are easily solved. In most cases, law of the state where the petition is filed (the parent’s state) would govern.

**STANDBY GUARDIANSHIP LAWS THAT HAVE WORKED WELL**

Each legislature must consider the unique structure of its state’s courts. Laws have evolved differently in every state, and guardian statutes might be found exclusively in probate in one state, while in another state they are spread over family, juvenile, and domestic relations codes as well. In the standby guardianship field, there are laws that do very well for the state itself, but cannot serve as national models because they are too closely tied to peculiarities of local law. Two states’ laws that could set national standards are Illinois and Pennsylvania. New York’s law will also be discussed as it has been in existence the longest of any state. The full texts of these three statutes are attached as Appendix X.

The *Illinois* law has a number of outstanding features. First, it breaks away from the confines of sickness as the locus of eligibility. Instead, eligibility to use standby guardianship is offered to all parents. Guardianship is triggered when the parents “die or are no longer willing or able to make and carry out day-to-day child care decisions.” Second, the law is simple and easily accessible to parents. A short designation form is published in the statute. It can be copied and completed and witnessed anywhere, any time. Third, the petition procedure is described briefly and so clearly that most parents could read and understand it. Fourth, standby guardianship is included as part of a range of probate possibilities, including short-term and permanent guardianships. The law is contained in the probate code along with other guardian statutes. There is abundant case law on custody in Illinois probate law.

In Illinois there is an easily grasped difference between the concept of *standby* and the concept of *permanent* guardianship. The judge orders the appointment of a standby guardian, who expects to become a permanent guardian once the triggering event occurs. Evidence of the triggering event could be simple parental consent or a physician’s statement or a death certificate. At that point, a petition for permanent guardianship is filed by the standby guardian, and since the standby guardian has been previously investigated with regard to the best interests of the child, the guardianship petition should usually be granted expeditiously.6

Two restrictions in the Illinois law should be noted. Standby guardianship is available only to parents (including adjudicated and adoptive parents) and guardians of the child’s person, and only where there is not another fit, willing, and able parent who objects to the appointment of the standby guardian. That another parent is fit, willing, and able is a legal presumption that can be rebutted by a preponderance of the evidence. The other restriction is that there is no concurrent decision-making among the parent and guardian once the triggering event has occurred. Permanent guardianship is ordered, at which point the guardian becomes the decision-maker.

The *Pennsylvania* law is innovative in that it is lodged in the domestic relations code rather than in probate. This was done with the intention of giving access to the rich resources on child custody available in domestic relations case law. At the same time, the drafters avoided associating standby guardianship with neglect-abuse case law.
The Pennsylvania law follows the early models based on illness. The three triggering events are physical debilitation with consent, mental incapacity, or death. A parent or legal guardian can file a petition with an attached designation at any time. If it is filed before the triggering event, the petitioner must appear in court, but if it is after the triggering event, the standby guardian is the one who appears. Evidence of the triggering event, in the form of a witnessed consent of the parent, an attending physician’s determination of mental incapacity, or a death certificate, must be filed in court. There is a rebuttable presumption that the chosen standby guardian is fit.

Once the standby guardianship begins, the standby and the parent are co-guardians unless the parties prefer a straight guardianship arrangement. The difference is that a co-guardian “shall assure frequent and continuing contact with and physical access to the child and shall further assure the involvement of the parent, to include, to the greatest extent possible, in the decision-making on behalf of the child” (Section 1, Title 23, 5613(a)).

Two aspects of the Pennsylvania law promote efficiency of use. First, no court hearing is required if the designator is a sole surviving parent, the other parent’s parental rights have been terminated, or if both parents consent. Second, the standby guardianship converts to permanent guardianship automatically upon death of the parent, according to the terms of the court order. Practitioners in both Illinois and Pennsylvania have enough experience using the standby guardianship laws to express confidence in their utility.

New York’s law is the most extensively used to date, and therefore offers a rich resource of cases and practitioners’ experience. Although certain features of that law now look unwieldy (e.g., a two-track system for filing; restrictions on standing to persons who are ill; and strict notice provisions to non-custodial parents), practitioners and courts have made it work. It is lodged in the probate code but the law permits cases to be heard in family court as well, and they almost exclusively are (Ambia et al., 1998).

**CASE EXAMPLE**

In the event that she cannot care for her children, John and Cathy, Kim has made a will and signed a power of attorney identifying her mother, Betty, as her choice for who will take over responsibility for the children. However, Kim wants something more secure and permanent for her children. She and Betty have ruled out adoption and custody as permanency plans because Kim does not want to lose custodial control until absolutely necessary. They visit a lawyer, who recommends a standby guardianship; as long as Kim is willing to try to obtain consents to this plan from John’s father Hector and Cathy’s father Len. Kim feels that a court-approved standby guardianship would assure that John and Cathy could grow up together in a safe home, guided by their beloved grandmother. Len, who is incarcerated, gives his written consent. Hector, however, refuses to consent because he wants his mother to raise John. The lawyer prepares the petition, citing evidence to help overcome Hector’s objections, and a court hearing is scheduled. At the hearing, the judge explains to Hector that his parental rights would not be cut off by the standby guardianship. Kim testifies as to her desire for the children to live together. Betty shares her belief that John should remain closely involved with Hector and his family, and promises to make all efforts to ensure this. Hector finally consents and the standby guardianship is approved. It will go into effect when one of the specified triggering events occurs.
RECOMMENDATIONS

- Standby Guardianship is considered to be the most useful future care planning tool. Whichever other options are in a state’s toolbox, this one should be among them.
- Standby Guardianship should be broadly available for the benefit of all children, whether in the care of their parents or other persons with a legal, custodial relationship.
- Standby Guardianship should not be limited to the children of persons with illness.
- If Standby Guardianship is limited to those with a chronic health condition, evidence of such condition should be taken through the parent’s testimony. Confirming lab tests or physician’s letters should not be required.
- Legislators should carefully consider where to place Standby Guardianship within their statutory scheme. This can greatly impact the law’s accessibility and the way in which the law is carried out.
- Parental consent should be included among specific conditions that will trigger a Standby Guardianship to become active.
- Whether through statutory provisions, or court procedures, courts should have the ability to hear Standby Guardianship cases on a priority basis when immediate action is needed.
- Standby Guardianship statutes should include a rebuttable presumption that the parent’s plan and choice of caregiver is in the child’s best interests.
- Attention should be paid to the mechanisms provided for converting the Standby Guardianship to an active, permanent guardianship.
- Attention should be paid to notice requirements in connection with Standby Guardianship proceedings.
Standby Guardianship is thought to be the most useful and secure planning tool. The following case studies outline the challenges and successes met by advocates in drafting and passing legislation in two states: Illinois and Minnesota.

**ILLINOIS**

Standby guardianship, effective in Illinois since 1994, was developed in response to the “AIDS orphan” phenomenon. Because parents with HIV/AIDS were dying, often with no family member or friend chosen and in place to take responsibility for the children in the family, children from HIV-affected families were often referred to and taken into custody by the Department of Children and Family Services (DCFS), and subsequently placed in foster care. Frequently, the parent with HIV/AIDS had identified someone to take responsibility for the child but did not know how to make her choice become a reality. Before 1994, Illinois law did not provide for the creation of a legally binding guardianship that would take effect only at a future date, such as the parent’s death or incapacity.

Advocates initially worked to create standby guardianship through changing case law. In January 1993, the AIDS Legal Council of Chicago (ALCC) filed a test case in the Circuit Court of Cook County’s Probate Division. ALCC represented a mother with AIDS in her bid to secure a standby guardianship for her two children. Although the trial court denied the mother’s petition and her subsequent request for reconsideration, the ALCC prevailed on appeal. The appellate court confirmed ALCC’s position that probate judges have plenary authority to tailor appropriate guardianships. Unfortunately, the mother died two days before the appellate court’s decision was rendered (In re Herrod and Stevenson, 1-93-1067 (Ill. App. Ct. September 30, 1993)).

At the same time, advocates recognized that the courts would be reluctant to create standby guardianship without legislative authority. In January of 1993, the Families’ and Children’s AIDS Network (FCAN) Family AIDS Advocacy Committee completed a draft of legislation to create standby and short-term guardianships. This legislation was the culmination of more than a year’s work involving review of existing Illinois law and developing proposed legislative options. FCAN formed a coalition that developed the standby guardianship legislation and worked toward its passage. FCAN also filed a brief in support of the AIDS Legal Council case at both the Probate and Appellate Court levels.

To support passage of standby guardianship legislation, FCAN organized a coalition of public and private agencies and organizations in support of standby guardianship legislation. This coalition included: the Illinois Department of Children and Family Services, the Office of the Cook County State’s Attorney, the Office of the Cook County Circuit Clerk, the Cook County Public Guardian, Lutheran Social Services of Illinois, the Child Care Association of Illinois, Illinois Association Against Drug Dependence and Alcoholism, the National Association of Social Workers Illinois Chapter, the Legal Assistance Foundation of Chicago, the AIDS Foundation of Chicago, the Episcopal Diocese of Chicago AIDS Task Force, the Illinois State Bar Association, the Chicago Bar Association, the AIDS Legal Council of Chicago and the Cook County Legal Assistance Foundation. Two virtually identical versions of the standby guardianship legislation were introduced early in the session, and both bills passed unanimously through both houses of the General Assembly. Subsequently an additional house bill containing needed procedural refinements proposed by the Chicago bar passed in October, and became law on the date signed: January 14, 1994.
The idea for passing a standby custody law in Minnesota first began in early 1999, when several legal services and private practice family law attorneys convened to discuss how best to address the permanency planning needs of parents with chronic or terminal illness. At the time, Minnesota had in place a Designated Caregiver Agreement (DCA) but the law was limited because it was only valid for two years, triggered a child protective services notification after a certain period, and did not extend past a parent or legal custodian’s death. Parental rights, benefits and child support issues, and the fluid situation of debilitating health conditions were not taken into account by the DCA. Further, the Department of Public Safety administered DCAs and only a small number of parents had used the designation on their driver’s licenses since the law went into effect in 1997. The group decided to research the standby guardianship laws of other states in order to create a law for Minnesota. This included policy investigation and discussions with individuals who had successful results in their states.

The group reconvened in the fall of 1999 to draft legislation for the upcoming session. Members included attorneys and public policy staff from the Minnesota AIDS Project (MAP), Legal Aid Society, and the Minnesota Justice Foundation (MJF). The draft was approved by the Family Law Section of the Minnesota State Bar Association (MSBA) and later the MSBA Board of Governors, making the proposed bill part of the MSBA’s legislative agenda. Bipartisan sponsors were secured in both the Minnesota House and Senate.

The Minnesota bill was based largely on Pennsylvania’s standby guardianship law but considerable discussion was also given to a proposed bill in the District of Columbia. The group also discussed how best to square the legislation with existing family and probate statutes. Because the group was concerned with potential conflict between the two courts, the term “custody” replaced the more familiar “guardianship” in the Minnesota bill. The proposed legislation was also created as a separate chapter to avoid confusion over whether to place the language in the family or probate chapters. Finally, the group thought it was important to include a temporary custody option within the bill in order to address situations beyond debilitating illness such as military tours of duty.

Once the bill was drafted, the group gathered support from the community. Coalition partners included the Women’s Cancer Resource Center, AARP, American Bar Association Center on Children and the Law, Chrysalis Center for Women, and the Minnesota Kinship Caregivers Association. Father’s rights groups were also approached which resulted in a commentary being published in the St. Paul Pioneer Press wondering how the standby custody legislation would be applied to the Elian Gonzales situation occurring at the time. The group organized and wrote a reply explaining not only the proposed law, but also how its protections applied to all parents.

Once the legislative session was underway, the MAP lobbyists shepherded the bill through the committee process. Fact sheets including bullet points about the bill, coalition partners, and a list of states with similar laws were distributed to members of the Civil Law and Judiciary Committees. Members of the planning group testified and the bill met no opposition. It was passed unanimously by both houses and signed into law by the governor in April 2000.
The Minnesota standby custody law was the product of a great deal of hard work and planning by many people. Positive results came after strategy sessions, extensive research, and a team effort. Every possible roadblock was considered, including stigma connected with HIV disease, possible objections that legislators might raise regarding same-sex relationships, and other issues. The group was prepared to remind the legislature, for example, that there is no test in the best interests of a child statute having to do with sexual orientation. The issue was never raised.

The standby custody law is now five years old and has been utilized often at MAP, Legal Aid and in private practice. It has proven to be a useful tool for helping parents to achieve their permanency planning goals.

NOTES

1 In family law practice, “reasonable efforts” might include mailing a copy of the court notice to the last known address of the non-custodial parent, and if that fails, publishing a notice in a local newspaper. Often, however, permanent shifts of custody such as adoption and termination of parental rights require diligent efforts. These include searching telephone directories, jails, hospitals, voter registration lists, Department of Motor Vehicles records, and so forth.

2 By law, parental rights tend to prevail over non-parental care. However, in making a “best interests of the child” analysis, the court could nevertheless agree to a standby guardian over the parent’s objection, unless the law raised an absolute barrier. In our example, if Cathy and John’s mother Kim was ill but still able to participate in parenting, placing even one of her children with a non-custodial parent, if he lived far away, would subvert one of the underlying reasons for standby guardianship: the designating parent has a right to stay involved in the child’s life.

3 It should be noted that if a family has considerable material assets, standby guardianship alone is not the best planning tool, even though some laws may permit the guardian to manage assets as well as custody.

4 See Appendix IX for a chart further discussing legislative considerations.

5 Note that foster parents would not be in a position to appoint standby guardians, as it is the state that has custody of the children in their care.

6 The law provides at 755 ILCS 5/11-5, sec. 11-5/(b-1):
“If the court finds the appointment of a guardian of the minor to be in the best interest of the minor, and if a standby guardian has previously been appointed for the minor under Section 11-5.3, the court shall appoint the standby guardian as the guardian of the person or estate, or both, of the minor unless the court finds, upon good cause shown, that the appointment would no longer be in the best interests of the minor.”
OVERVIEW

Standby adoption is the newest legal permanency option for families who wish to make a court-ordered plan for their children in the event of their death. Standby adoption evolved in response to the needs of parents with HIV who wanted the most legally secure plan possible for their children. Traditional adoption offers the most permanency for a child in that it is the most difficult to modify or revoke once it has been approved. However, few families affected by HIV choose adoption as a planning mechanism, since it requires immediate termination of parental rights and relinquishment of care and custody of the child from the birth parent to the adoptive parent.

Effective since January 1, 2000, Illinois’ standby adoption provisions were the first to be enacted in the country (750 ILCS 50). Taking a cue from standby guardianship, standby adoption provides for the court appointment of a person who will adopt the child upon the occurrence of a “triggering event”, either the death of the parent or the parent’s request to the court that the adoption become final. Following court appointment, the standby adoptive parent “stands by” until needed. In the meantime, the parent retains all parental rights, and keeps custody of the child. Once the parent dies or requests that the adoption be finalized, the court may enter a final Judgment Order for Adoption. At that point, the child would go to live with the (standby) adoptive parent. Because the final outcome is permanent adoption, standby adoption can provide the highest degree of permanency for a child.

When originally enacted, the parent must have been determined by a physician to be terminally ill in order to use the law. In 2004, the law was amended to eliminate the illness requirement. Now, any parent is eligible to bring a petition for standby adoption.

PROCESS

Any person who otherwise qualifies to adopt may act as standby adoptive parent. In Illinois, adoptive parents must be eighteen years of age, not adjudicated disabled, and citizens or legal residents of the U.S. The requirements of the petition for standby adoption are substantially the same as those of the petition for regular adoption with respect to petition contents, verification, and filing, except that the petition “shall also state the facts concerning the consent of the child’s parent to the standby adoption” (750 ILCS 50/5F). Consents must be in writing and substantially follow the “Final and Irrevocable Consent to Standby Adoption” form set forth in 750 ILCS 50/10B-5. The consent is specific and conditional as to who will adopt the child, so that only the individual(s) chosen by the parent may adopt the child. It also indicates the parent’s preference as to who would adopt, if a married couple were appointed as standby adoptive parents, in the event that the couple divorces before the adoption is finalized. Consent may also be given by the child’s other parent. The consent becomes effective “when the parent of the child dies or that parent requests that the final judgment of adoption be entered” (750 ILCS 50/9E). If after the “triggering event” the adoption is not finalized, the consent becomes void.

Investigation requirements for standby adoption parallel those for regular adoptions, which vary according to the proposed standby adoptive parent’s relationship to the child. If the standby adoptive parent is not related to the child, then the court’s investigation will include a home assessment, criminal background check and fingerprinting. If the standby adoptive parent is related to the child, then fingerprinting and a criminal background check are not required, unless ordered by the court.
Standby status creates a legal presumption that finalization of the adoption will be in the child’s best interests. The court issues an order that will be “final as to all findings and shall be followed in the judgment of adoption” unless the court finds that the adoption is no longer in the child’s best interests (750 ILCS 50/13.1(b)). This interim order acknowledges that the child who is the subject of the petition has submitted to the court’s jurisdiction, makes the child welfare agency a party to the proceedings (if applicable), appoints a guardian ad litem for the child, and orders the home assessment. Unlike interim orders in regular adoptions, temporary custody of the child is not granted to the standby adoptive parents, since the parents retain custody of the child until the adoption is finalized.

The statute provides that a petition for finalization must be filed by the standby adoptive parent(s) within 60 days of learning of the triggering event (750 ILCS 50/13.1(c)). The petition for finalization must include evidence of the event’s occurrence. If the standby adoptive parent cannot, for some reason, ultimately adopt, she may elect not to finalize the adoption. In that event, someone other than the standby adoptive parent may adopt the child, or another legal arrangement, such as guardianship, may be pursued. Examples of the forms for standby adoption may be found as Appendix XI.

**ADVANTAGES OF STANDBY ADOPTION**

The great advantage of standby adoption is that it provides a future adoption for a child while permitting the parent to retain custody of the child for as long as possible without terminating parental rights or requiring that custody be immediately transferred, as in regular adoption. An additional advantage is that the parent has the ability to present evidence to the court. This is in contrast to completion of a traditional adoption after a parent’s death, when the parent is not alive to provide testimony concerning the best interests of the child. Furthermore, having the standby adoptive appointment in place may facilitate a smooth transition for the child to the new adoptive home.

The arrangement may also help preserve existing benefits for the child or help the child achieve eligibility for new benefits. Standby adoptive parents may not access benefits and entitlements for a child during the standby status. Once the adoption is finalized, however, the standby adoptive parent becomes the child’s legal parent, and may apply for and access any and all benefits on the child’s behalf. Many adoptive families will qualify for a tax credit for adoption expenses. As of 2003, families who adopt special needs children are able to claim an adoption tax credit even if they do not incur adoption expenses of their own (U.S. Department of the Treasury, 2004). Some income, such as social security benefits received by a retired adoptive parent, may increase. Health insurance premiums may decrease when the child becomes a member of the family. Adoption establishes the parent-child relationships necessary to procure social security benefits in the event that the adoptive parent dies or becomes disabled (42 U.S.C. §402(d), 416(e)). Finally, for children who were previously adopted through child welfare, standby adoption prevents the interruption of adoption subsidy payments. Once the adoption is finalized, payments for the child transfer immediately to the new adoptive parent. The child’s eligibility for payments and a medical card are preserved throughout the process.

**LIMITATIONS OF STANDBY ADOPTION**

As with standby guardianship, there may be circumstances in which standby adoption is either not available or inappropriate as a planning option. As one example, in Illinois the court lacks jurisdiction to proceed on a petition for standby adoption if the child has an adjudicated or adoptive parent whose parental rights have not been terminated and whose whereabouts are known, unless the parent consents to the
standby adoption or, after receiving notice of the hearing on the standby adoption petition, fails to object to the appointment at the hearing on the petition (750 ILCS 50/13D(c)). Thus, if the child’s other parent objects to the standby adoption, the court must dismiss the petition. Secondly, if it is reasonably foreseeable that the parent may change her mind about the caregiver, the family may want to look at other planning options. Once a standby adoptive parent is appointed, a triggering event occurs, and the standby adoptive parent files a motion for finalization, the adoption will be finalized. Standby adoption is permanent and, like regular adoptions, cannot be overturned unless fraud or duress can be shown. Thus the parent must be absolutely certain about her choice of prospective caregiver. Similarly, standby adoption is not appropriate for families who are seeking a temporary caregiver status for a child. The arrangement does not have the flexibility to allow a child to go back and forth between parent and adoptive parent depending on the parent’s need. Families with temporary or intermittent need for a caregiver may wish to consider standby guardianship or short-term guardianship.

LEGISLATIVE AND SYSTEMS ISSUES

Advocates and legislators in states considering standby adoption have a number of choices to consider in drafting a statute. Primary among these is a parent’s standing to use the law. Many advocates believe a terminal illness requirement for standby adoption is too narrow, and that other families who may not be able to provide future care for their children could also benefit. For example, a parent could have a chronic, but not terminal, illness, or engage in a profession that routinely jeopardizes the parent’s health or safety (e.g., soldier, police officer, firefighter). Some would argue that any parent, including parents who are in excellent health, should be able to make a future care and custody plan that provides the greatest degree of permanency for the child. When standby guardianship laws were first enacted, many states allowed only terminally ill parents to use the law. Many additionally required that death be likely to occur within two years (See pp. 36-47 in this monograph on standby guardianship). Thankfully, with advances in treatments for HIV and other illnesses, the ability to predict death has become more and more uncertain, and most states have discarded the two-year rule. In many states, further amendments and newly-enacted laws have made standby guardianship available to all parents. It seems reasonable that standby adoption should be available to all parents without regard to their health.

Standby adoption statutes should create a legal presumption that finalization of the adoption will be in the child’s best interests. By establishing this presumption, the statute will help insure that the parent’s plan has been examined and approved by the court and that, absent contrary clear and convincing evidence, the plan will be finalized once the duties of the standby adoptive parent are triggered. The Illinois statute provides that the interim order for standby adoption creates this presumption in favor of the standby adoptive parent that should be followed unless doing so would no longer be in the child’s best interest: “The order for standby adoption shall be final as to all findings and shall be followed in the judgment of adoption unless the court finds by clear and convincing evidence that it is no longer in the best interest of the child for the adoption to be finalized” (750 ILCS 50/13).

Standby adoption is a plan that follows the wishes of the parent as to who should adopt when the parent is no longer able to provide care. Consents for standby adoption should be specific and conditional as to who will adopt the child, so that only the individual(s) chosen by the parent may adopt. The consent should also indicate the parent’s preference as to who would adopt, if a married couple were appointed as standby adoptive parents, in the event that the couple divorces prior to finalization of the adoption. The statute should also provide that the child’s other parent may also give a specific consent
for standby adoption. Further, as with the Illinois statute, parental rights should be preserved for as long as the parent is able to provide care, and consents should be effective upon the death of the parent or upon the parent’s request for finalization of the adoption. States should also consider including a statutory consent form in standby adoption legislation.

A further legislative issue concerns the finality of consents for standby adoption. In Illinois, consents for standby adoption, like consents for regular adoption, have the attributes of being both final and irrevocable unless obtained by fraud or duress on the part of the adopting parents or their agents. But what about situations in which a parent signs a consent for adoption of a child, and a period of years passes before the “triggering event” for standby adoption occurs? Should the parent have the ability to revoke her consent if she changes her mind about the plan for the child? Suppose, after the appointment, the standby adoptive parent decides that he or she will not be able to fulfill the duties of an adoptive parent. Suppose the parent decides that the standby adoptive parent is, for some reason, no longer fit to serve as adoptive parent for the child. Although it would be preferable to avoid numerous court interventions spurred on by fickle parents, some adoption advocates argue that parents should be able to revoke their consent and request that the court void the court appointment for standby adoption, upon a showing of good cause such as a material change of circumstances impacting the child’s best interests.

A further legislative issue concerns the method for finalizing the adoptive arrangement. Although the parent may be terminally ill, the “standby” status in a standby adoption case may last for a long period of time, so that months and even years may pass before the triggering event occurs. Still, time can be of the essence when finalizing an adoption. Benefits for the child, including health insurance and financial assistance, may be impacted if the adoption is not finalized immediately following the triggering event. It may be important to statutorily empower the judiciary to schedule standby adoption cases on an expedited basis, and to clearly outline what evidence, in addition to a death certificate or parental consent, is needed in order to finalize the adoption. For example, if an investigatory report and/or criminal background check was completed on the standby adoptive home more than a year prior to the triggering event, may the court rely on that evidence, is a de novo best interests analysis necessary, or is there some interim evidentiary showing that would suffice?

Finally, legislators and advocates should look at systems issues, particularly the coordination of standby adoption with benefits systems. As previously mentioned, benefits available to the child and family may change once the child is adopted. But the ability of a person to accept the status of a standby adoptive parent may well depend on whether and which benefits a child may bring to the new family. Adoption may impact the child’s eligibility for TANF (Temporary Assistance to Needy Families), SSI, Medicaid, and other benefits that are based on the income level of the child’s new family. States considering standby adoption legislation should consider specifying in the legislation that benefits will follow the child once they are adopted, and that no child should lose benefits by virtue of the fact that they have been orphaned and are subsequently adopted.
Kim has determined that she wants the most legally secure plan possible for her children, John and Cathy, if something were to happen and she could no longer care for them. She would like her mother, Betty, to care for the children. Although Hector, John’s father, has agreed to let Betty become John’s caregiver, he has also indicated that he may later change his mind. Len, Cathy’s father, is agreeable to Betty taking Cathy permanently. Kim works with a social worker and lawyer through a local program that helps HIV-affected families who want to plan for their children. A series of family meetings is held, with Hector, Len, and Betty present. The family comes to the conclusion that standby adoption would be the best plan for the children, so long as Betty agrees to be open about visitation by the fathers regardless of the fact that their parental rights will be terminated. Kim, Hector, and Len sign specific consents for the standby adoption of the children by Betty. A petition is filed with the court, and a hearing is held, at which John, because he is 14 and can therefore legally consent to his own adoption, signs a document indicating his agreement. The court appoints Betty as standby adoptive parent.

Kim is still living, and her children are still with her, but she and her family are glad that the future of the children has been decided so that, if needed, Betty can easily become their adoptive parent. Betty remains actively involved with the children, and frequently keeps them on weekends. The children’s fathers remain in support of Kim’s plan, which has now also become their plan for the children.

RECOMMENDATIONS

- Standby Adoption is considered to be the most secure planning tool and is highly recommended as a vital part of a state’s permanency planning toolbox.

- Standby Adoption should be broadly available for the benefit of all children, regardless of their parents’ health status.

- Standby Adoption laws should provide for the rebuttable presumption that the plan and the parent’s choice of adoptive parent are in the best interests of the child.

- Standby Adoption laws should provide for specific consents to adoption (those in which consent is limited to adoption by a specific person named by the parent).

- Legislators should consider the method for finalizing the standby arrangement.
Illinois’ standby adoption legislation was developed in the mid 1990’s, and became effective on January 1, 2000. Advocates viewed it as a “next step” in securing more flexible permanency options for Illinois families. The “first step,” standby guardianship, became available in Illinois in 1994.

The need for standby adoption became apparent when working with HIV-affected families who wished to make a plan for their children. While standby guardianship afforded families the opportunity to make a legal plan while retaining custody and care of the child for as long as possible, the final outcome, guardianship of the child, did not provide the security of an adoption. Some families expressed the desire for an option that could not be changed or vacated after their death. As conceptualized, standby adoption appeared as a reasonable alternative planning option—one that would ultimately provide the most permanency possible once the adoption is finalized, but still permits the parent to retain custody and obtain an interim court appointment.

Crucial to the passage of standby adoption was the support of the organized bar—particularly the adoption bar, but also other family law practitioners. Initially, the adoption bar was opposed to the idea, viewing adoptions as immediate and final, and more flexible future adoption appointments did not appear to fit into the traditional adoption framework. In 1999 the legislation was introduced, and after many months of negotiation, the support of the Adoption Law Committee of the Chicago Bar Association (CBA) and the Family Law Committee of the Illinois State Bar Association was obtained. Key to acceptance of the initial legislation was the requirement that a parent be terminally ill before a petition for standby adoption could be filed. The coalition that had formed to support standby guardianship in the early 90’s also provided support for standby adoption's passage in the legislature. The Families’ and Children’s AIDS Network (FCAN) took the lead in educating interest groups and legislators about standby adoption. The bill passed without opposition.

As written, the standby adoption law had been of valuable assistance to families in which a parent is terminally ill. But over time, practitioners began to believe that removing the terminal illness requirement would mean that more families could take advantage of this useful legal planning tool. In addition, some legislators believed that the terminal illness identification requirement might be in violation of the Health Information Portability and Accessibility Act of 1996 (HIPAA). To correct this situation, a bill to amend the Illinois Adoption Act was drafted and introduced.

Little resistance to amending the standby adoption statute was encountered. Initially, the CBA Adoption Law Committee expressed reservations to creating more flexibility in the Illinois adoption process, but the committee ultimately decided to support the removal of the terminal illness identification requirement from standby adoption law. Support was also secured from the CBA Legal Aid, Probate Practice, and Legislative Committees. Ultimately, the bill became a “CBA bill,” and the bar association spearheaded efforts to lobby for its support. The bill also received the support of the AIDS Foundation of Chicago, the AIDS Legal Council, and Chicago Legal Aid to Incarcerated Mothers (CLAIM), FCAN, the Illinois Department of Children and Family Services, and the Illinois State Bar Association. Ultimately the bill passed both houses of the Illinois General Assembly unanimously.
NOTES

1 If the child was previously adopted through the Illinois Department of Children and Family Services (child welfare), then DCFS makes arrangements for and pays for the investigatory report.

2 Notice requirements are virtually the same as in regular adoption proceedings, and may be procedurally demanding depending upon the extent of the other parent’s relationship with the child (750 ILCS 50/7).

3 In situations in which children are to be adopted after birth, parents are afforded a small amount of time during which they may change their mind about the adoption: a minimum of 72 hours must elapse from the time of the child’s birth before a parent can sign a consent to adoption, except the father may sign a revocable consent before birth that becomes irrevocable 72 hours after the child is born (750 ILCS 50/9). This “leeway” would also apply to standby adoption of a child who is yet to be or has just been born.
— Joint Guardianship and Joint Custody —

Through joint guardianship statutes, a parent can establish a shared guardianship with another person. In the context of permanency planning, this means that the parents can retain an active role and custodial rights up to, and even after, becoming disabled. The appointed joint guardian is authorized to make decisions about the children and if necessary, to physically provide care for them. As the parent becomes unable to care for the children, the joint guardian increases her responsibilities. When the parent dies, the joint guardian remains as sole guardian of the children.

While some states require that a parent demonstrate terminal illness in order to use joint guardianship, others do not. California, for example, requires that a terminal condition be documented by a licensed physician, while Connecticut’s law is open to all parents regardless of health condition (General Statutes of Connecticut, Volume XII, Title 45a, Chapter 820h, Part II, Sections 45a-624 et seq). The text of California’s Joint Guardianship law is attached hereto as Appendix XII.

Joint guardianship is a judicially-approved appointment requiring the parent to petition the court. Joint guardianship statutes tend to be located in Probate codes that provide for legal guardianship. The advantage of this is that the concepts and procedures are familiar to attorneys, judges, and court administrators. With this comes the disadvantage, however, of the labor-intensive nature of most guardianship practice. A significant amount of judicial, as well as social services, intervention is required. There is often a great deal of paperwork. In California, for example, 25 legal documents are necessary to complete the process. An investigation is performed in the home of the joint guardian, with specific attention to each adult and child living in the home. In addition to face-to-face interviews, criminal and child abuse/neglect checks are performed. The investigator prepares a written report for the court hearing, which is carefully reviewed by the judicial officer.

The hearing may be scheduled a month or two after the petition is filed in order to give the investigator time to complete the investigation and obtain the records needed for a court report. Notice of the hearing must be provided to the non-custodial parent and children age 12 or older. Similar to standby guardianship and standby adoption, the petition may not go forward if the non-custodial parent objects and is able to care for the child. The court must conduct a best interests analysis, giving significant weight to the parent’s unique knowledge of the child, the caregiver, and the situation. The decision must be based on clear and convincing evidence. As with other child custody actions, the court may refuse to appoint a proposed guardian who has a history of criminal conviction or child abuse/neglect.

If the parent’s illness is so serious that death is imminent, or expected, before a final guardianship hearing can be held, the petitioner may ask the court for an order of temporary guardianship. In California, a hearing for temporary guardianship is scheduled within a week of the filing, so that a temporary joint guardian can be in place to assist with providing care for the children immediately. Some courts may even grant temporary guardianship on the filing or intake date, pending investigation and further consideration at a later hearing.

The joint guardianship order becomes effective either immediately (e.g., California), or upon the occurrence of a triggering event (e.g., Connecticut) and ensures continuity of care for the children without a separate proceeding at the time of the parent’s death or incapacity. The joint guardian is able to obtain benefits and entitlements for the children when acting as primary caregiver.
ADVANTAGES AND LIMITATIONS

The great advantage to joint guardianship is its flexibility. Because the parent and caregiver share concurrent authority, the child may receive care on a daily basis from either or both adults, as the situation dictates. Often terminal or chronic illness leaves the parent unable to care for the children on some days, but quite capable on others. Joint guardianship allows for fluidity in care provision without need of documentation or court intervention.

In addition, the concurrent authority granted by joint guardianship may improve the chances that the future care arrangement will be successful, by allowing the children to begin viewing the joint guardian as a parental figure incrementally and over a period of time. Moreover, the children will be more likely to accept the new joint guardian if the parent is there to facilitate and support the transition.

While offering the advantages discussed above, joint guardianship is not an appropriate tool in all situations. Both the idea and the reality of shared custody may not be optimal for the parent while she is able-bodied, due to her loss of autonomy and the creation of rights in someone who heretofore did not have them. The parent should be very sure that the proposed guardian is able to effectively work in partnership with her, and shares (or agrees to adopt) her beliefs regarding parenting decisions and styles.

There is tremendous potential for harm to the children due to disruption and emotional uncertainty if the arrangement collapses. For example, the appointed joint guardian may come to believe that the parent is not using good judgment in caring for the children and take actions ultimately requiring court intervention. Once the order for joint guardianship or custody is made, it is very difficult to change, and requires judicial intervention. A parent wishing to modify a joint guardianship or custody order may have to demonstrate changed circumstances impacting the best interests of the child.

LEGISLATIVE ISSUES

One of the barriers to passing joint guardianship legislation may be a reluctance to create legal rights and responsibilities toward a child for a non-parent when the parent or parents are still capable and willing to act as such with respect to the child. Not only is there potential for confusion and disagreement in decision-making and physical custody as discussed above, but also the need to appoint a guardian for the child may be unclear, and the procedural costs of investigating and granting a shared custody arrangement (which may require further modification if the parent’s disability is not imminent), unjustifiable. There seems to be no reason to limit the laws to terminally ill parents, when parents may be unable to care for their children for reasons other than illness. Non-parental legal caregivers should also have the option of using joint guardianship.

Drafters of legislation may wish to clarify lines of authority to limit disputes and confusion arising out of concurrent authority. For example, statutes could provide that, absent evidence of a specified triggering event, the parent remains the primary custodian and decision-maker. Alternatively, primary authority may be defined to rest with whichever joint guardian presently has physical custody of the child. Statutes should also address the circumstances under which joint guardianship arrangements may be modified, as well as the procedures for such modification and who is eligible to seek it. These provisions should be drafted so as to be favorable to parents (within the limits of protecting the best interest of the child), and provide incentive, not discouragement, to election of joint guardianship as a plan.
Legislators should also attempt to ensure that the law is accessible, both by placing it in an appropriate legal code (e.g., Probate or Family) and by recommending a process that can be expedited when necessary. To that end, it would seem reasonable that joint guardianship statutes join the state’s other guardianship provisions. Perhaps, however, the forms and procedures need not be as onerous as they would if the nomination of a guardian were not made by the parent and upon her consent. The statute might contain a presumption that the appointment is in the child’s best interest, for example, opening up the door for court procedures that are more parent-friendly and eliminating unnecessary administrative expense.

**CASE EXAMPLE**

Kim’s health has been declining. In addition to her HIV positive status, she has also received a breast cancer diagnosis. The cancer requires aggressive treatment in order to prevent further spread. Although her prognosis is good, Kim will need to undergo surgery and chemotherapy, and will be hospitalized for an extended period. She will remain significantly weakened for some time thereafter. Kim has asked her mother, Betty, to take the children, John and Cathy, into her home for the duration of the treatment.

Kim would like Betty to become John and Cathy’s joint guardian, able to make decisions and obtain services for the children whenever needed. It would also give Kim peace of mind to know that Betty is already in position as the children’s guardian in case she passes away. Kim is aware that there will be home studies conducted and that an investigator will talk with the children and Betty. She believes that the investigation will support her decision and decides to pursue the joint guardianship in court.

Kim’s attorney suggests that she discuss her plan with Hector, John’s father, to determine whether he will consent to the joint guardianship arrangement. If Hector still wants his mother to be John’s eventual guardian, the court case will be contested and it is unclear how the court’s analysis would proceed. John, who is 14, will be entitled to make his preference known to the court, and has indicated that he does not want to be separated from Cathy. He wants to be able to stay in his neighborhood so that he can be near friends and community activities.

Hector and Kim meet with a mediator, and after much discussion Hector concedes that John will probably be happiest with Betty. Hector also knows that his mother is not immediately prepared to take John while Kim undergoes inpatient treatment. Kim and Betty make a written promise to Hector and his family to ensure that they remain involved in John’s life. Hector submits his written consent to the court hearing the joint guardianship petition. The court considers the petition, and the positive results of Betty’s home investigation, and appoints Betty as joint guardian with Kim.

With the joint guardianship in place, Betty can now take the children to the doctor, participate fully in meetings at school, and begin handling any public benefits. This gives Kim peace of mind, as she knows that Betty can provide for the needs of the children during any periods of disability or after her death.
RECOMMENDATIONS

- Joint Guardianship should be broadly for the benefit of all children, whether in the care of their parents or other persons with a legal, custodial relationship.

- There should be a rebuttable presumption that the plan and the parent’s choice of joint guardian is in the best interests of the child.

- Joint Guardianship statutes should clarify roles and lines of authority in the relationship between guardians.

NOTES

1 California's legislation originally had a requirement that the parent must have medical proof that death was expected within two years before a petition for joint guardianship could be considered. The two-year requirement is no longer part of the statute, but the terminal illness requirement remains.

2 In California the court must give presumptive weight that the custodial parent’s choice of joint guardian serves the child’s best interests.
Short-term guardianships are statutorily-authorized mechanisms which function like powers of attorney but are applicable solely to child custody matters. Relatively few states and jurisdictions have legislation authorizing short-term guardianships. Some of these laws limit the authority of the guardian to decisions regarding the child’s medical treatment (Coon, 2000; Selbin & McAllaster, 2000). No states make illness a condition of the parent’s use of a short-term guardianship.

Short-term guardianships are made without court intervention, through written instruments signed by the parent with some degree of formality (i.e., witnessed, notarized, or both). The written instrument states the parent’s intention to authorize her chosen caregiver to care and make decisions for the children in the parent’s place. The caregiver acts as the parent’s agent with respect to child care responsibilities. During the time that the short-term guardianship is effective, health care providers and other persons may rely on any decision or direction made by the short-term guardian to the same extent, and with the same effect, as if the decision or direction had been made or given by the parent. Short-term guardians who, with due care and in accordance with law, act, or refrain from acting on behalf of the child are immune from criminal prosecution or other claims based on lack of authority or failure to act. Short-term guardianships are generally effective as soon as parents sign them and are limited in duration to periods of one year or less. For example, in Minnesota, parents and custodians can execute a Delegation of Power (DOP) that grants the caregiver certain decision-making powers (Minn. Stat. §524.5-211 (2003). The DOP is effective without any judicial review and revocation merely requires written notification to all parties. The duration of the DOP is limited by statute to one year, after which time the agreement must be renewed. A sample DOP form is attached at Appendix XIII.

In Illinois, a parent who is temporarily unable to care for her child can transfer guardianship to another person of her choosing by making a “Short-Term Guardianship” (755 ILCS 5/11-5.4, 5/11-13.2 and 5/11-13.3). The statute permits the parent to appoint a short-term guardian by a private writing, and without any court involvement, for up to 60 days. The short-term guardian acts as guardian of the minor’s person only, except that as such, the short-term guardian may apply for and receive government benefits on behalf of the minor. The parent may specify within the instrument for the guardianship to terminate upon a specified date or event. Activation of the duties of the short-term guardian occurs immediately upon the date the written instrument is executed, unless the written instrument provides for the appointment to become effective upon a later specified date or event. The statutory form provides suggestions for parents who opt to choose a later date or event, but the appointing parent or guardian can specify any date or event that she wishes. Short-term transfers of guardianship are renewable for successive 60-day periods, but only one instrument can be in force at any time for the same child. An example of the statutory form is provided in Appendix XIV.

Short-term guardianships have been successfully used within the armed forces. In fact, military couples and single parents in the armed services are required to develop such a plan. For example, such members of the U.S. Air Force “are required to develop a written plan (AF Form 357) to be maintained by the commander or first sergeant. It will detail and provide a smooth, rapid transfer of responsibilities to designees during the absence of the member” (Secretary of the Air Force, 2000).  

ADVANTAGES AND LIMITATIONS

Because of the ease in creating, withdrawing, and modifying short-term guardianships, and their broad applicability to parents regardless of health status, there are many situations in which this tool can be
used in addition to more permanent planning options. For example, a parent facing rehabilitation may wish to grant temporary custody to another party so that she can focus on her recovery. Or, the parent may be attending college, working out-of-town, entering chemical dependency treatment, facing incarceration, deployed by the military, or in another situation requiring the parent to leave the child for a period of time. Short-term transfers of custody do not extend past a parent’s death. That they are only effective during the parent’s lifetime is a major limitation of short-term guardianship. Short-term guardianship is an agency relationship: if the parent dies during the period of the short-term guardianship, the instrument and the authority of the guardian are immediately extinguished. If the parent has not made a more permanent arrangement, the child’s future care is uncertain. It is possible that the temporary custody document could provide the court with evidence of the parent’s intent. In many instances, however, the parent prefers different caregivers for temporary and permanent situations. For example, a parent may ask a local relative to care for the child while the parent is in the hospital but would want a relative living out-of-state to care for the children on a more permanent basis. In such cases, the existence of the short-term appointment may prove misleading in a later guardianship, custody, or adoption proceeding. Judges and attorneys who are aware of this potential problem may be reluctant to give much evidentiary weight to a deceased parent’s grant of short-term authority.

Short-term guardianships are not always appropriate or may open the door to familial conflict. For example, if the non-custodial parent is available to care for the child then it is presumed that that parent is best qualified to care for the child in the absence of the other parent. A short-term guardianship conferring authority on a third party will not survive the non-custodial parent’s challenge and may lead to litigation over any actions taken by the guardian. If a parent believes that the other parent is not able to effectively care for the child, but may attempt to do so anyway, then it may be best for the parent to conclusively determine these issues through a court-ordered plan such as standby guardianship.

LEGISLATIVE ISSUES

Short-term guardianships are a natural extension of powers of attorney and other agency law currently existing in most states. Because the framework for these laws is already in place, and because the lack of court oversight keeps the administrative cost low, advocates for these tools should not face much opposition in trying to get them enacted. In many cases, new statutes would simply codify what parents presently do to informally extend power of attorney appointments or create parental delegations. Drafters of such legislation should seek to avoid statutory limitation of powers to medical treatment and/or education decisions. If desired, the statute may enable parents to elect such limitations. In most cases, however, ill or disabled parents will need the caregiver to act as proxy in all dealings with the children.

Legislation should also eliminate strict limitations on the duration of short-term guardianships. While there may be merit in limiting the time a caregiver should act as the sole guardian without some public check such as judicial oversight, the short-term guardianship does not operate to confer authority beyond the parent’s death. Like other powers of attorney, the short-term guardianship is an extension of parental authority, not really a “guardianship” in the traditional sense. Alternatively, the statute might provide for triggering events that would activate or terminate the short-term guardianship, much like a springing power of attorney or written designation of standby guardianship. It might be more reasonable, in such a case, to provide that periods of activation lasting longer than a specified duration require a successive written instrument or judicial intervention towards a more permanent arrangement.

Finally, due to the limitations of short-term transfers as *inter vivos* documents, drafters of such legislation may wish to include precatory language in the introductory notes, recommending the use of short-
term transfers in conjunction with plans made in case of a parent’s death, such as wills or more specialized mechanisms, if available. Similarly, if suggested forms are published as part of the statute, instructions to those forms could include such a recommendation.

**CASE EXAMPLE**

Kim’s health has taken a turn for the worse. A recent week-long stay at the hospital has prompted her to consider whether she should better prepare her mother, Betty, to temporarily care for the children, John and Cathy. Kim needs help to allow her to rest and cope with the often debilitating side effects from her medication, and Kim prefers that the children stay at Betty’s house for a while. Betty’s home is nearby so the children can visit Kim, and they will not have to enroll in new schools or experience any other dramatic changes in what is already a difficult time. Kim anticipates that she will be able to resume daily care for her children at some later date. After visiting her attorney, Kim signs short-term guardianship papers, to which Betty adds her signature in acceptance of the appointment. Betty will supply this form to the children’s school, doctor, and whoever else requires proof of Betty’s caregiver relationship to the children. Now, Betty will be able to make decisions for the children’s care while Kim concentrates on regaining her health. The transfer is good for 60 days, so Kim and Betty will need to sign another form if Kim’s poor health continues.

**RECOMMENDATIONS**

- Short-Term Guardianship should be broadly available for the benefit of all children, whether in the care of their parents or other persons with a legal, custodial relationship.
- Statutes should provide for triggering events to activate and terminate the Short-Term Guardianship.
- Statutes should provide, but not require, example forms for maximum accessibility.
- Drafters of legislation should avoid limiting delegable authority to medical treatment and/or education decisions. If desired, the statute may enable parents to elect such limitations.

**NOTES**

1 Variations on short-term guardianship are currently available in Delaware, Illinois, Louisiana, Minnesota, North Carolina, and the District of Columbia.

2 This practice ensures that the children of military personnel will have a responsible alternate caregiver in the case of deployment, but does not address plans for the children in the event of the parents’ death. Military service personnel are encouraged, but not required, to develop wills or use other planning tools to address this possibility (Department of Defense, 1992).

3 For example, the 60-day requirement in Illinois’ short-term transfer of guardianship law seems to mirror the periods within which appointed standby guardians or standby adoptive parents may act without providing evidence to the court of the parent’s death, disability, or consent to transfer authority, suggesting that policymakers believe caregivers should aim to attain legal authority if they expect to care for children for longer than two months.
This monograph provides an overview of voluntary permanency planning options in the U.S. for families who wish to plan for the future care and custody of a child. A family’s decision concerning the best plan for a child must, however, take into account both the best legal plan from a permanency standpoint, and practical considerations concerning the child’s care. Financial support is often essential for successful long-term care, especially for families with low incomes. But the existing methods for obtaining financial assistance can be problematic. Often the plan that makes the most sense for a child from a legal permanency perspective may not result in financial stability for the child. Conversely, the greater the stability afforded the child through a permanency plan, the less the new family may be able to access benefits on the child’s behalf. A lack of financial resources ought not limit a parent’s choice of caregiver, or lead to the failure of voluntary permanency plans. This chapter outlines the public benefits available for children whose parents are unable to care for them, and for the caregivers of those children. Consistent with our case example, we assume for illustrative purposes that the planning parent is HIV positive.

The primary sources of public benefits to children include Temporary Assistance to Needy Families (TANF), a program for families and children with low or no income, administered by each state through federal block grants; and Supplemental Security Income (SSI), a federally-administered program for which children may qualify on the basis of disability. If their parents have a work history, children may also receive federal Social Security Disability Insurance (SSDI) benefits provided as a result of their parents’ death or disability. Children living with parents who are ill may also benefit indirectly from the enhanced services and funds available to persons with debilitating health conditions.

Of great concern for planning parents and caregivers of limited means is the transition and preservation of benefit eligibility. For example, HIV-infected parents are generally eligible for a range of financial and other assistance, such as SSDI, medical assistance, long-term disability, housing assistance, reimbursement, or subsidies for drugs, in-home respite and homemaker services, and case management, all of which may be terminated when the parent dies. The new caregiver will likely not have such breadth of support. In addition, state and local agencies frequently have formulas for determining benefit offsets—and these formulas may impact the amount of assistance received by the new caregiver on behalf of the orphaned child. Furthermore, the loss of case management comes at a time when a new caregiver most needs referrals and assistance in identifying and accessing the public benefits available to the child in the new household. These issues become even more significant if a large group of siblings are orphaned.

In general, most states limit eligibility for public welfare benefits, including TANF, to children living with a parent or other specified blood relative unless specific state programs are available (National Center for Children in Poverty, 2004). Unrelated adults or distant kin who assume caregiving responsibility for orphaned children may not be eligible for benefits on behalf of a child, no matter how closely involved they may have been with the child over time, and even if they become the child’s legal guardian or custodian.
If the child qualifies for SSI, the child will continue to receive SSI benefits. If the child was receiving SSDI benefits based on a parent’s disability or death, the child remains eligible for those benefits. For example, a child whose parent dies may be eligible for Social Security benefits due to the parent’s past employment. Under most circumstances, children are not paid this income directly because the Social Security Administration requires that an adult act as “representative payee” (American Bar Association, 2001).

This is how the case would be treated if it were to occur in Illinois: If the guardian is related to the child, he or she may be able to receive TANF on the child’s behalf, either by adding the child to an existing TANF family grant or by applying for a TANF child-only grant. If the guardian is unrelated to the child, the guardian cannot receive TANF on the child’s behalf; however he or she may qualify for other forms of local assistance. All legal guardians who qualify for public assistance, and some other low-income guardians, should be able to obtain medical assistance for a child if the child is income eligible for medical care or Child Health Insurance Plan (CHIP) (Children’s Defense Fund, 2001; Generations United, 2001). The child will be included in the family’s Food Stamp household unit as long as the family remains income eligible. A guardian can also be a representative payee for children who receive their own SSI benefits (20 CFR 416.610, 416.615, 416.621; Centers for Medicare and Medicaid Services, n.d.).

If the caregiver adopts the child, the loss in benefits may be even worse. In the eyes of the law, the caregiver is now the parent, with all the responsibilities pertaining thereto. The child will no longer be eligible for TANF benefits unless the caregiver’s family, as a whole, qualifies for such assistance. The same is true for Food Stamps and other income-eligible programs including public programs for medical treatment. If the caregiver has private medical insurance she will need to purchase additional coverage for the child. Thus, the plan with the highest degree of permanency may bring with it the highest “cost” with respect to entitlements. On the other hand, adoption does not bar the receipt of income to which the child is entitled, such as social security benefits or veterans’ benefits from the death of a parent. Some income, such as Social Security received by a retired adoptive parent, may increase. Adoptive families (excluding stepparent adoptions) are also eligible for federal income tax credits. Adoption assistance benefits can also be exempt from an employee’s taxable income. Finally, the adoption of a previously-adopted child who received adoption subsidies allows these payments to be reinstated once the new adoption is completed.

Even if the child continues to qualify for TANF, in most states, cash assistance payments are at less than half of the federal poverty level (Geballe, 2000). In addition, TANF grants are time limited and some states impose a family cap on benefits, which are important considerations for caregivers deciding to care for others’ children (Geballe 2000). In comparison, foster care rates are significantly higher, creating an unintended incentive for placement of the child. If adoption, guardianship, or even informal custody do not produce acceptable financial results, the child may end up in foster care, not necessarily with the desired caregiver.

So how is the best plan achieved for a child, both legally and financially? The birth family and new caregiver must conduct an assessment of the financial and service resources available to a child and decide whether the new caregiver can take on the responsibility in addition to researching and selecting among the available planning options. Consider, for example, the chart used by the Family Options Project in Illinois—a program that provides social and legal services to HIV affected families who wish to make future care and custody plans for their children—is reproduced as Appendix XV. The chart provides comparative information about cash assistance, food stamps, and social security that are available in Illinois to informal caregivers, standby guardians, guardians, standby adoptive parents, adoptive parents,
and short-term guardians. The chart illustrates the complexities involved in assessing the legal plan for the child that will offer the most financial stability, and demonstrates that the most financially stable plan may not offer the most security for the child in terms of permanency.

**Legislative Issues**

To facilitate the permanency of these future care and custody plans, financial support, medical insurance, housing assistance, counseling, and other services may be needed by the caregivers and children. At a minimum, the future care and custody planning process should facilitate the smooth transfer of any existing benefits to the caregivers (e.g., Social Security Disability, child support, public assistance, and Medicaid), and other financial supports that become available after the parent’s death (e.g., Social Security and pensions). Likewise, policies and procedures that facilitate the appointment of caregivers as representative payees would help to support and protect the children’s new living arrangements.

States and local governments should consider basing benefits eligibility on custodial relationships, to include godchild-godparent relationships, children who are informally “adopted” by extended families, significant family friends, gay and lesbian families, and any adult with close ties to the child. Expanding these definitions would effectively recognize those populations most impacted by the HIV/AIDS epidemic—African Americans, Latinos, and the gay community (Kaiser Family Foundation, 2004).

Law and policy makers concerned with permanency planning for children should also consider programs of transitional services and funding for families following the death of a biological parent, and more innovative, long-term programs to address the long-term needs of these families. For example, current child welfare policies limit preventative services and financial assistance to children who have been found by a court to be abused, neglected, or dependent or are at risk of such intervention. Left out are the unpaid, untrained, and unsupported family members and significant other adults who assume responsibility for raising children whose parents are unavailable or deceased (Fields, 2003; Generations United, 2001; Generations United, 2002; Generations United, 2003; McKelvy & Draimin, 2002; Mason & Linsk, 1999). Child welfare policies and programs should aim to strengthen families and caregiving structures in which orphaned children live, even if they have not been the victims of child abuse or neglect. Preventive services should be offered without the specter that it is the last ditch effort before abuse or neglect charges. Voluntary foster placements should also be an option for families in need of additional support, with the proviso that child welfare policymakers consider the risks and recommendations discussed in pp.16-21 of this monograph.

A relatively new form of supportive child welfare program is subsidized guardianship. Subsidized guardianship is available in some states to foster and kinship parents who are willing to assume private guardianship responsibility for a child under the legal jurisdiction of a state child welfare agency, and for whom a return home or adoption has been ruled out. Subsidized guardians receive a monthly payment and medical assistance for the child, similar to an adoption subsidy without the requirement of that relationship. Thirty-five states and the District of Columbia have established some type of subsidized guardianship program, many through federal Title IV-E waiver demonstration projects, surplus TANF funds, or state dollars (Children's Defense Fund, 2004; National AIA Resource Center, 2002; Testa et al., 2004). In recent years, legislation to create a federally-funded subsidized guardianship program has been introduced in Congress (Testa et al., 2004).
In many states the guardianship subsidy amount is equivalent to a foster care stipend, or if less, is still higher than a TANF payment for the same child. Unlike TANF, this subsidy is not time-limited, but continues until the child is 18. The caregiver is appointed as permanent guardian for the child, but is not required to adopt the child—an important aspect for many families, especially those in which a relative becomes the caregiver but does not wish to terminate the parental rights of the birth parent or otherwise change existing kinship relationships. States may benefit from this type of plan by ending casework and other administrative responsibilities for the child upon the child’s discharge from foster care.

Subsidized guardianship is generally used to serve “hard-to-place” children in foster care, particularly older children, sibling groups, or those with special health needs. Although subsidized guardianship programs vary, most states require that the children be in the child welfare system for a period of time prior to establishing the subsidized guardianship. Programs may also require the children to be in the care of their prospective guardian, and seek parental consent, if applicable, as a way to ensure the permanence of the guardianship (McDaniel & Sosso, 1996). In theory, however, subsidized guardianship could be applied to any situation where otherwise, a child might end up in foster care. Law and policy makers should consider creating or expanding existing subsidized guardianship programs that will assist families who are willing to become guardians of children without requiring that the children first enter the child welfare system.

Finally, states and localities should also provide information about any benefits and services for which the caregivers and children are eligible. Minnesota provides an example of this type of effort to assist children and their caregivers. A recently passed amendment to the statute regarding juvenile court placements and custodianship includes the provision that, “the Commissioner of Human Services shall annually prepare for counties information that must be given to proposed custodians about their legal rights and obligations as custodians together with information on financial and medical benefits for which the child is eligible” (Minn. Stat. §260C.201, subd. 11(d)(v)).

CASE EXAMPLE

Kim receives TANF assistance for herself and her children, John and Cathy, including food stamps and medical coverage. She also receives housing assistance, in-home respite, and case management in connection with her HIV status. She has never received court-ordered child support for John from his father, Hector, who is unemployed. Cathy’s father, Len, provides no financial support for her.

Kim’s preference for her plan concerning her children included making the plan as legally secure as possible. Initially, Kim selected adoption as her plan of choice. After her death, Kim’s mother, Betty, would adopt John and Cathy, and the children’s fathers would not be able to later overturn the adoption. But Betty’s income level, even though it is low, is higher than the state threshold established for TANF. The children would not be eligible for child-only grants because of the legal parent-child relationships that would be created by adoption. And if she is ineligible for TANF, Betty will also be unable to get Medicaid or other public health benefits for the children. She cannot afford private medical insurance, and her job does not offer insurance coverage. The children would, however, be eligible for child-only TANF grants and public medical assistance if Betty became their guardian.

After Kim passes away, the children will no longer be able to live in their apartment because eligibility for HIV housing assistance is contingent on someone with HIV living in the apartment. Betty has a small one-bedroom
apartment, and cannot afford a larger one to accommodate the children. The family will also lose the case management and in-home respite services which were available to the family because of Kim’s HIV status. The case management services have been very useful to the family in navigating the public assistance, legal, social service, and medical service systems. Through case management, the family has also been referred to counseling programs that have greatly helped the family with issues of anticipatory grief and loss.

Neither Kim nor Betty wants the children to be split up at Kim’s death. However, Len may wish to petition for custody of Cathy in order to access benefits to which she is entitled due to her special needs. Fearful of this, Kim decides not to discuss planning with either Hector or Len.

Kim still believes that adoption, which creates the most permanent legal relationship, would be best for her children. Betty has informed her, however, that she would only be able to provide for John and Cathy as a guardian; she would need the benefits that would be unavailable to her as an adoptive parent. Even then, it will be very difficult to locate appropriate housing on her small budget. Kim keeps her will, her power of attorney, and periodically arranges for Betty’s short-term guardianship of the children. Discouraged, she reluctantly determines that she cannot at this time make more permanent future legal plans for John and Cathy. While her health has improved in recent weeks, her concern for her children’s future continues to preoccupy her as she waits for a better solution.

RECOMMENDATIONS

- State and local laws regarding the delivery of public benefits should facilitate the smooth, expedient transfer of benefits when a child joins a new caregiver’s household.
- Benefits for which the child was directly eligible in the parent’s household should continue in the new caregiver’s household.
- The child’s eligibility for benefits within the new caregiver’s household should be based on a legal, custodial relationship, not on a biological relationship.
- States should provide for transitional benefits and services to children and families when death or disability has necessitated a change in legal custody.
- Subsidized guardianship programs should be made available. Where possible, eligibility for these programs should not require that the child first enter foster care.
- States and localities should disseminate information for caregivers on public benefits and how to access them.

NOTES

1. The U.S. Supreme Court recently ruled that SSI benefits for children in foster care may go to the foster care agency to offset the cost of foster care (Wash. St. Dept. of Social and Health Services v. Estate of Danny Keffler, et al., 2003).

2. It is noted, however, that if a previously-adopted child is not adopted but is cared for in a different relationship such as guardianship, these payments do not continue.
Planning for the future care and custody of children is a priority issue, both for families and policymakers. Continuity, stability, and a sense of security are crucial factors in a child’s development; therefore, all efforts should be made to develop and improve legislation, administrative policies, and systemic procedures that work to achieve these ideals. This monograph explores the many planning tools available to families and provides examples of how different states have put these tools into practice. Specifically, differences between traditional and innovative approaches are discussed in order to support recommendations for improvements in existing state and federal law.

Many of the plans included within this monograph are specifically designed to be flexible because, after all, every family is different. Further, visionary advocates and policymakers recognize that the tools will need to be revisited and refined for additional flexibility and new or changing needs. For now, however, the call to action is simple. Families benefit from having as many planning options as possible at their disposal: it is the aim of the authors that the information contained within this monograph will not only aid advocates in examining current practices in their jurisdictions, but also inspire even more innovation on the local, state, and national levels.

A significant shift in planning policies is already well underway in the U.S.; however, there is still opportunity for considerable expansion and improvement. There are several ways to approach the challenges and problems presented by future care and custody planning issues. Alliances are crucial, and they can take many forms. On the grassroots level, like-minded individuals and organizations must be willing to work together toward a common goal. Coalitions must organize around their collective strengths, including first-hand knowledge of family experiences with planning issues culled from the legal, child welfare, and social service contexts. Lawmakers, public officials, and other individuals in leadership positions must move the process forward through legislation and implementation in affected communities. In essence, this monograph tasks legislators with the responsibility for transforming vision into law and challenges advocates to take the initiative of transforming real-world experience into effective policy.
Introduction


Overview of Future Care and Custody Planning


**Traditional Tools**

** Foster Care**


Families in Transition Act of 2000. New York State


WILLS


Uniform Transfers to Minors Act, Minnesota Statute §527.23 (2003).

POWERS OF ATTORNEY


CUSTODY AND GUARDIANSHIP

Minnesota Statute §518.003 (a) & (c) (2003).

Minnesota Statute Chap. 257C.


ADOPTION


Innovative Tools

STANDBY GUARDIANSHIP


Pennsylvania State Law, Section 1, Title 23, 5613(a).


STANDBY ADOPTION

Illinois Adoption Act, 750 ILCS 50 (1960).

Old-age and survivors insurance benefit payments, 42 U.S.C. § 402(d), 416(e).

JOINT GUARDIANSHIP AND JOINT CUSTODY

California Probate Code Section 2105(f).

General Statutes of Connecticut, Volume XII, Title 45a, Chapter 820h, Part II, Sections 45a-624 et seq.

SHORT-TERM GUARDIANSHIP


Minnesota Stat. §524.5-211 (2003).


Benefits


Minnesota Stat. §260C.201, subd. 11(d)(v).


Resources

Online Resources

National Abandoned Infants Assistance Resource Center, Standby Guardianship Project
http://aia.berkeley.edu/information_resources/standby_guardianship.html

Generations United, Kinship Care: Legal Options
http://www.gu.org/projg&clegal.htm

Family Ties Project, Standby Guardianship
http://www.standbyguardianship.org/

HIV/AIDS Law Consortium of Western Massachusetts, Standby Guardianship—A Means to Provide for the Future Care of Your Children
http://www.neighborhoodlaw.org/page/58267&cat_id=35

National Adoption Information Clearinghouse, Standby Guardianship State Statutes Series 2003
http://naic.acf.hhs.gov/general/legal/statutes/guardianship.cfm

The Well Project, Inc., Guardianship
http://www.thewellproject.org/Living_Well/Legal_Issues/Guardianship.jsp

Manuals and Workbooks


Additional Journal Articles


National Abandoned Infants Assistance Resource Center. (2000, Fall). The Source, 10(2).


### Videos

A Gift for My Children
(Families Talk About Custody Planning)
The Family Center
66 Reade Street
New York, NY 10007
212-766-4522

Bigger Than This Manhattan
(Kids Talk About Ill Parents)
The Family Center
66 Reade Street
New York, NY 10007
212-766-4522

Mommy, Who'll Take Care of Me
Connecticut Public Television
Hartford, CT
203-278-5310

The Tomorrow's Children Face When a Parent Dies
Aquarius Productions, Inc.
5 Powderhouse Lane
Sherborn, MA 01770
508-651-2963
APPENDIX I

VOLUNTARY PLACEMENT: NEW YORK

Voluntary Placement Agreement By Parent or Guardian
(Prepare in Quintuplicate: original signature on all copies)

NOTICE

BY SIGNING THIS AGREEMENT, YOU WILL VOLUNTARILY TRANSFER THE CARE AND CUSTODY OF YOUR CHILD TO THE COMMISSIONER OF SOCIAL SERVICES. YOU DO NOT HAVE TO SIGN THE AGREEMENT AND YOU WILL NOT BE SUBJECT TO ANY LEGAL PENALTIES IF YOU DO NOT SIGN IT.

YOU HAVE THE RIGHT TO TALK TO A LAWYER OF YOUR OWN CHOOSING BEFORE SIGNING THIS AGREEMENT. IF YOU CANNOT AFFORD A LAWYER, THERE ARE SEVERAL ORGANIZATIONS WHICH PROVIDE SERVICES:

- Legal Services for New York City (212) 431-7200
- Legal Aid Society (212) 577-3300
- MFY Legal Services (212) 417-3700

Name of Person Signing Agreement: Address

___________________________________ __________________________________________
Mother Number and Street Apt. #
Borough or PO Zip

___________________________________ __________________________________________
Father* Number and Street Apt. #
Borough or PO Zip

___________________________________ __________________________________________
Legal Guardian** Number and Street Apt. #
Borough or PO Zip

Parent(s)/Legal Guardian of ____________________________________ born on _____________________ requests the Commissioner of Social Services to accept care and custody of my child. The transfer of custody shall not take effect until the (parent) or (legal guardian) dies, becomes debilitated or incapacitated.

*If child is born out-of-wedlock, attach acknowledgement of paternity form or indicate the date and court where paternity was established: Date _________________ Court _______________________________________

**If signing as legal guardian, specify the date and court where guardianship was obtained: Date _____________________ Court _______________________________________________________
TERMS OF PLACEMENT

I grant permission to the Commissioner of Social Services (Commissioner) to place my child in a foster care setting that is determined to be suitable for my child’s care. I understand that I am expected to work cooperatively towards planning for the future of my child, and that the agency will offer whatever help is available to enable me to decide what is best for my child, I understand that it is both my right and responsibility to plan with the agency for my child’s return home, or to actively participate in making alternate plans so that the child may have the benefit of another home.

[ ] INDEFINITE PLACEMENT

I AM PLACING MY CHILD WITH THE COMMISSIONER FOR AN INDEFINITE PERIOD OF TIME. WHEN I WANT MY CHILD DISCHARGED FROM FOSTER CARE, I WILL GIVE NOTICE TO THE AGENCY CARING FOR MY CHILD. IF POSSIBLE, I WILL GIVE SUCH NOTICE IN WRITING USING THE “REQUEST FOR DISCHARGE OF A CHILD FROM FOSTER CARE” FORM WHICH IS ATTACHED TO THIS AGREEMENT.

THE AGENCY WILL RETURN MY CHILD TO ME WITHIN TWENTY (20) DAYS AFTER RECEIVING MY REQUEST UNLESS A COURT ORDER EXISTS THAT WOULD NOT ALLOW THE RETURN OR COURT ORDER IS OBTAINED TO PREVENT THE RETURN.

A COURT ORDER MAY BE OBTAINED BY THE COMMISSIONER IN ANY OF THE FOLLOWING COURT PROCEEDINGS: (1) A CUSTODY PROCEEDING; (2) A CHILD PROTECTIVE PROCEEDING; (3) A PROCEEDING TO TERMINATE PARENTAL RIGHTS; OR (4) A PERMANENCY HEARING HELD IN ACCORDANCE WITH THE PROVISIONS OF SECTION 392 OF THE SOCIAL SERVICES LAW, WHICH DIRECTED CONTINUED CARE.

[ ] LIMITED PLACEMENT

I WANT MY CHILD TO BE PLACED WITH THE COMMISSIONER UNTIL __________________ (DATE) OR UNTIL THE FOLLOWING EVENT TAKES PLACE:

____________________________________________________________________________________
____________________________________________________________________________________

MY CHILD WILL BE RETURNED BY THE ABOVE DATE OR EVENT SPECIFIED UNLESS A COURT ORDER IS OBTAINED TO PREVENT THE RETURN BEFORE THE ABOVE DATE OR EVENT, OR WITHIN TEN (10) DAYS AFTER THE DATE OR EVENT.

IF I AM UNABLE TO RECEIVE MY CHILD, OR I AM UNAVAILABLE OR INCAPACITATED, I CONSENT TO EXTEND FOSTER CARE AGENCY WHEN I AM ABLE TO ACCEPT MY CHILD. MY CHILD MUST THEN BE RETURNED TO ME WITHIN TEN (10) DAYS AFTER THE RECEIPT OF MY REQUEST UNLESS A COURT ORDER AGAINST THE RETURN IS OBTAINED WITHIN TEN (10) DAYS OF MY REQUEST.

I MAY REQUEST IN WRITING TO THE FOSTER CARE AGENCY THE RETURN OF MY CHILD BEFORE THE ABOVE DATE OR EVENT. THE AGENCY MUST RETURN MY CHILD OR NOTIFY ME WITHIN TEN (10) DAYS OF MY REQUEST IF THE REQUEST IS DENIED. IF THE AGENCY DOES NOT ACT UPON MY REQUEST, I HAVE THE RIGHT TO SEEK THE IMMEDIATE RETURN OF MY CHILD IN EITHER FAMILY COURT OR STATE SUPREME COURT.
RESPONSIBILITIES OF PARENTS

AS THE PARENT(S)/GUARDIAN OF MY CHILD, I AGREE TO:

(1) PLAN FOR THE FUTURE OF MY CHILD;
(2) MEET AND CONSULT WITH AGENCY STAFF IN DEVELOPING AND CARRYING OUT THE BEST PLAN FOR MY CHILD AND ME;
(3) VISIT AND OTHERWISE COMMUNICATE WITH MY CHILD, AND HAVE MY CHILD VISIT ME; IF I CANNOT VISIT, I WILL TELL THE CASEWORKER WHY AND MAKE EVERY EFFORT TO CALL MY CHILD AND/OR WRITE REGULARLY;
(4) KEEP APPOINTMENTS WITH MY CASEWORKER AND ANSWER LETTERS THE AGENCY WORKER SENDS ME;
(5) FOLLOW-UP SUGGESTIONS MADE BY MY AGENCY WORKER IN OBTAINING HELP FOR MY PROBLEM;
(6) KEEP THE FOSTER CARE AGENCY INFORMED OF MY ADDRESS, TELEPHONE NUMBER, PLACE OF EMPLOYMENT, INCOME, LIVING ARRANGEMENTS, AND CHANGE OF NAME, IF IT SHOULD OCCUR; AND
(7) CONTRIBUTE, IF I AM FINANCIALLY ABLE, TOWARD THE COST OF MY CHILD’S FOSTER CARE. THE AMOUNT OF MONEY I WILL BE ABLE, TO CONTRIBUTE EACH (WEEK) (MONTH) WHILE MY CHILD REMAINS IN THE CARE AND CUSTODY OF THE COMMISSIONER IS ________________ (COMPLETE BY WRITING AN AMOUNT OR “UNKNOWN”)

I UNDERSTAND THAT FAILURE TO MEET THESE RESPONSIBILITIES LISTED ON PAGE 4 COULD BE A BASIS FOR COURT PROCEEDINGS TO TERMINATE MY PARENTAL RIGHTS AND FREE MY CHILD FOR ADOPTION.

I UNDERSTAND THAT IF MY CHILD REMAINS IN FOSTER CARE FOR FIFTEEN (15) OF THE MOST RECENT TWENTY-TWO (22) MONTHS, THE AGENCY MAY BE REQUIRED BY LAW TO FILE A PETITION TO TERMINATE MY PARENTAL RIGHTS.

I UNDERSTAND THAT IF MY RIGHTS ARE TERMINATED, MY CONSENT WOULD NO LONGER BE NEEDED FOR MY CHILD TO BE ADOPTED.

RESPONSIBILITIES OF THE COMMISSIONER

I understand that the Commissioner of Social Services or the foster care agency where my child is placed, in accordance with the plan for supportive services, and to the extent to which such services and facilities are available and my eligibility for services is established, agrees to:

(1) Provide care, supervision, room, board, clothing, medical care, dental care, and education for my child;
(2) Inform me of the name, address and telephone number of the foster care agency, home or facility where my child is placed;
(3) Clearly inform me of what is expected of me before my child will be returned home and to work with me to develop and carry out a service plan for my child and me, including those supportive services needed so that my child can return home;
(4) Provide help, if needed, for any children who remain in my home;
(5) Help me make arrangements to visit my child;
(6) Hear and take appropriate action upon complaints I may have about care and services provided to my child and me. If my caseworker is unable to resolve my complaint, I may contact the Parents and Children’s Rights Unit of the Administration for Children’s Services at (212) 676-9421.
SUPPORTIVE SERVICES

I HAVE BEEN ADVISED OF MY RIGHT TO HAVE SUPPORTIVE SERVICES PROVIDED, INCLUDING PREVENTIVE AND OTHER SUPPORTIVE SERVICES, WHILE MY CHILD REMAINS IN FOSTER CARE. I UNDERSTAND THAT SUCH SUPPORTIVE SERVICES SHOULD BE PROVIDED SO THAT MY CHILD MAY BE RETURNED TO MY HOME.

I further understand that it is my responsibility to plan for and to cooperate with the provision of such supportive services. Should I fail to cooperate and my child cannot be returned to my home in accordance with the plan for services, a court action to terminate my parental rights might be brought.

I understand that the supportive services will not be discontinued while my child remains in placement unless I agree to this in writing. There are three exceptions to this rule: (1) if the continued provision of supportive services would be contrary to a court order entered in a proceeding of which I was notified; (2) if I do not keep the agency informed of my whereabouts; or (3) if I refuse to communicate with the agency or I refuse to accept the supportive services offered.

VISITING

I HAVE BEEN ADVISED OF MY RIGHT TO VISIT WITH MY CHILD IN FOSTER CARE AND I HAVE BEEN INFORMED OF THE IMPORTANCE OF VISITING REGULARLY. I HAVE THE RIGHT TO DETERMINE JOINTLY, WITH THE AGENCY, THE TERMS AND FREQUENCY OF VISITATION. I AGREE TO COOPERATE WITH THE AGENCY IN ESTABLISHING APPROPRIATE VISITING PERIODS. I UNDERSTAND THAT VISITING SCHEDULES MAY NOT ALWAYS BE FIXED AND AT TIMES IT MAY BE NECESSARY TO CHANGE VISITING SCHEDULES DUE TO CHANGES IN MY CIRCUMSTANCES OR BECAUSE OF CIRCUMSTANCES WHERE MY CHILD IS PLACED.

NO ONE MAY STOP OR LIMIT MY VISITS WITHOUT MY AGREEMENT OR APPROVAL FROM A COURT PROCEEDING. IF THE ADMINISTRATION FOR CHILDREN’S SERVICES OR THE FOSTER CARE AGENCY FEELS MY VISITS HARM MY CHILD, THEY CAN REFUSE TO ALLOW ME TO VISIT, BUT MUST OBTAIN COURT APPROVAL THE NEXT BUSINESSDAY. I UNDERSTAND THAT I WOULD BE NOTIFIED OF SUCH A PROCEEDING AND MAY APPEAR AT THE PROCEEDING. IF I AGREE IN WRITING WITH THE DECISION TO LIMIT OR STOP THE VISITS, COURT ACTION MAY NOT BE REQUIRED.

Any court orders concerning the right of visitation to my child remain in effect and are noted here or attached to this document as required by law.

Noted: ______________________________________________________________________________

Attached: ____________________________________________________________________________

HEALTH AND MEDICAL CARE

As the parent(s)/guardian of my child:
(1) I understand that the Commissioner a designated representative will keep me informed of my child’s progress, development and health status (other than routine health care);
(2) I authorize the Commissioner or a designated representative to consent to any routine treatment that my child may need while placed in foster care. Routine medical treatment is defined as medical (pediatric or psychiatric), dental, health and hospital services, which are customarily given as part of preventive health and/or care for ordinary childhood diseases or illnesses.

(3) I authorize the Commissioner or a designated representative to consent to emergency medical care. Emergency medical, dental, health and hospital services or surgical care is defined as care that should be provided immediately because delay of such care places the health of the child in serious jeopardy, or in the case of a behavioral condition places the health of such child or others in serious jeopardy (New York State, Public Health Law §4900(3)).

(4) I authorize the Commissioner or a designated representative to consent to surgical care in the event that I cannot be contacted at the time that surgical care is medically necessary.

(5) I understand that when my consent to a medical procedure is requested, and if the Commissioner or a designated representative believes that my failure to give such consent would endanger the life, health or safety of my child, a child protective proceeding may be initiated in order to obtain court authorization for the medical procedure.

(6) I understand that my written consent must be obtained before my child is tested for HIV infection UNLESS my child has the capacity to give consent to such testing or I lost guardianship of my child or the Commissioner takes custody of my child as an abused or neglected child.

(7) I understand that my written consent must be obtained before my child is entered into an experimental medical research program (clinical trial) UNLESS my child reaches age 18 or I lost guardianship of my child.

COURT HEARINGS

(1) According to the provisions of Section 358a of the Social Services Law, if a social services official believes my child is likely to remain in care more than thirty days, a proceeding will be file, in the Family Court to obtain a Court review of this Agreement. According to the provisions of Section 392 of the Social Services Law, a permanency hearing will be held within fourteen (14) months of the date my child entered foster care and at least every twelve (12) months thereafter. I will receive notice of these hearings and have an opportunity to be present. At the hearing, the Court has the authority to order the Commissioner of Social Services to carry out a specific plan of action to exercise diligent efforts toward the discharge of my child from foster care, either to my child’s own family or to an adoptive home. The court also retains continuing jurisdiction for certain purposes, and may review the case at the request of any of the parties involved, including the parent(s) or legal guardian.

(2) My failure to maintain parental responsibilities may lead to action and termination of parental rights. Under the Social Services Law of the State of New York, my failure to visit and communicate with a child for six successive months without good reasons may be considered abandonment. Under the Social Services Law and the Family Court Act of the State of New York, my failure to substantially and continuously or repeatedly maintain contact with or plan for the future of the child, although physically and financially able to do so, for a period of more than one year following the date the child came into foster care, may be considered permanent neglect if the agency has made diligent efforts to encourage and strengthen my relationship with my child when such efforts are not contrary to the best interests of the child.
RIGHT TO A FAIR HEARING

I UNDERSTAND THAT I HAVE THE RIGHT TO REQUEST A STATE FAIR HEARING IF I DISAGREE WITH ANY DECISIONS CONCERNING SERVICES FOR MYSELF OR MY CHILD SUCH AS:

- SUPPORTIVE SERVICES ARE DENIED, REDUCED, OR DISCONTINUED;
- SUPPORTIVE SERVICES ARRANGED ARE NOT APPROPRIATE FOR MY SITUATION;
- I HAVE BEEN DENIED THE RIGHT TO VISIT WITH MY CHILD

I may request a fair hearing by (1) writing a letter to the Office of Administrative Hearings' of the Office of Temporary and Disability Assistance, P.O. Box 1930, Albany, NY 12201; or (2) by calling (212) 417-6550; or (3) going in person to the New York State Office of Children and Family Services, Fair Hearing Section, 14 Boerum Place, Brooklyn, NY 11201.

IF YOU RECEIVE A NOTICE DENYING, DISCONTINUING, OR REDUCING A SERVICE, YOU MUST REQUEST YOUR HEARING WITHIN 60 DAYS OF THE DATE OF SUCH NOTICE.

SIGNATURES

I understand that I have the right to consult with an attorney prior to signing this Agreement or at any other time, as outlined in the Notice on the first page of the Agreement.

I understand that none of the above provisions may be changed without my consent or that of an individual acting in my behalf with my consent, and the consent of the Commissioner of Social Services designated representative. If any such provision is to be changed, it shall be indicated in writing in a supplemental instrument which will be acknowledged and signed in the same manner as this Agreement, and shall be attached and become part of this original Agreement.

I have read and I understand this Agreement which will be in effect during the time that my child is in foster care placement. I have received a copy of this agreement.

____________________________________________
Signature of Parent or Guardian

____________________________________________
Signature of Second Parent

Signed in the presence of:

____________________________________________
Signature of Caseworker

____________________________  Date: _______________________
Caseworker Print Name

Title: _______________________
Phone Number: ____________________
Unit Number: __________________

Note: A copy of the Parent’s Handbook should be given to you when this Agreement is signed. If it is not available, you should ask the caseworker to mail it to you. It contains additional information about matters related to foster care. The caseworker can clarify any of the information in this publication at any time.
APPENDIX II

SAMPLE CLAUSE APPOINTING GUARDIAN IN A WILL

I nominate my mother, Jane Doe, as guardian of the person and guardian of the estate of my child. John Smith is the biological father of Jane Smith however he abandoned her in March 2000 and has not provided for her care in any way since. Further, he is violent, and was abusive toward me in her presence. She fears him. Jane Doe will look out for Jane's best interests and I ask her to do so with input from my father, Joseph Doe. A designation for Stand-by Custody has also been completed with these instructions. It has been filed in the Large County District Court.

I nominate my father, Joseph Doe, as guardian of the person and guardian of the estate of my child if Jane Doe is unable to serve as such. John Smith is the biological father of Jane Smith however he abandoned her in March 2000 and has not provided for her care in any way since. Further, he is violent, and was abusive toward me in her presence. She fears him. Joseph Doe will look out for Jane's best interests. A designation for Stand-by Custody has also been completed with these instructions. It has been filed in the Large County District Court.
APPENDIX III

POWER OF ATTORNEY: COLORADO

POWER OF ATTORNEY
(Designating another person to make decisions regarding a minor child in lieu of the child’s parent or legal guardian)

The undersigned certify(ies) that the undersigned is/are the parent(s)/legal guardian(s) of ______________________________ (“minor child”). As authorized under C.R.S. § 15-14-105, the undersigned hereby designate(s) ________________________________________________, (FULL NAME OF ATTORNEY IN FACT)

____________________________________________________________________________________,
(STREET ADDRESS, CITY, STATE AND ZIP CODE OF ATTORNEY IN FACT)

____________________________________________________________________________________,
(HOME PHONE OF ATTORNEY IN FACT) (WORK PHONE OF ATTORNEY IN FACT)

as the undersigned’s attorney in fact with respect to the minor child, and for this purpose delegate(s) to the attorney in fact all of my/our power and authority regarding the care, custody and property of the minor child, including but not limited to the right to inspect and obtain copies of education records and other records concerning the minor child, the right to attend school activities and other functions concerning the minor child, and the right to give or withhold any consent or waiver with respect to school activities, medical and dental treatment, and any other activity, function or treatment that may concern the minor child. This delegation does not include the power or authority of the attorney in fact to consent to the minor child’s marriage or adoption. This power of attorney is effective for a period not to exceed twelve (12) months, commencing ______________, 20__, and ending ______________, 20__. The undersigned agree(s) to indemnify, defend and hold harmless any individual or organization acting in reliance on this power of attorney.

By:__________________________________ By:_______________________________________
(PARENT/Legal GUARDIAN SIGNATURE) (PARENT/Legal GUARDIAN SIGNATURE)

STATE OF ____________________ )
) ss.
COUNTY OF ____________________ )

The foregoing Power of Attorney was subscribed and sworn to before me this ____ day of ____________________, 20__ by __________________________ and __________________________ .

Witness my hand and official seal.

________________________________________
Notary Public

My commission expires:

(Acceptance of Attorney in Fact on next page)
I hereby accept my designation as attorney in fact for ____________________________ in accordance with the delegation of power of attorney on the front of this page.

________________________________________
(ATTORNEY IN FACT SIGNATURE)

STATE OF COLORADO _________________ )
COUNTY OF __________________ ) ss.

The foregoing Acceptance of Power of Attorney was subscribed and sworn to before me this ____ day of ________________, 20__ by ______________________________.

Witness my hand and official seal.

__________________________________________________________________________
Notary Public

My commission expires:

revised 2/2002
APPENDIX IV

SPRINGING POWER OF ATTORNEY: NEW YORK

DURABLE GENERAL POWER OF ATTORNEY EFFECTIVE AT A FUTURE TIME
NEW YORK STATUTORY SHORT FORM

Caution: This is an important document. It gives the person whom you designate (your “Agent”) broad powers to handle your property during your lifetime, which may include powers to mortgage, sell, or otherwise dispose of any real or personal property without advance notice to you or approval by you. These powers may only be used after a certification that you have become disabled, incapacitated, or incompetent or that some other event has occurred. These powers are explained more fully in New York General Obligations Law, Article 5, Title 15, Sections 5-1502A through 5-1506, which expressly permit the use of any other or different form of power of attorney.

This document does not authorize anyone to make medical or other health care decisions. You may execute a health care proxy to do this.

If there is anything about this form that you do not understand, you should ask a lawyer to explain it to you.

THIS is intended to constitute a POWER OF ATTORNEY EFFECTIVE AT A FUTURE TIME pursuant to Article 5, Title 15 of the New York General Obligations Law:

I, ____________

(Insert your name and address)

do hereby appoint:

(If 1 person is to be appointed agent, insert the name and address of your agent above)

(If 2 or more persons are to be appointed agents by you insert their names and addresses above)

my attorney(s)-in-fact TO ACT

(If more than one agent is designated, choose ONE of the following two choices by putting your initials in ONE of the blank spaces to the left of your choice:)

[ ] Each agent may SEPARATELY act.
[ ] All agents must act TOGETHER.

(If neither blank space is initialed, the agents will be required to act TOGETHER)

TO TAKE EFFECT upon the occasion of the signing of a written statement EITHER:

(INSTRUCTIONS: COMPLETE OR OMIT SECTION (I) —OR— SECTION (II) BELOW BUT NEVER COMPLETE BOTH SECTIONS (I) AND (II) BELOW. IF YOU DO NOT COMPLETE EITHER SECTION (I) OR SECTION (II) BELOW, IT SHALL BE PRESUMED THAT YOU WANT THE PROVISIONS OF SECTION (I) BELOW TO APPLY.)

(I) by a physician or physicians named herein by me at this point:

Dr.

(Insert full name(s) and address(es) of certifying Physician(s) chosen by you)
or if no physician or physicians are named hereinabove, or if the physician or physicians named hereinabove are unable to act, by my regular physician, or by a physician who has treated me within one year preceding the date of such signing, or by a licensed psychologist or psychiatrist, certifying that I am suffering from diminished capacity that would preclude me from conducting my affairs in a competent manner;

—OR—

(II) by a person or persons named herein by me at this point:

(Insert full name(s) and address(es) of certifying Person(s) chosen by you)

CERTIFYING that the following specified event has occurred:

(Insert hereinabove the specified event the certification of which will cause THIS POWER OF ATTORNEY to take effect)

IN MY NAME, PLACE AND STEAD in any way which I myself could do, if I were personally present, with respect to the following matters as each of them is defined in Title 15 of Article 5 of the New York General Obligations Law to the extent that I am permitted by law to act through an agent:

(DIRECTIONS: Initial in the blank space to the left of your choice any one or more of the following lettered subdivisions as to which you WANT to give your agent authority. If the blank space to the left of any particular lettered subdivision is NOT initialed, NO AUTHORITY WILL BE GRANTED for matters that are included in that subdivision. Alternatively, the letter corresponding to each power you wish to grant may be written or typed on the blank line in subdivision “Q”, and you may then put your initials in the blank space to the left of subdivision “Q” in order to grant each of the powers so indicated.)

[ ] (A) real estate transactions;
[ ] (B) chattel and goods transactions;
[ ] (C) bond, share and commodity transactions;
[ ] (D) banking transactions;
[ ] (E) business operating transactions;
[ ] (F) insurance transactions;
[ ] (G) estate transactions;
[ ] (H) claims and litigation;
[ ] (I) personal relationships and affairs;
[ ] (J) benefits from military service;
[ ] (K) records, reports and statements;
[ ] (L) retirement benefit transactions;
[ ] (M) making gifts to my spouse, children and more remote descendants, and parents, not to exceed in the aggregate $10,000$ to each of such persons in any year;
[ ] (N) tax matters;
[ ] (O) all other matters
[ ] (P) full and unqualified authority to my attorney(s)-in-fact to delegate any or all of the foregoing powers to any person or persons whom my attorney(s)-in-fact shall select;
[ ] (Q) each of the above matters identified by the following letters: ..................

.......................... ..........................................................

This durable Power of Attorney shall not be affected by my subsequent disability or incompetence.

(Special provisions and limitations may be included in the statutory short form power of attorney effective at a future time only if they conform to the requirements of section 5-1503 of the New York General Obligations Law.)

$^1$As of January 1, 2002, the annual gift tax exclusion is $11,000. To authorize gifts up to $11,000, add language to that effect.
If every agent named above is unable or unwilling to serve, I appoint (Insert name and address of successor) to be my agent for all purposes hereunder.

To induce any third party to act hereunder, I hereby agree that any third party receiving a duly executed copy or facsimile of this instrument together with a duly executed copy or facsimile of the written statement or statements of certification required for this instrument to be effective may act hereunder, and that the suspension, revocation or termination hereof shall be ineffective as to such third party unless and until actual notice or knowledge of such suspension, revocation or termination shall have been received by such third party, and I for myself and for my heirs, executors, legal representatives and assigns, hereby agree to indemnify and hold harmless any such third party from and against any and all claims that may arise against such third party by reason of such third party having relied on the provisions of this instrument.

This General Power of Attorney Effective at a Future Time may be revoked by me at any time.

In Witness Whereof, I have hereunto signed my name this day of

(YOU SIGN HERE:) (Signature of Principal)

NEW YORK UNIFORM ACKNOWLEDGEMENT

STATE OF NEW YORK, COUNTY OF ss.: On before me, the undersigned, personally appeared

personally known to me or proved to me on the basis of satisfactory evidence to be the individual(s) whose name(s) is (are) subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their capacity(ies), and that by his/her/their signature(s) on the instrument, the individual(s), or the person upon behalf of which the individual(s) acted, executed the instrument.

(signature and office of person taking acknowledgment)

ACKNOWLEDGMENT OUTSIDE NEW YORK STATE

STATE OF COUNTY OF ss.: On before me, the undersigned, personally appeared

personally known to me or proved to me on the basis of satisfactory evidence to be the individual(s) whose name(s) is (are) subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their capacity(ies), and that by his/her/their signature(s) on the instrument, the individual(s), or the person upon behalf of which the individual(s) acted, executed the instrument, and that such individual made such appearance before the undersigned in

(insert city or political subdivision and state or county or other place acknowledgment taken).

(signature and office of person taking acknowledgment)
AFFIDAVIT THAT POWER OF ATTORNEY IS IN FULL FORCE
(Sign before a notary public)

STATE OF COUNTY OF ss.: being duly sworn, deposes and says:

1. The Principal within did, in writing, appoint me as the Principal’s true and lawful ATTORNEY(S)-IN-FACT in the within Power of Attorney.
2. I have no actual knowledge or actual notice of revocation or termination of the Power of Attorney by death or otherwise, or knowledge of any facts indicating the same. I further represent that the Principal is alive, has not revoked or repudiated the Power of Attorney and the Power of Attorney still is in full force and effect.
3. I make this affidavit for the purpose of inducing to accept delivery of the following Instrument(s), as executed by me in my capacity as the ATTORNEY(S)-IN-FACT, with full knowledge that this affidavit will be relied upon in accepting the execution and delivery of the Instrument(s) and in paying good and valuable consideration therefor:

Sworn to before me on

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FCA §§ 467, 549, 651, 652, 654; DRL §240

General Form 17
(Petition-Custody, Visitation)
10/2004

FAMILY COURT OF THE STATE OF NEW YORK
COUNTY OF .................................................................
In The Matter of a Proceeding for
☐ Custody  ☐ Visitation under Article 04 05 06
of the Family Court Act or Section 240
of the Domestic Relations Law

Petitioner

Docket No.

☐ PETITION
☐ CUSTODY
☐ VISITATION

-against-

Respondent .................................................................

TO THE FAMILY COURT:

The undersigned Petitioner respectfully alleges upon information and belief that:

1. Petitioner, , [check applicable box]: q resides q is located at [specify address or indicate if ordered to be kept confidential pursuant to Family Court Act §154-b(2) or Domestic Relations Law §254]:

   Petitioner is [specify relationship to child; if foster parent, agency, institution or other relationship, so state]:

2. Respondent, , [check applicable box]: q resides q is located at [specify address or indicate if ordered to be confidential, pursuant to Family Court Act §154-b(2) or Domestic Relations Law §254]:

   Respondent is [specify relationship to child; if foster parent, agency, institution or other relationship, so state]:

3. [Delete if inapplicable]: An order was issued by Court, County, State of , referring the issue of qcustody q visitation to the Family Court of the State of New York in and for the County of [specify]:

4. The name, present address and date of birth of each child who is the subject of this proceeding are as follows [specify address or indicate if ordered to be kept confidential pursuant to Family Court Act §154-b(2) or Domestic Relations Law §254]:

   Name   Address   Date of Birth
5. (Upon information and belief) During the last five years each child who is the subject of this proceeding resided at:

<table>
<thead>
<tr>
<th>Name</th>
<th>Address</th>
<th>Duration (from/to)</th>
</tr>
</thead>
</table>

6. (Upon information and belief) The name and present address of the person(s) with whom each child resided during the past five years are as follows:

<table>
<thead>
<tr>
<th>Name</th>
<th>Address</th>
<th>Duration (from/to)</th>
</tr>
</thead>
</table>

7. [Check applicable box(es). Delete inapplicable provisions]:
   a. [ ] The father of the child(ren) who (is)(are) the subject(s) of this proceeding is [specify]:
      - [ ] The father was married to the child(ren)’s mother at the time of the conception or birth.
      - [ ] An order of filiation was made on [specify date and court and attach true copy]:
      - [ ] An acknowledgment of paternity was signed on [specify date]:
        by [specify who signed and attach a true copy]:
      - [ ] The father is deceased.
   b. [ ] The father of the child(ren) who (is)(are) the subject(s) of this proceeding has not been legally established.
   c. [ ] A paternity agreement or compromise was approved by the Family Court of County on [specify date], concerning [name parties to agreement or compromise and child(ren)]:
      A true copy of the agreement or compromise is annexed hereto.

8. [Applicable to cases in which mother is not a party]: The name and address of the mother is [indicate if deceased or if address ordered to be kept confidential pursuant to Family Court Act §154-b(2) or Domestic Relations Law §254]:

9. [Delete if inapplicable]: Petitioner has participated as a [ ] party [ ] witness [ ] other capacity [specify]: in other litigation concerning the custody of the same children in [ ] New York State [ ] Other jurisdiction [specify]:
   If so, specify type of case, capacity of participation, court, location and status of case.

10. A custody or visitation proceeding concerning the same child(ren) [ ] is [ ] is not pending in New York State. [If pending, give court docket number and status of case]:

11. The custody or visitation of the child(ren) has been determined or agreed upon in the following instruments [specify court, if any, and date and attach true copy of instrument(s)]:
    - [ ] Custody order of [specify court and location]: , dated [specify]:
    - [ ] Stipulation of settlement in [specify court and location]: , dated [specify]:
    - [ ] Judgment of Divorce of [specify court and location]: , dated [specify]:
    - [ ] Separation Agreement, dated [specify]:
    - [ ] Custody or Guardianship Agreement confirmed by [specify court and location]: , dated [specify]:

12. [ ] Petitioner [ ] Respondent obtained custody of the child(ren) on [specify date]:
    , as follows:

13. It would be in the best interests of the child(ren) to have [ ] custody [ ] visitation awarded to the Petitioner for the following reasons:
14. There has been a change of circumstances since entry of the [ ] order [ ] judgment awarding [ ] custody [ ] visitation in that:

15. An Order of Protection or Temporary Order of Protection was issued [check applicable box(es)]: [ ] against Respondent [ ] against me in the following criminal, matrimonial or Family Court proceeding(s) [specify the court, docket or index number, date of order, next court date and status of case, if available]:

The [ ] Order of Protection [ ] Temporary Order of Protection expired or will expire on [specify date]:

16. Petitioner requests a Temporary Order of Protection pursuant to Family Court Act §655 because [specify]:


18. No previous application has been made to any court or judge for the relief herein requested, (except [specify; delete if inapplicable]: )

WHEREFORE, Petitioner requests an order awarding [ ] custody [ ] visitation of the child(ren) to the Petitioner and for such other and further relief as the Court may determine.

Dated: ______________________________________________________

Petitioner __________________________________________________

Print or Type Name _____________________________________________

Signature of Attorney, if any _____________________________________

Attorney’s Name (print or type) _________________________________

Attorney’s Address and Telephone Number _________________________

VERIFICATION
STATE OF NEW YORK )
: ss:
COUNTY OF )
being duly sworn, says that (s)he is the Petitioner in the above-named proceeding and that the foregoing petition is true to (his)(her) own knowledge, except as to matters therein stated to be alleged on information and belief and as to those matters (s)he believes it to be true.

________________________________________
Petitioner

Sworn to before me this day of

Deputy) Clerk of the Court
Notary Public

1 Specify address or indicate if ordered to be kept confidential pursuant to Family Court Act §154-b(2) or Domestic Relations Law §254.

2 Specify address or indicate if ordered to be kept confidential pursuant to Family Court Act §154-b(2) or Domestic Relations Law §254.
## PRINCIPAL LEGAL CITATIONS TO STATE STANDBY GUARDIAN LAWS

<table>
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APPENDIX VII

COMMON ELEMENTS OF STANDBY GUARDIAN LAW

I. DESIGNATION OF A STANDBY GUARDIAN

A. There is a process, similar to writing a will, for designating a person to be a standby guardian for a child.

Variations: CA, CO, VA, WY: No requirement that document be witnessed.

IL: Witnessing creates a presumption of validity. Designation can be in any written form.

IA: Term used is “verified” rather than “witnessed.”

AK, NE: No designation process is described in the standby guardian laws. The states’ other guardianship laws do describe written designations and probably would apply here.

WY: A petition which includes a nomination may be kept as a private designation until it is filed.

B. The designation document indicates that the parent qualifies to establish a standby guardianship because he or she has a “terminal” or “chronic” illness.

Variations: CT, FL, IL, IA, MA, MN PA, and WY do not limit use of standby guardianships to those who can show initially that they are very sick.

GA: refers to “health determination” that designator is unable to care for child due to a “physical or mental condition or health.”

CO: “will likely be unable to care for the child within two years”

C. The standby guardianship will become active when a “triggering” event or condition occurs.

Variations: CA: There is no triggering event. “Joint Guardianship” begins as soon as a guardian is appointed.

GA: Designation not filed until “health determination” concludes designator is unable to care for child.

L: Standby guardianship exists prior to triggering event. At triggering event guardianship becomes permanent.

D. The future events that are likely to occur to the parent are mental incapacity, physical disability or death.

Major Variation: In MD, MA, NC, NY, PA, VA, and WV, parental consent alone, in addition to the above, can be enough to trigger the standby guardianship.

Other FL, TX: Incapacity or death are the only bases for standby guardianship.
Variations: IL, MA: Parent’s inability to make day-to-day decisions for the child activates guardianship.

CT, IA, MN, OH, WY permit addition of triggering events other than illness and death.

GA: “Physical or mental condition or health including a condition created by treatment”

E. The parent’s consent – insofar as he or she is able to give consent – controls many aspects of the guardianship.

II. AGREEMENT OF THE NON-CUSTODIAL PARENT

A. Through notice of a court hearing, the non-custodial parent has an opportunity to be heard on the issue of guardianship.

B. Reasonable or diligent efforts must be made to notify the non-custodial parent.

Variation I: Certain states explicitly eliminate the need to contact certain kinds of non-custodial parents.

MN, NJ, PA: Notice need not be given if parental rights already terminated.

NY: Notice to the non-custodial parent need only be given if he is in the state, his residence is known, and he hasn’t been deprived of guardianship rights through abandonment of the child, loss of civil rights, or divorce.

AK, PA, VA, WV and WY: Notice goes to non-custodial parents whose “whereabouts are known” or that can be known.

Variation II: Many states permit search to be governed by Rules of Civil Procedure, or processes set forth in another statute of different part of the legal code. These amount either to “reasonable efforts” (the usual standard for notice of court hearings) or diligent search (the more stringent standard in termination of parental rights, adoption, and other custody cases.)

MD, DC: Specify a standard of “reasonable efforts.”

WI: Specifies a standard of “reasonable diligence” in locating a non-custodial parent.

WY: Refers to “due diligence.”

III. ROLE OF THE STANDBY GUARDIAN

A. The guardian’s tasks will begin when a future event or condition occurs to the parent.
B. If the court has not approved the standby guardianship prior to the triggering event, the standby guardian has responsibility to bring to the court evidence that the “triggering” event or condition has occurred.

Variations: Many states explicitly assign this task to the standby guardian: AK, CO, GA, IL, MD, MA, MN, NY, NJ, NC, PA, VA, WV, WI. In other states the task tends to fall upon the standby guardian simply because he or she is closest to the family’s situation: e.g. CT, WY.

CA: No evidentiary confirmation is needed because the guardianship is established upon appointment.

FL: Evidence is produced by an Examining Committee of experts.

NE, OH, TX and WY: Law does not state any duty to file evidence of triggering event.

C. Once the guardianship is activated by a triggering event, the standby guardian and the parent share decision-making for the child.

Variations: CO, CT, IA, OH and WY: Law is silent on concurrent decision-making.

FL, TX: Standby guardianship is activated only after parent is incapacitated so there is no sharing of decision-making. The guardian takes full control as soon as appointed.

IL: Parent decides when to activate guardianship. Statute does not impose concurrent decision-making.

IV. COURT PROCESS

A. The court determination occurs after the designating document is filed.

Major In states that follow the New York model, a parent can choose between variation: an early- petition process where the hearing would occur at the stage of filing the designation document (the rule), and a late-filing process where documents are not filed until a triggering event has occurred.

NC, PA, and WI follow NY model, but with modifications.

FL: Has 2-tracks in sense that it has 2 laws. Under 1 law hearing occurs when designating document is filed; under other law, it does not occur until after triggering event.

Other NC: Court clerk has been delegated judicial authority for guardianships and presides at any hearing.
VA, WV: Designation document to be filed at any time, up to 30 days after triggering event has occurred.

CT, IA: No hearing requirement stated in law.

GA: A designation and petition are filed only after the triggering event.

DC, MN, PA: No hearing required if there is no issue in controversy.

B. A judge (or designated court officer) will determine whether a standby guardianship is in the best interests of the child.

Major
Variation: A guardian *ad litem* or attorney can be appointed for the child to help the judge determine “best interests.” The following States explicitly provide for that, though in other States, courts also may have the power to do that: CO, CT, IL, NE, NJ, VA and WV.

Other
Variations:

CA: Refers judge to family court in matters of child welfare.

CT: Specific guidance on best interests is given in probate code.

IL: Best interests factors are listed in family code and in case law referenced in the probate code.

AK: Probate laws silent on best interests standard.

C. Evidence is filed with the court that the triggering event or condition has occurred. No hearing would be held for pre-approved standby guardianships. A hearing would be held if a standby guardianship petition accompanies the evidence.

Variations: CA: Joint guardian begins tasks as soon as appointment is made. No triggering event.

D. A physician's statement is required to be filed as evidence, if the triggering event is the parent's mental incapacity or physical debilitation.

Variations: CT: Law requires affidavit by guardian or other person that triggering event has occurred.

FL: Standby guardian files Petition of Incapacity and a cross-disciplinary committee of experts looks at evidence. In all probability a physician's statement would be part of the evidence.

IA: Law just states the evidentiary standard: event or condition must be proved by “clear and convincing evidence.”

AK, WY: Law does not specify what evidence must be filed to prove triggering event.

DC: An attending clinician's statement is required only for mental incapacity.
GA: A health care professional makes a “health determination,” which is the triggering event.

TX: Parent’s mental incapacity begins petition process, but no standard is stated for evidence.

E. After a parent’s death a standby guardianship converts to a permanent guardianship.

Variations: CT, VA, and WV: separate petition specifically required to establish a permanent guardianship after parent’s death.

IL: Petition for permanent guardianship is filed upon occurrence of any triggering event.

MA: Standby guardian must file petition for permanent guardianship within 90 days of triggering event.

CO: Guardianship impliedly is permanent as soon as approved because parent’s right to object is terminated.

CA: Joint guardianship is permanent as soon as established.

PA: Specifically states that standby guardianship will be permanent.

MN: At death, court is to convert standby guardianship to permanent guardianship without a separate petition.

IA, MD, NE, NJ, NY, NC, and WY: Standby guardian law silent as to any extra step to convert guardianship to permanency, although probate rules or practice may require it.

VA and WV: Standby guardian petitions court to make formal guardianship determination.

AK: The court “shall enter” an order of guardianship after standby guardian informs of triggering event.

TX: At death, standby guardian is to be preferred permanent guardian.

GA: Standby guardianship terminates four months after triggering event, at which point a petition for permanent guardianship must be filed.

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1 Adapted from Standby Guardianship Training and Technical Assistance Project, prepared by the American Bar Association Center on Children and the Law and Circle Solutions for the U.S. Dept. of Health and Human Services
APPENDIX VIII

DESIGNATION OF STANDBY GUARDIAN FORM: ILLINOIS

DESIGNATION OF STANDBY GUARDIAN

[IT IS IMPORTANT TO READ THE FOLLOWING INSTRUCTIONS]

A standby guardian is someone who has been appointed by the court as the person who will act as guardian of the child when the child’s parents die or are no longer willing or able to make and carry out day-to-day child care decisions concerning the child. By properly completing this form, a parent is naming the person that the parent wants to be appointed as the standby guardian of the child or children of the parent. Both parents of a child may join together and co-sign this form. Signing the form does not appoint the standby guardians; to be appointed, a petition must be filed in and approved by the court.

1. Parent and Children. I, (insert name of designating parent), currently residing at (insert address of designating parent), am a parent of the following child or children (or of a child likely to be born): (insert name and date of birth of each child, or insert the words “not yet born” to designate a standby guardian for a child likely to be born and the child’s expected date of birth).

2. Standby Guardian. I hereby designate the following person to be appointed as standby guardian for my child or children listed above (insert name and address of person designated).

3. Successor Standby Guardian. If the person named in item 2 above cannot or will not act as standby guardian, I designate the following person to be appointed as successor standby guardian for my child or children: (insert name and address of person designated).

4. Date and Signature. This designation is made this (insert day) day of (insert month and year).
   Signed: (designating parent)

5. Witnesses. I saw the parent sign this designation or the parent told me that the parent signed this designation. Then I signed the designation as a witness in the presence of the parent. I am not designated in this instrument to act as a standby guardian for the parent’s child or children. (insert space for names, addresses, and signatures of 2 witnesses.)
APPENDIX IX

LEGISLATOR’S CHECKLIST FOR STANDBY GUARDIANSHIP

GENERAL ISSUES

Should the standby guardian law be placed in the probate code _____ [majority], the family or domestic relations code _____ [DC, FL, MN, PA], or the juvenile code _____ [VA, WV, WI]?

Should the law be one that most parents can read and understand _____ [CT, MD, WY], or one that comprehensively describes the steps to be taken and provides for many contingencies _____ [IL, NJ, NY, WI, VA]?

Should the law aim to create a guardianship that is essentially permanent and will withstand most legal assaults, _____ [IL, NJ], or aim instead to fill a parent’s lifetime need until a permanent guardian is appointed _____ [CT, VA]?

Should a parent be able to use the law only if chronically or terminally ill _____ [majority], or should there be broader criteria for the law’s use _____ [CT, IA, IL, MA, PA, WY]?

DESIGNATION PROCESS

Should a designation form be printed in the statute for the parent’s optional use _____ [DC, CT, GA, IL, MD, MN, NJ, NY, PA]?

Should the law require the document’s signing to be witnessed _____ [majority], or leave that choice to the parent _____ [CA, IL, VA]?

Should the parent have a free hand to choose and describe the triggering events _____ [CT, IA, OH, WY], or should the law prescribe the triggering events _____ [majority]?

If the law is prescriptive, should the triggering events include mental incapacity _____ [majority], physical debilitation plus parental consent _____ [majority], and death _____ [majority]?

Whether or not the law is prescriptive, should the parent’s consent alone be permitted to activate the guardianship _____ [IL, MD, MA, NY, NC, PA, VA, WV]?

Should the parent be permitted to revoke the designation at any time _____ [majority] and if so, must the revocation be in writing if the designation document already has been filed in court _____ [majority]?

AGREEMENT OF THE NON-CUSTODIAL PARENT

Should the law describe a standard for notifying the non-custodial parent of a court hearing (for example, “reasonable efforts”) _____ [DC, MD], or should specific notification steps be listed in the law _____ [WV], or only the exceptions to notification _____ [NJ, NY]?
Should there be an absolute requirement for the parent to secure the agreement of any fit and able non-custodial parent [CT, FL, IL, MD, NE, PA], or should there only be an opportunity for the non-custodial parent to appear in court and argue in opposition to the guardianship [majority]?

Should the law provide that the non-custodial parent may request review of the court’s decision at any time [DC, VA, WV], or should that be left implicit [majority]

**ROLE OF THE STANDBY GUARDIAN**

Should the law provide that the parent and guardian will have concurrent decision-making power [majority], or should this be optional [DC, MN, PA], or should concurrent decision-making be precluded after the triggering event [IL, FL, TX]?

Should the standby guardian’s duties include informing the court when the triggering event has occurred [majority], and gathering and filing evidence of the triggering event (physician’s statement, death certificate, etc.) [majority]?

Should the law require the standby guardian to petition for permanent guardianship when the parent dies [CO, IL, VA, WV].

Should there be a presumption that the standby guardian will become the permanent guardian [DC, CO, IL, PA]?

**COURT PROCESS**

To determine the “best interests of the child,” should the court hold a hearing in every case [majority], or only if necessary after the judge reviews the documents in-chambers [DC, MN, NC, PA, VA, WV]?

Should there be an opportunity for a guardian ad litem to be appointed for the child to help the court determine the child’s “best interests” [CO, CT, IL, NE, NJ, VA, WV]?

Should the parent be permitted to control the timing of the hearing by choosing to file either before or after the triggering event [DC, FL, IL, MN, NY, NC, PA, WI, VA, WV]?

Should the law express an evidentiary standard (such as “clear and convincing evidence) for proof that events have occurred or conditions are present [IA], or should certain documents be required to be filed (for example, physician’s certificate, death certificate or guardian’s affidavit) [majority]?

Should the law include a process for converting a standby guardianship into a permanent guardianship (for example, filing a separate petition, holding an additional hearing) [GA, IL, MA, VA, WV], or should the presumption be that the standby guardian automatically becomes the permanent guardian, absent a parental challenge [IA, PA]?

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1 Adapted from Standby Guardianship Training and Technical Assistance Project, prepared by the American Bar Association Center on Children and the Law and Circle Solutions for the U.S. Dept. of Health and Human Services.
APPENDIX X

STANDBY GUARDIANSHIP LEGISLATION: ILLINOIS

IL Statutes, Chapter 755, section 5/11a-3.1
Sec. 11a-3.1. Appointment of standby guardian.
(a) The guardian of a disabled person may designate in any writing, including a will, a person qualified to
act under Section 11a-5 to be appointed as standby guardian of the person or estate, or both, of the dis-
abled person.

The guardian may designate in any writing, including a will, a person qualified to act under Section 11a-5
to be appointed as successor standby guardian of the disabled person's person or estate, or both.

The designation must be witnessed by 2 or more credible witnesses at least 18 years of age, neither of whom
is the person designated as the standby guardian.

The designation may be proved by any competent evidence.

If the designation is executed and attested in the same manner as a will, it shall have prima facie validity.

Prior to designating a proposed standby guardian, the guardian shall consult with the disabled person to
determine the disabled person's preference as to the person who will serve as standby guardian.

The guardian shall give due consideration to the preference of the disabled person in selecting a standby
 guardian.

(b) Upon the filing of a petition for the appointment of a standby guardian, the court may appoint a stand-
by guardian of the person or estate, or both, of the disabled person as the court finds to be in the best
interest of the disabled person.

The court shall apply the same standards used in determining the suitability of a plenary or limited guardian
in determining the suitability of a standby guardian, giving due consideration to the preference of the dis-
able person as to a standby guardian.

The court may not appoint the Office of State Guardian, pursuant to Section 30 of the Guardianship and
Advocacy Act, or a public guardian, pursuant to Section 13-5 of this Act, as a standby guardian, without the
written consent of the State Guardian or public guardian or an authorized representative of the State
Guardian or public guardian.

(c) The standby guardian shall take and file an oath or affirmation that the standby guardian will faithfully
discharge the duties of the office of standby guardian according to law, and shall file in and have
approved by the court a bond binding the standby guardian so to do, but shall not be required to file a
bond until the standby guardian assumes all duties as guardian of the disabled person under Section 11a-
18.2.
Section 1726. Standby guardians
1. For the purpose of this section:
   (a) “Standby guardian” means (i) a person judicially appointed pursuant to subdivision three of this section as standby guardian of the person and/or property of an infant whose authority becomes effective upon the incapacity or death of the infant’s parent or upon the consent of the parent; and (ii) a person designated pursuant to subdivision four of this section as standby guardian whose authority becomes effective upon the incapacity of the infant’s parent, or upon the debilitation and consent of the parent.
   (b) “Attending physician” means the physician who has primary responsibility for the treatment and care of the petitioner. Where more than one physician shares such responsibility, or where a physician is acting on the attending physician’s behalf, any such physician may act as the attending physician pursuant to this section. Where no physician has such responsibility, any physician who is familiar with the petitioner’s medical condition may act as the attending physician pursuant to this section.
   (c) “Debilitation” means a chronic and substantial inability to care for one’s dependent infant, as a result of (i) a progressively chronic or irreversibly fatal illness, or (ii) physically debilitating illness, disease or injury. “Debilitated” means the state of having a debilitation.
   (d) “Incapacity” means a chronic and substantial inability, as a result of mental impairment, to understand the nature and consequences of decisions concerning the care of one’s dependent infant, and a consequent inability to care for such infant. “Incapacitated” means the state of having an incapacity.

2. The provisions of this chapter relating to guardians shall apply to standby guardians, except insofar as this section provides otherwise.

3. (a) A petition for the judicial appointment of a standby guardian of the person and/or property of an infant pursuant to this subdivision may be made only by a parent, a legal guardian of the infant or a legal custodian of the infant; or where the infant is not residing with a parent, legal guardian or legal custodian and, to the satisfaction of the court, such parent, legal guardian or legal custodian cannot be located with due diligence, the primary caretaker of such infant may petition for a judicial appointment of such standby guardian. Application for standing to petition as a primary caretaker shall be upon motion to the court upon notice to such parties as the court may direct.
   (b) A petition for the judicial appointment of a standby guardian of an infant shall, in addition to meeting the requirements of section seventeen hundred four of this article:
      (i) State whether the authority of the standby guardian is to become effective upon the petitioner’s incapacity, upon the petitioner’s death, or upon whichever occurs first;
      (ii) State that the petitioner suffers from (A) a progressively chronic illness or (B) an irreversibly fatal illness and the basis for such statement, such as the date and source of a medical diagnosis, without requiring the identification of the illness in question.
   (c) The petitioner’s appearance in court shall not be required if the petitioner is medically unable to appear, except upon motion and for good cause shown.
   (d) (i) If the court finds that the petitioner suffers from a progressively chronic illness or an irreversibly fatal illness and that the interests of the infant will be promoted by the appointment of a standby guardian of the person and/or property it must make a decree accordingly.
(ii) Such decree shall specify whether the authority of the standby guardian is effective upon the receipt of a determination of the petitioner's incapacity, upon the receipt of the certificate of the petitioner's death, or upon whichever occurs first, and shall also provide that the authority of the standby guardian may earlier become effective upon written consent of the parent pursuant to subparagraph (iii) of paragraph (e) of this subdivision. Such decree shall also indicate that the authority of the standby guardian is effective upon the petitioner's consent.

(iii) If at any time prior to the commencement of the authority of the standby guardian the court finds that the requirements of subparagraph (i) of this paragraph are no longer satisfied, it may rescind such decree.

(e) (i) Where the decree provides that the authority of the standby guardian is effective upon receipt of a determination of the petitioner's incapacity, the standby guardian's authority shall commence upon the standby guardian's receipt of a copy of a determination of incapacity made pursuant to subdivision six of this section. The standby guardian shall file a copy of the determination of incapacity with the court that issued the decree within ninety days of the date of receipt of such determination or the standby guardian's authority may be rescinded by the court.

(ii) Where the decree provides that the authority of the standby guardian is effective upon receipt of a certificate of the petitioner's death, the standby guardian's authority shall commence upon the standby guardian's receipt of a certificate of death. The standby guardian shall file the certificate of death with the court that issued the decree within ninety days of the date of the petitioner's death or the standby guardian's authority may be rescinded by the court.

(iii) Notwithstanding subparagraphs (i) and (ii) of this paragraph, a standby guardian's authority shall commence upon the standby guardian's receipt of the petitioner's written consent to such commencement, signed by the petitioner in the presence of two witnesses at least eighteen years of age, other than the standby guardian, who shall also sign the writing. Another person may sign the written consent on the petitioner's behalf and at the petitioner's direction if the petitioner is physically unable to do so, provided such consent is signed in the presence of the petitioner and the witnesses. The standby guardian shall file the written consent with the court that issued the decree within ninety days of the date of receipt of such written consent or the standby guardian's authority may be rescinded by the court.

(f) The petitioner may revoke a standby guardianship created under this subdivision by executing a written revocation, filing it with the court that issued the decree, and promptly notifying the standby guardian of the revocation.

(g) A person judicially appointed standby guardian pursuant to this subdivision may at any time before the commencement of his or her authority renounce the appointment by executing a written renunciation and filing it with the court that issued the decree, and promptly notifying the petitioner of the renunciation.

4. (a) A parent, a legal guardian, a legal custodian, or primary caretaker under the circumstances described in paragraph (a) of subdivision three of this section may designate a standby guardian by means of a written designation, signed by the parent, legal guardian, legal custodian or primary caretaker in the presence of two witnesses at least eighteen years of age, other than the standby guardian, who shall also sign the writing. Another person may sign the written designation on the parent's, legal guardian's, legal custodian's or primary caretaker's behalf and at the parent's, legal guardian's, legal custodian's or primary caretaker's direction if the parent, legal guardian, legal custodian or primary caretaker is physically unable to do so, provided the designation is signed in the presence of the parent, legal guardian, legal custodian or primary caretaker and the witnesses.
(b) (i) A designation of a standby guardian shall identify the parent, legal guardian, legal custodian or primary caretaker, the infant and the person designated to be the standby guardian, and shall indicate that the parent, legal guardian, legal custodian or primary caretaker intends for the standby guardian to become the infant’s guardian in the event the parent, legal guardian, legal custodian or primary caretaker either: (A) becomes incapacitated; (B) becomes debilitated and consents to the commencement of the standby guardian’s authority; or (C) died prior to the commencement of a judicial proceeding to appoint a guardian of the person and/or property of an infant.

(ii) A parent, legal guardian, legal custodian or primary caretaker may designate an alternate standby guardian in the same writing, and by the same manner, as the designation of a standby guardian.

(iii) A designation may, but need not, be in the following form:

Designation of Standby Guardian

I (name of parent) hereby designate (name, home address and telephone number of standby guardian) as standby guardian of the person and property of my child(ren) (name of child(ren)).

(You may, if you wish, provide that the standby guardian’s authority shall extend only to the person, or only to the property, of your child, by crossing out “person” or “property”, whichever is inapplicable, above.)

The standby guardian’s authority shall take effect if and when either: (1) my doctor concludes I am mentally incapacitated, and thus unable to care for my child(ren); or (2) my doctor concludes that I am physically debilitated, and thus unable to care for my child(ren) and I consent in writing, before two witnesses, to the standby guardian’s authority taking effect.

In the event the person I designate above is unable or unwilling to act as guardian for my child(ren), I hereby designate (name, home address and telephone number of alternate standby guardian), as standby guardian of my child(ren).

I also understand that my standby guardian’s authority will cease sixty days after commencing unless by such date he or she petitions the court for appointment as guardian.

I understand that I retain full parental rights even after the commencement of the standby guardian’s authority, and may revoke the standby guardianship at any time.

Signature: ______________________________________________________________
Address: _______________________________________________________________
Date: _________________________________________________________________

I declare that the person whose name appears above signed this document in my presence, or was physically unable to sign and asked another to sign this document, who did so in my presence. I further declare that I am at least eighteen years old and am not the person designated as standby guardian.

Witness’ Signature: ______________________________________________________
Address: _______________________________________________________________
Date: _________________________________________________________________
(c) The authority of the standby guardian under a designation shall commence upon either: (i) the standby guardian’s receipt of a copy of a determination of incapacity made pursuant to subdivision six of this section; or (ii) the standby guardian’s receipt of (A) a copy of a determination of debilitation made pursuant to subdivision six of this section and (B) a copy of the parent’s, legal guardian’s, legal custodian’s or primary caretaker’s written consent to such commencement, signed by the parent, legal guardian, legal custodian or primary caretaker in the presence of two witnesses at least eighteen years of age, other than the standby guardian, who shall also sign the writing. Another person may sign the written consent on the parent’s, legal guardian’s, legal custodian’s or primary caretaker’s behalf and at the parent’s, legal guardian’s, direction if the parent, legal guardian, legal custodian or primary caretaker is physically unable to do so, provided such consent is signed in the presence of the parent, legal guardian, legal custodian or primary caretaker and the witnesses. The standby guardian shall file a petition pursuant to paragraph (d) of this subdivision within sixty days of the date of its commencement pursuant to this paragraph or such standby guardian’s authority shall cease after such date, but shall recommence upon such filing.

(d) The standby guardian may file a petition for appointment as guardian after receipt of either: (i) a copy of a determination of incapacity made pursuant to subdivision six of this section; or (ii) (A) a copy of a determination of debilitation made pursuant to subdivision six of this section and (B) a copy of the parent’s, legal guardian’s, legal custodian’s or primary caretaker’s written consent, pursuant to paragraph (c) of this subdivision. Such petition must, in addition to meeting the requirements of section seventeen hundred four of this article:

(i) append the written designation of such person as standby guardian; and

(ii) append a copy of either: (A) the determination of incapacity of the parent, legal guardian, legal custodian or primary caretaker; or (B) the determination of debilitation and the parental, guardian’s, custodian’s or caretaker’s consent; and

(iii) if the petition is by a person designated as alternate standby guardian, state that the person designated as standby guardian is unwilling or unable to act as standby guardian, and the basis for such statement.

(e) If the court finds that the person was duly designated as standby guardian, that a determination of incapacity, a determination of debilitation and parental or guardian’s consent or a document indicating that the parent, legal guardian, legal custodian or primary caretaker of the infant has died, such as a copy of a death certificate or a funeral home receipt or other such document, that the interests of the infant will be promoted by the appointment of a standby guardian of the person and/or property, and that, if the petition is by a person designated as alternate standby guardian, the person designated as standby guardian is unwilling or unable to act as standby guardian, it must make a decree accordingly.

(f) The parent, legal guardian, legal custodian or primary caretaker may revoke a standby guardianship created under this subdivision: (i) by notifying the standby guardian verbally or in writing or by any other act evidencing a specific intent to revoke the standby guardianship prior to the filing of a petition; and (ii) where the petition has already been filed, by executing a written revocation, filing it with the court where the petition was filed, and promptly notifying the standby guardian of the revocation.

5. The standby guardian may also file a petition for appointment as guardian in any other manner permitted by this article or article six of the family court act, on notice to the parent, and may append a designation of standby guardian to the petition for consideration by the court in the determination of such petition.
6. (a) A determination of incapacity or debilitation must: (i) be made by the attending physician to a reasonable degree of medical certainty; (ii) be in writing; and (iii) contain the attending physician’s opinion regarding the cause and nature of the petitioner’s incapacity or debilitation as well as its extent and probable duration. The attending physician shall provide a copy of the determination of incapacity or debilitation to the standby guardian, if the standby guardian’s identity is known to the physician.

(b) If requested by the standby guardian, an attending physician shall make a determination regarding the petitioner’s incapacity or debilitation for purposes of this section.

(c) The standby guardian shall ensure that the petitioner is informed of the commencement of the standby guardian’s authority as a result of a determination of incapacity and of the petitioner’s right to revoke such authority promptly after receipt of the determination of incapacity, provided there is any indication of the petitioner’s ability to comprehend such information.

7. The commencement of the standby guardian’s authority pursuant to a determination of incapacity, determination of debilitation, or consent shall not, itself, divest the petitioner of any parental or guardianship rights, but shall confer upon the standby guardian concurrent authority with respect to the infant.

8. (a) The clerk of any county upon being paid the fees allowed therefor by law shall receive for filing any instrument appointing or designating a standby guardian pursuant to section seventeen hundred twenty-six of this chapter made by a domiciliary of the county, and shall give a written receipt therefor to the person delivering it. The filing of an appointment or designation of standby guardian shall be for the sole purpose of safekeeping and shall not affect the validity of the appointment or designation.

(b) The appointment or designation shall be delivered only to: (i) the parent, legal guardian legal custodian or primary caretaker who appointed or designated the standby guardian; (ii) the standby guardian or alternate standby guardian; (iii) the person designated as standby guardian or alternate standby guardian; or (iv) any other person directed by the court.

STANDBY GUARDIANSHIP LEGISLATION: PENNSYLVANIA

23 PA Cons. Stat. §§ 5601-5612

§ 5601. Short title of chapter

This chapter shall be known and may be cited as the Standby Guardianship Act.

§ 5602. Definitions

The following words and phrases when used in this chapter shall have the meanings given to them in this section unless the context clearly indicates otherwise:

“Alternate.” A person with all the rights, responsibilities and qualifications of a standby guardian who shall become a standby guardian only in the event that the currently designated standby guardian is unable or refuses to fulfill his obligation.

“Attending physician.” A physician who has primary responsibility for the treatment and care of the designator. If physicians share responsibility, another physician is acting on the attending physician’s behalf or no physician has primary responsibility, any physician who is familiar with the designator’s medical condition may act as an attending physician under this chapter.

“Coguardian.” A person who, along with a parent, shares physical or legal custody, or both, of a child.

“Consent.” A written authorization signed by the designator in the presence of two witnesses, who shall also sign the writing. The witnesses must be 18 years of age or older and not named in the designation.
“Court.” Family Court Division or domestic relations section of a court of common pleas, unless otherwise provided by local rules of court.

“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.” A written document naming the standby guardian. A parent, a legal custodian or a legal guardian may designate an alternate standby guardian in the same writing.

“Designator.” A parent, a legal custodian 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 in question 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 coguardian 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 empowers a standby guardian to assume the powers, duties and responsibilities of guardian or coguardian.

§ 5603. Scope
The provisions of Chapter 53 (relating to custody) and 20 Pa.C.S. Ch. 25 (relating to wills) shall apply to standby guardians, coguardians, guardians and any alternates unless otherwise specified in this chapter. Nothing in this chapter shall be construed to deprive any parent, custodial or non-custodial, of legal parental rights. Nothing in this chapter shall be construed to relieve any parent, custodial or non-custodial, of a duty to support a child under the provisions of 23 Pa.C.S. Ch. 43 (relating to support matters generally).

§ 5611. Designation
(a) General rule.—A custodial parent, a legal custodian or legal guardian may designate a standby guardian by means of a written designation unless the minor has another parent or adoptive parent:

1. whose parental rights have not been terminated or relinquished;
2. whose whereabouts are known; and
3. who is willing and able to make and carry out the day-to-day child-care decisions concerning the minor.

(b) Exception where other parent consents.—Notwithstanding subsection (a), a parent, legal custodian or legal guardian may designate a standby guardian with the consent of the other parent.

(c) Contents.—
1. A designation of a standby guardianship shall identify the custodial parent, legal custodian or legal guardian making the designation, the minor or minors, any other parent, the standby guardian and the triggering event or events upon which a named standby guardian shall become a coguardian or guardian. If desired, different standby guardians may be designated for different triggering events. The designation shall also include the signed consent of the standby guardian, and the signed consent of any other parent or an indication why the other parent’s consent is not necessary.
(2) The designation shall be signed by the designating parent, legal custodian or legal guardian in the presence of two witnesses, who are 18 years of age or older and not otherwise named in the designation, who shall also sign the designation. If the parent, legal custodian or legal guardian is physically unable to sign the designation, the parent, legal custodian or legal guardian may direct another person not named in the designation to sign on the parent’s, legal custodian’s or the legal guardian’s behalf in the presence of the parent, legal custodian or legal guardian and the witnesses.

(3) A parent, legal custodian or legal guardian may also, but need not, designate an alternate in the designation.

(4) A designation may, but need not, be in the following form:

I (insert name of designator) do hereby appoint (insert name, address and telephone number of standby guardian) as the standby guardian of (insert name(s) of minor(s)) to take effect upon the occurrence of the following triggering event or events (insert specific triggering events).

I hereby revoke all former wills and codicils to the extent that there is a conflict between those formerly executed documents and this, my duly executed standby guardian designation.

I am the (insert designator’s relationship to minor(s)) of (insert name(s) of minor(s)).

(Insert name(s) of minor(s)’s other parent(s)) is the father/mother of (insert name(s) of minor(s)).

His/her address is: _____________________________________________________________________

(Insert name(s) of minor(s)’s other parent(s)) is the father/mother of (insert name(s) of minor(s)).

His/her address is: _____________________________________________________________________

(Check all that apply):

___ He/she died on (insert date of death).

___ His/her parental rights were terminated or relinquished on (insert date of termination or relinquishment).

___ His/her whereabouts are unknown. I understand that all living parents whose rights have not been terminated must be given notice of this designation pursuant to the Pennsylvania Rules of Civil Procedure or a petition to approve this designation may not be granted by the court.

___ He/she is unwilling and unable to make and carry out day-to-day child-care decisions concerning the minor.

___ He/she consents to this designation and has signed this form below.

By this designation I am granting (insert name of standby guardian) the authority to act for 60 days following the occurrence of the triggering event as a coparental with me, or in the event of my death, as guardian of my minor child(ren).

Optional: I hereby nominate (insert name, address and telephone number of alternate standby guardian) as the alternate standby guardian to assume the duties of the standby guardian named above in the event the standby guardian is unable or refuses to act as a standby guardian.

If I have indicated more than one triggering event, it is my intent that the triggering event which occurs first shall take precedence. If I have indicated “my death” as the triggering event, it is my intent that the person named in the designation to be standby guardian for my minor child(ren) in the event of my death shall be appointed as guardian of my minor child(ren) when I die.

It is my intention to retain full parental rights to the extent consistent with my condition and to retain the authority to revoke the standby guardianship if I so choose.

This designation is made after careful reflection, while I am of sound mind.
§ 5612. Petition for approval of a designation

(a) General rule.—A petition for court approval of a designation under this chapter may be made at any time by filing with the court a copy of the designation. If the triggering event has not occurred on or before the time of filing, only the designator may file the petition. If the triggering event has occurred on or before the time of filing, the standby guardian named in the designation may file the petition and the petition shall also contain one of the following:
(1) A determination of the designator’s incapacity.
(2) A determination of the designator’s debilitation and the designator’s signed and dated consent.
(3) A copy of the designator’s death certificate.

(b) Notice.—

(1) The petitioner shall notify any person named in the designation within ten days of the filing of the petition and of any hearing thereon.
(2) If the petition alleges that a nondesignating parent cannot be located, that parent shall be notified in accordance with the notice provisions of the Pennsylvania Rules of Civil Procedure in Custody Matters. No notice is necessary to a parent whose parental rights have previously been terminated or relinquished.

(c) Jurisdiction.—For purposes of determining jurisdiction under this chapter, the provisions of Subchapter B of Chapter 53 (relating to child custody jurisdiction) shall apply.

(d) Presumptions.—In a proceeding for judicial appointment of a standby guardian, a designation shall constitute a rebuttable presumption that the designated standby guardian is capable of serving as coguardian or guardian. When the designator is the sole surviving parent, when the parental rights of any non-custodial parent have been terminated or relinquished or when all parties consent to the designation, there shall be a rebuttable presumption that entry of the approval order is in the best interest of the child. In any case, if the court finds entry of the approval order to be in the best interest of the child, the court shall enter an order approving the designation petition.

(e) Approval without hearing.—Approval of the designation without a hearing is permitted when the designator is the sole surviving parent, when the parental rights of any non-custodial parent have been terminated or relinquished or when all parties consent to entry of the approval order.

(f) Hearing.—In the event a hearing is required, it shall be conducted in accordance with the proceedings set forth in Chapter 53 (relating to custody).

(g) Court appearance.—The designator need not appear in court if the designator is medically unable to appear.

§ 5613. Authority of standby guardian

(a) General rule.—The standby guardian shall have authority to act as coguardian or guardian upon the occurrence of the triggering event. The commencement of the standby guardian’s authority to act as coguardian pursuant to: a determination of incapacity; a determination of debilitation and consent; or, the receipt of consent alone, shall not itself divest the designator of any parental rights, but shall confer upon the standby guardian concurrent or shared custody of the child. The commencement of the standby guardian’s authority to act as guardian pursuant to the death of the designator shall not confer upon the standby guardian more than physical and legal custody of the child as defined in Ch. 53 (relating to custody). A coguardian shall assure frequent and continuing contact with and physical access to the child and shall further assure the involvement of the parent, to include, to the greatest extent possible, in the decision making on behalf of the child.

(b) Effect of filing.—The designator may file a petition for approval of a designation with the court at any time. If the petition is approved by the court before the occurrence of the triggering event, the standby guardian’s authority will commence automatically upon the occurrence of the triggering event. No further petition or confirmation is necessary. If a designation has been made, but the petition for approval of the designation has not been filed and a triggering event has occurred, the standby guardian shall have temporary legal authority to act as a coguardian or guardian of the minor without the direction of the court.
for a period of 60 days. The standby guardian shall, within that period, file a petition for approval in accordance with section 5612 (relating to petition for approval of a designation). If no petition is filed within the specified 60 days, the standby guardian shall lose all authority to act as coguardian or guardian. If a petition is filed but the court does not act upon it within the 60-day period, the temporary legal authority to act as coguardian or guardian shall continue until the court orders otherwise.

(c) Parental rights.—The commencement of a coguardian’s or guardian’s authority under this subchapter may not, itself, divest a parent or legal guardian of any parental or guardianship rights.

(d) Restored capacity.—If a licensed physician determines that the designator has regained capacity, the coguardian’s authority which commenced pursuant to the occurrence of a triggering event shall become inactive and the coguardian shall return to having no authority. Failure of a coguardian to comply with this provision and to immediately return the minor to the designator’s care shall entitle the designator to an emergency hearing in a court of competent jurisdiction.

§ 5614. Revocation
(a) Prepetition.—Prior to a petition being filed under section 5612 (relating to petition for approval of a designation) the designator may revoke a standby guardianship by simple destruction of the designation and notification of the revocation to the standby guardian.

(b) Postpetition.—After a petition has been filed, the designator may revoke a standby guardianship by:
   (1) executing a written revocation;
   (2) filing the revocation with the court; and
   (3) notifying the persons named in the designation of the revocation in writing.

(c) Unwritten revocation.—Regardless of whether a petition has been filed, an unwritten revocation may be considered by the court if it can be proven by clear and convincing evidence.

§ 5615. Conflicting documents
If a parent has appointed a testamentary guardian of the person or estate of a minor by will under 20 Pa.C.S. § 2519 (relating to testamentary guardian) and there is a conflict between that will and a duly executed written standby guardian designation, the document latest in date of execution shall prevail.

§ 5616. Bond
In no event shall a standby guardian be required to post bond prior to the occurrence of the triggering event. The court may require a bond if the standby guardian is designated the coguardian or guardian of the estate of a minor but will not require a bond for the coguardianship or guardianship of the person of a minor.
APPENDIX XI

STANDBY ADOPTION FORM: ILLINOIS

FINAL AND IRREVOCABLE CONSENT TO STANDBY ADOPTION

I, _______________, (relationship, e.g. mother or father) of _______________, a male child, state:

That the child was born on _______________ at _______________.

That I reside at _______________, County of _______________, and State of _______________.

That I am of the age of _______________ years.

That I hereby enter my appearance in this proceeding and waive service of summons on me in this action only.

That I do hereby consent and agree to the standby adoption of the child, and that I have not previously executed a consent or surrender with respect to the child.

That (I am terminally ill) (the child’s other parent is terminally ill).

That I wish to and understand that by signing this consent I do irrevocably and permanently give up all custody and other parental rights I have to the child, effective upon (my death) (the child’s other parent’s death) or upon (my) (the terminally ill parent’s) request for the entry of a final judgment for adoption if _______________ (specified person or persons) adopt my child.

That I understand that until (I die) (the child’s other parent dies), I retain all legal rights and obligations concerning the child, but at that time, I irrevocably give all custody and other parental rights to _______________ (specified person or persons).

I understand my child will be adopted by _______________ (specified person or persons) only and that I cannot, under any circumstances, after signing this document, change my mind and revoke or cancel this consent or obtain or recover custody or any other rights over my child if _______________ (specified person or persons) adopt my child.

I understand that this consent to standby adoption is valid only if the petition for standby adoption is filed and that if _______________ (specified person or persons), for any reason, cannot or will not file a petition for standby adoption or if his, her, or their petition for standby adoption is denied, then this consent is void. I have the right to notice of any other proceeding that could affect my parental rights.

That I have read and understand the above and I am signing it as my free and voluntary act.

Dated (insert date).

____________________________________________________
Signature
CERTIFICATE OF ACKNOWLEDGEMENT

STATE OF _______________

) SS.

COUNTY OF _______________

I, _______________ (name of Judge or other person) _______________ (official title, name, and address), certify that _______________, personally known to me to be the same person whose name is subscribed to the foregoing Final and Irrevocable Consent to Standby Adoption, appeared before me this day in person and acknowledged that (she) (he) signed and delivered the consent as (her) (his) free and voluntary act, for the specified purpose.

I have fully explained that this consent to adoption is valid only if the petition to adopt is filed, and that if the specified person or persons, for any reason, cannot or will not adopt the child or if the adoption petition is denied, then this consent will be void. I have fully explained that if the specified person or persons adopt the child, by signing this consent (she) (he) is irrevocably and permanently relinquishing all parental rights to the child, and (she) (he) has stated that such is (her) (his) intention and desire.

Dated (insert date).

____________________________________
Signature
APPENDIX XII

JOINT GUARDIANSHIP LEGISLATION: CALIFORNIA

CA Codes (prob:2100-2112)PROBATE CODE
SECTION 2100-2112

2100. Guardianships and conservatorships are governed by Division 3 (commencing with Section 1000), except to the extent otherwise expressly provided by statute, and by this division. If no specific provision of this division is applicable, the provisions applicable to administration of estates of decedents govern so far as they are applicable to like situations.

2101. The relationship of guardian and ward and of conservator and conservatee is a fiduciary relationship that is governed by the law of trusts, except as provided in this division.

2102. A guardian or conservator is subject to the regulation and control of the court in the performance of the duties of the office.

2103. (a) When a judgment or order made pursuant to this division becomes final, it releases the guardian or conservator and the sureties from all claims of the ward or conservatee and of any persons affected thereby based upon any act or omission directly authorized, approved, or confirmed in the judgment or order. For the purposes of this section, “order” includes an order settling an account of the guardian or conservator, whether an intermediate or final account.

(b) This section does not apply where the judgment or order is obtained by fraud or conspiracy or by misrepresentation contained in the petition or account or in the judgment or order as to any material fact. For the purposes of this subdivision, misrepresentation includes, but is not limited to, the omission of a material fact.

2104. (a) A nonprofit charitable corporation may be appointed as a guardian or conservator of the person or estate, or both, if all of the following requirements are met:

1. The corporation is incorporated in this state.
2. The articles of incorporation specifically authorize the corporation to accept appointments as guardian or conservator, as the case may be.
3. The corporation has been providing, at the time of appointment, care, counseling, or financial assistance to the proposed ward or conservatee under the supervision of a registered social worker certified by the Board of Behavioral Science Examiners of this state.

(b) The petition for appointment of a nonprofit charitable corporation described in this section as a guardian or conservator shall include in the caption the name of a responsible corporate officer who shall act for the purposes of this division. If, for any reason, the officer so named ceases to act as the responsible corporate officer for the purposes of this division, the corporation shall file with the court a notice containing (1) the name of the successor responsible corporate officer and (2) the date the successor becomes the responsible corporate officer.

(c) If a nonprofit charitable corporation described in this section is appointed as a guardian or conservator:

1. The corporation’s compensation as guardian or conservator shall be allowed only for services actually rendered.
2. Any fee allowed for an attorney for the corporation shall be for services actually rendered.

2105. (a) The court, in its discretion, may appoint for a ward or conservatee:

1. Two or more joint guardians or conservators of the person.
(2) Two or more joint guardians or conservators of the estate.
(3) Two or more joint guardians or conservators of the person and estate.

(b) When joint guardians or conservators are appointed, each shall qualify in the same manner as a sole guardian or conservator.

(c) Subject to subdivisions (d) and (e):

(1) Where there are two guardians or conservators, both must concur to exercise a power.
(2) Where there are more than two guardians or conservators, a majority must concur to exercise a power.

(d) If one of the joint guardians or conservators dies or is removed or resigns, the powers and duties continue in the remaining joint guardians or conservators until further appointment is made by the court.

(e) Where joint guardians or conservators have been appointed and one or more are (1) absent from the state and unable to act, (2) otherwise unable to act, or (3) legally disqualified from serving, the court may, by order made with or without notice, authorize the remaining joint guardians or conservators to act as to all matters embraced within its order.

(f) If a custodial parent has been diagnosed as having a terminal condition, as evidenced by a declaration executed by a licensed physician, the court, in its discretion, may appoint the custodial parent and a person nominated by the custodial parent as joint guardians of the person of the minor. However, this appointment shall not be made over the objection of a non-custodial parent without a finding that the non-custodial parent’s custody would be detrimental to the minor, as provided in Section 3041 of the Family Code. It is the intent of the Legislature in enacting the amendments to this subdivision adopted during the 1995-96 Regular Session for a parent with a terminal condition to be able to make arrangements for the joint care, custody, and control of his or her minor children so as to minimize the emotional stress of, and disruption for, the minor children whenever the parent is incapacitated or upon the parent’s death, and to avoid the need to provide a temporary guardian or place the minor children in foster care, pending appointment of a guardian, as might otherwise be required. “Terminal condition,” for purposes of this subdivision, means an incurable and irreversible condition that, without the administration of life-sustaining treatment, will, within reasonable medical judgment, result in death.

2105.5. (a) Except as provided in subdivision (b), where there is more than one guardian or conservator of the estate, one guardian or conservator is not liable for a breach of fiduciary duty committed by another guardian or conservator.

(b) Where there is more than one guardian or conservator of the estate, one guardian or conservator is liable for a breach of fiduciary duty committed by another guardian or conservator of the same estate under any of the following circumstances:

(1) Where the guardian or conservator participates in a breach of fiduciary duty committed by the other guardian or conservator.
(2) Where the guardian or conservator improperly delegates the administration of the estate to the other guardian or conservator.
(3) Where the guardian or conservator approves, knowingly acquiesces in, or conceals a breach of fiduciary duty committed by the other guardian or conservator.
(4) Where the guardian or conservator negligently enables the other guardian or conservator to commit a breach of fiduciary duty.
(5) Where the guardian or conservator knows or has information from which the guardian or conservator reasonably should have known of the breach of fiduciary duty by the other guardian or conservator and fails to take reasonable steps to compel the other guardian or conservator to redress the breach.

(c) The liability of a guardian or conservator for a breach of fiduciary duty committed by another guardian or conservator that occurred before July 1, 1988, is governed by prior law and not by this section.
2106. (a) The court, in its discretion, may appoint one guardian or conservator for several wards or conservatees.
(b) The appointment of one guardian or conservator for several wards or conservatees may be requested in the initial petition filed in the proceeding or may be requested subsequently upon a petition filed in the same proceeding and noticed and heard with respect to the newly proposed ward or conservatee in the same manner as an initial petition for appointment of a guardian or conservator.

2107. (a) Unless limited by court order, a guardian or conservator of the person of a nonresident has the same powers and duties as a guardian or conservator of the person of a resident while the nonresident is in this state.
(b) A guardian or conservator of the estate of a nonresident has, with respect to the property of the nonresident within this state, the same powers and duties as a guardian or conservator of the estate of a resident. The responsibility of such a guardian or conservator with regard to inventory, accounting, and disposal of the estate is confined to the property that comes into the hands of the guardian or conservator in this state.

2108. (a) Except to the extent the court for good cause determines otherwise, if a guardian of the person is nominated as provided in Article 1 (commencing with Section 1500) of Chapter 1 of Part 2 and is appointed by the court, the guardian shall be granted in the order of appointment, to the extent provided in the nomination, the same authority with respect to the person of the ward as a parent having legal custody of a child and may exercise such authority without notice, hearing, or court authorization, instructions, approval, or confirmation in the same manner as if such authority were exercised by a parent having legal custody of a child.
(b) Except to the extent the court for good cause determines otherwise and subject to Sections 2593, 2594, and 2595, if a guardian of the estate is nominated under Section 1500 or a guardian for property is nominated under Section 1501 and the guardian is appointed by the court, the guardian shall be granted in the order of appointment, to the extent provided in the nomination, the right to exercise any one or more of the powers listed in Section 2591 without notice, hearing, or court authorization, instructions, approval, or confirmation in the same manner as if such authority were granted by order of the court under Section 2590. In the case of a guardian nominated under Section 1501, such additional authority shall be limited to the property covered by the nomination.
(c) The terms of any order made under this section shall be included in the letters.

2109. (a) Subject to Section 2108, a guardian appointed under subdivision (d) of Section 1514 for particular property upon a nomination made under Section 1501 has, with respect to that property, the same powers and duties as a guardian of the estate. The responsibility of such a guardian with regard to inventory, accounting, and disposal of the estate is confined to the property covered by the nomination.
(b) When a guardian is appointed under subdivision (d) of Section 1514 for particular property upon a nomination made under Section 1501 and there is a guardian of the estate appointed under any other provision of Part 2 (commencing with Section 1500):
   (1) The guardian appointed for the property covered by the nomination manages and controls that property and the guardian of the estate manages and controls the balance of the guardianship estate.
   (2) Either guardian may petition under Section 2403 to the court in which the guardianship of the estate proceeding is pending for instructions concerning how the duties that are imposed by law upon the guardian of the estate are to be allocated between the two guardians.
2110. Unless otherwise provided in the instrument or in this division, a guardian or conservator is not personally liable on an instrument, including but not limited to a note, mortgage, deed of trust, or other contract, properly entered into in the guardian’s or conservator’s fiduciary capacity in the course of the guardianship or conservatorship unless the guardian or conservator fails to reveal the guardian’s or conservator’s representative capacity or identify the guardianship or conservatorship estate in the instrument.

2111. (a) As used in this section, “transaction” means any of the following:
   (1) A conveyance or lease of real property of the guardianship or conservatorship estate.
   (2) The creation of a mortgage or deed of trust on real property of the guardianship or conservatorship estate.
   (3) A transfer of personal property of the guardianship or conservatorship estate.
   (4) The creation of a security interest or other lien in personal property of the guardianship or conservatorship estate.

(b) Whenever the court authorizes or directs a transaction, the transaction shall be carried out by the guardian or conservator of the estate in accordance with the terms of the order.

(c) A conveyance, lease, or mortgage of, or deed of trust on, real property executed by a guardian or conservator shall set forth therein that it is made by authority of the order authorizing or directing the transaction and shall give the date of the order. A certified copy of the order shall be recorded in the office of the county recorder in each county in which any portion of the real property is located.

(d) A transaction carried out by a guardian or conservator in accordance with an order authorizing or directing the transaction has the same effect as if the ward or conservatee had carried out the transaction while having legal capacity to do so.

2111.5. (a) Except as provided in subdivision (b), every court official or employee who has duties or responsibilities related to the appointment of a guardian or conservator, or the processing of any document related to a guardian or conservator, and every person who is related by blood or marriage to a court official or employee who has these duties, is prohibited from purchasing, leasing, or renting any real or personal property from the estate of the ward or conservatee whom the guardian or conservator represents. For purposes of this subdivision, a “person related by blood or marriage” means any of the following:
   (1) A person’s spouse or domestic partner.
   (2) Relatives within the second degree of lineal or collateral consanguinity of a person or a person’s spouse.

(b) A person described in subdivision (a) is not prohibited from purchasing real or personal property from the estate of the ward or conservatee whom the guardian or conservator represents where the purchase is made under terms and conditions of a public sale of the property.

(c) A violation of this section shall result in the rescission of the purchase, lease, or rental of the property. Any losses incurred by the estate of the ward or conservatee because the property was sold or leased at less than fair market value shall be deemed as charges against the guardian or conservator under the provisions of Sections 2401.3 and 2401.5. The court shall assess a civil penalty equal to three times the charges against the guardian, conservator, or other person in violation of this section, and may assess punitive damages as it deems proper. If the estate does not incur losses as a result of the violation, the court shall order the guardian, conservator, or other person in violation of this section to pay a fine of up to five thousand dollars ($5,000) for each violation. The fines and penalties provided in this section are in addition to any other rights and remedies provided by law.

2112. With respect to a guardianship or conservatorship proceedings to which Title 25 of the United States Code (Indians) applies, the provisions of this division are subject to the provisions of Title 25 and, to the extent inconsistent with Title 25, are superseded by that title.
APPENDIX XIII

DELEGATION OF POWER LEGISLATION: MINNESOTA

Minnesota Statutes 2004, 524.5-211
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524.5-211 Delegation of power by parent or guardian.

(a) A parent, legal custodian, or guardian of a minor or incapacitated person, by a properly executed power of attorney, may delegate to another person, for a period not exceeding one year, any powers regarding care, custody, or property of the minor or ward, except the power to consent to marriage or adoption of a minor ward.

(b) A parent who executes a delegation of powers under this section must mail or give a copy of the document to any other parent within 30 days of its execution unless:

1. the other parent does not have parenting time or has supervised parenting time; or

2. there is an existing order for protection under chapter 518B or a similar law of another state in effect against the other parent to protect the parent, legal custodian, or guardian executing the delegation of powers or the child.

(c) A parent, legal custodian, or guardian of a minor child may also delegate those powers by designating a standby or temporary custodian under chapter 257B.
APPENDIX XIV

SHORT-TERM GUARDIANSHIP LEGISLATION: ILLINOIS

(755 ILCS 5/11-5.4)
Sec. 11-5.4. Short-term guardian.

(a) A parent, adoptive parent, or adjudicated parent whose parental rights have not been terminated, or the guardian of the person of a minor may appoint in writing, without court approval, a short-term guardian of an unmarried minor or a child likely to be born. The written instrument appointing a short-term guardian shall be dated and shall identify the appointing parent or guardian, the minor, and the person appointed to be the short-term guardian. The written instrument shall be signed by, or at the direction of, the appointing parent in the presence of at least 2 credible witnesses at least 18 years of age, neither of whom is the person appointed as the short-term guardian. The person appointed as the short-term guardian shall also sign the written instrument, but need not sign at the same time as the appointing parent.

(b) A parent or guardian shall not appoint a short-term guardian of a minor if the minor has another living parent, adoptive parent or adjudicated parent, whose parental rights have not been terminated, whose whereabouts are known, and who is willing and able to make and carry out day-to-day child care decisions concerning the minor, unless the nonappointing parent consents to the appointment by signing the written instrument of appointment.

(c) The appointment of the short-term guardian is effective immediately upon the date the written instrument is executed, unless the written instrument provides for the appointment to become effective upon a later specified date or event. The short-term guardian shall have authority to act as guardian of the minor as provided in Section 11-13.2 for a period of 60 days from the date the appointment is effective, unless the written instrument provides for the appointment to terminate upon an earlier specified date or event. Only one written instrument appointing a short-term guardian may be in force at any given time.

(d) Every appointment of a short-term guardian may be amended or revoked by the appointing parent or by the appointing guardian of the person of the minor at any time and in any manner communicated to the short-term guardian or to any other person. Any person other than the short-term guardian to whom a revocation or amendment is communicated or delivered shall make all reasonable efforts to inform the short-term guardian of that fact as promptly as possible.

(e) The appointment of a short-term guardian or successor short-term guardian does not affect the rights of the other parent in the minor.

(f) The written instrument appointing a short-term guardian may, but need not, be in the following form:

APPOINTMENT OF SHORT-TERM GUARDIAN

IT IS IMPORTANT TO READ THE FOLLOWING INSTRUCTIONS:

By properly completing this form, a parent or the guardian of the person of the child is appointing a guardian of a child of the parent (or a minor ward of the guardian, as the case may be) for a period of up to 60 days. A separate form should be completed for each child. The person appointed as the guardian must sign the form, but need not do so at the same time as the parent or parents or guardian.

This form may not be used to appoint a guardian if there is a guardian already appointed for the child, except that if a guardian of the person of the child has been appointed, that guardian may use this form to appoint a short-term guardian. Both living parents of a child may together appoint a guardian of the child,
or the guardian of the person of the child may appoint a guardian of the child, for a period of up to 60 days through the use of this form. If the short-term guardian is appointed by both living parents of the child, the parents need not sign the form at the same time.

1. Parent (or guardian) and Child. I, (insert name of appointing parent or guardian), currently residing at (insert address of appointing parent or guardian), am a parent (or the guardian of the person) of the following child (or of a child likely to be born): (insert name and date of birth of child, or insert the words “not yet born” to appoint a short-term guardian for a child likely to be born and the child’s expected date of birth).

2. Guardian. I hereby appoint the following person as the short-term guardian for the child: (insert name and address of appointed person).

3. Effective date. This appointment becomes effective: (check one if you wish it to be applicable)

   ( ) On the date that I state in writing that I am no longer either willing or able to make and carry out day-to-day child care decisions concerning the child.

   ( ) On the date that a physician familiar with my condition certifies in writing that I am no longer willing or able to make and carry out day-to-day child care decisions concerning the child.

   ( ) On the date that I am admitted as an in-patient to a hospital or other health care institution.

   ( ) On the following date: (insert date).

   ( ) Other: (insert other).

[NOTE: If this item is not completed, the appointment is effective immediately upon the date the form is signed and dated below.]

4. Termination. This appointment shall terminate 60 days after the effective date, unless it terminates sooner as determined by the event or date I have indicated below: (check one if you wish it to be applicable)

   ( ) On the date that I state in writing that I am willing and able to make and carry out day-to-day child care decisions concerning the child.

   ( ) On the date that a physician familiar with my condition certifies in writing that I am willing and able to make and carry out day-to-day child care decisions concerning the child.

   ( ) On the date that I am discharged from the hospital or other health care institution where I was admitted as an in-patient, which established the effective date.

   ( ) On the date which is (state a number of days, but no more than 60 days) days after the effective date.

   ( ) Other: (insert other).

[NOTE: If this item is not completed, the appointment will be effective for a period of 60 days, beginning on the effective date.]
5. Date and signature of appointing parent or guardian. This appointment is made this (insert day) day of (insert month and year).

   Signed: (appointing parent)

6. Witnesses. I saw the parent (or the guardian of the person of the child) sign this instrument or I saw the parent (or the guardian of the person of the child) direct someone to sign this instrument for the parent (or the guardian). Then I signed this instrument as a witness in the presence of the parent (or the guardian). I am not appointed in this instrument to act as the short-term guardian for the child. (Insert space for names, addresses, and signatures of 2 witnesses)

7. Acceptance of short-term guardian. I accept this appointment as short-term guardian on this (insert day) day of (insert month and year).

   Signed: (short-term guardian)

8. Consent of child’s other parent. I, (insert name of the child’s other living parent), currently residing at (insert address of child’s other living parent), hereby consent to this appointment on this (insert day) day of (insert month and year).

   Signed: (consenting parent)

[NOTE: The signature of a consenting parent is not necessary if one of the following applies: (i) the child’s other parent has died; or (ii) the whereabouts of the child’s other parent are not known; or (iii) the child’s other parent is not willing or able to make and carry out day-to-day child care decisions concerning the child; or (iv) the child’s parents were never married and no court has issued an order establishing parentage.]
## General Eligibility

To qualify for Temporary Assistance for Needy Families (TANF), a child must live with a “caregiver relative” who may be a parent or other relative. A child who lives with an unrelated adult is not eligible for TANF. If, however, the unrelated adult is the child’s legal guardian, the family may be able to receive cash assistance through the General Assistance—Family and Children Assistance (GA-FCA) program.

Eligibility for Food Stamps is based on income standards and household size. A child can be included in the Food Stamp unit of a parent or a caregiver who is “in parental control” of the child. The child does not have to be related to the caregiver in order to be included in the household grant.

A child may be eligible for Supplemental Security Income (SSI) benefits if his or her physical or mental impairment(s) medically or functionally equal the severity of an impairment listed in Social Security’s Listing of Impairments and the child is financially eligible. A child may not receive both SSI and TANF; however, an eligible adult whose child receives SSI may be able to receive a TANF adult-only grant.

A representative payee can receive Social Security benefits on a child’s behalf. An individual responsible for the care of the child may apply for Social Security benefits on a child’s behalf.

### Notes

1. **A caretaker relative refers to an individual related to the child through blood, marriage, or adoption.** This definition of “related” will be used throughout this chart.
2. **General Assistance (GA) is a state program for people who are ineligible for other cash assistance.** Some (but not all) townships receive state aid to operate the GA program, as does the city of Chicago.
3. **Social Security benefits include SSI benefits, survivor’s benefits, and dependent’s benefits.**
<table>
<thead>
<tr>
<th>Type of Caregiver</th>
<th>Cash Assistance</th>
<th>Medical Assistance</th>
<th>Food Stamps</th>
<th>Social Security</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>INFORMAL CAREGIVER</strong></td>
<td>An informal caregiver who is related to the child being cared for may be able to receive Temporary Assistance for Needy Families (TANF) on the child’s behalf, either by adding the child to an existing TANF family grant or by applying for a TANF child-only grant. An informal caregiver who is not related to the child being cared for will not be able to obtain cash benefits on the child's behalf without establishing legal guardianship, in which case the caregiver might be eligible to receive GA-FCA on the child’s behalf.</td>
<td>An informal caregiver who is related to the child can obtain a medical card for a child in his/her care if the child is eligible for Medicaid. The caregiver can apply for medical assistance through KidCare on behalf of a child who is not eligible for Medicaid if the child’s income is between 133% and 200% of the federal poverty level. The caregiver may also obtain low cost health services under FamilyCare if the household income is less than 49% of the federal poverty level. An informal caregiver who is not related to the child can also apply for KidCare on the child’s behalf.</td>
<td>A child living with an informal caregiver who is “in parental control” of the child can be included in the household’s Food Stamp unit as long as the family is otherwise eligible.</td>
<td>An informal caregiver may be able to become a representative payee for a child in his/her care who is already receiving Social Security benefits. An informal caregiver can also apply for disability benefits on behalf of a child who may be eligible.</td>
</tr>
<tr>
<td><strong>SHORT-TERM GUARDIAN</strong></td>
<td>If a child is already receiving cash assistance, a short-term guardian and the parent should decide whether transferring cash benefits to the short-term guardianship is appropriate given the length of time that the child will be cared for by the short-term guardian. If the short-term guardian cares for the child for an extended period of time, this change in the child’s placement can be reported to the local public aid office to facilitate the transfer of cash benefits.</td>
<td>If the child has a medical card, the short-term guardian may want access to that card in order to ensure that the child gets appropriate medical care. If the child does not have a medical card, the short-term guardian may be able to apply for medical assistance on the child’s behalf. (Please keep in mind footnote 5.)</td>
<td>A short-term guardian may be able to include the child in household’s food stamp unit when caring for the child as long as the family is otherwise eligible. Child cannot be included in the parent’s food stamp unit, &amp; the families must report changes in the household make-up to the local public aid office. Whether or not to do so is a decision that should be made by both the parent and the short-term guardian.</td>
<td>A short-term guardian who is currently caring for a child may be able to become a representative payee for a child who is currently receiving Social Security benefits with the parent or legal guardian’s consent. The short-term guardian may also apply for benefits on a child’s behalf if the child is eligible.</td>
</tr>
</tbody>
</table>

4 The short-term guardian is able to make decisions for the child that are normally made by the parent for up to 60 days for each short-term guardianship form completed.

5 Please keep in mind that some Public Aid local offices will not transfer benefits to a short-term guardian that is not a relative caregiver and require legal guardianship.
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</thead>
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<tr>
<td><strong>STANDBY GUARDIAN</strong></td>
<td>A standby guardian who does not currently live with the child cannot receive Temporary Assistance for Needy Families (TANF) on a child’s behalf until the standby guardianship is activated either by the parent or legal caregiver’s death or the parent or legal caregiver’s inability to care for the child. Once activated, the standby acts as legal guardian of the child for 60 days after the activating event. The standby guardian will be eligible to receive cash benefits on the child’s behalf at this time. See Legal Guardian Cash Assistance below.</td>
<td>A standby guardian who currently lives with the child and is caring for a child may be able to obtain medical assistance for a child as described in the informal caregiver section above.</td>
<td>A standby guardian who currently lives with the child and is caring for a child may be able to obtain food stamps for a child as described in the informal caregiver section above.</td>
<td>A standby guardian who currently lives with the child and is caring for a child may be able to become a representative payee for a child who is currently receiving Social Security benefits. A standby guardian who has custody of a child and is caring for a child may also apply for benefits on a child’s behalf if the child is eligible.</td>
</tr>
<tr>
<td><strong>LEGAL GUARDIAN</strong></td>
<td>Legal guardians who are related to the child in their care may be able to receive Temporary Assistance for Needy Families (TANF) on behalf of the child, either by adding the child to an existing TANF family grant or by applying for a TANF child-only grant. An unrelated legal guardian cannot receive TANF on the child’s behalf; however, this person may qualify to receive General Assistance - Family and Children’s Assistance for the child if otherwise eligible.</td>
<td>A guardian should be able to obtain medical assistance for the child in his/her care if the child is income eligible for Medicaid or KidCare. A legal guardian can also apply for coverage on the child’s behalf.</td>
<td>A child living with a legal guardian can be included in the family’s existing food stamp household unit as long as the family remains income eligible. The guardian can apply for food stamps for the household if the household was not previously eligible for benefits but is now eligible with the additional child.</td>
<td>A legal guardian can be named representative payee for a child in his/her care who is already receiving Social Security benefits. A legal guardian can also apply for disability benefits on behalf of a child who may be eligible.</td>
</tr>
</tbody>
</table>

6 See footnote 2.
<table>
<thead>
<tr>
<th>Type of Caregiver</th>
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<th>Food Stamps</th>
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</tr>
</thead>
<tbody>
<tr>
<td>STANDBY ADOPTIVE PARENT</td>
<td>A standby adoptive parent who currently lives with the child and is caring for a child may be able to obtain cash benefits as described in the informal caregiver section above. A standby adoptive parent who does not live with the child generally cannot receive Temporary Assistance for Needy Families (TANF) on behalf of a child until the adoption of the child is finalized either after the parent’s death or when the parent voluntarily surrenders his/her rights. After the adoption is finalized, the adoptive parent becomes the child’s legal parent and is entitled to receive TANF for the child if the household is eligible.</td>
<td>A standby adoptive parent who currently lives with the child and is caring for a child may be able to obtain medical assistance for a child as described in the informal caregiver section above. A standby adoptive parent who does not live with the child cannot obtain medical assistance for the child until the adoption of the child is finalized, either after the parent’s death or voluntary surrender of parental rights.</td>
<td>A standby adoptive parent who does not live with the child cannot include a child in his/her food stamp unit.</td>
<td>A standby adoptive parent who currently lives with the child and is caring for a child may be able to become a representative payee for a child who is currently receiving Social Security benefits. A standby guardian who has custody of a child and is caring for a child may also apply for benefits on a child’s behalf if the child is eligible. A standby adoptive parent who does not currently live with the child cannot apply for Social Security benefits on a child’s behalf. The standby adoptive parent may act as representative payee for existing benefits if no other adult with custody of the child is able or willing to act.</td>
</tr>
<tr>
<td>ADOPTIVE PARENT</td>
<td>Once an adoption is finalized, an adoptive parent can include an adoptive child in any cash assistance grant the family is receiving just as they would include any biological children in the assistance unit.</td>
<td>Once an adoption is finalized, an adoptive parent can apply for his/her child if the family is income eligible. The adoptive parent’s income will be counted when determining eligibility for medical assistance such as Medicaid or KidCare. Once an adoption is finalized, the adoptive parent may also apply for low cost health services under FamilyCare if the household income is less than 49% of the federal poverty level.</td>
<td>Once an adoption is finalized, an adoptive parent can include the child in the family’s household food stamp unit as long as the family is income eligible.</td>
<td>Once an adoption is finalized, an adoptive parent can become a representative payee for a child receiving Social Security benefits or can apply for children’s Social Security benefits on the child’s behalf. If the child is receiving survivor’s or dependent’s benefits from a natural parent’s account before the adoption occurs, the benefits may continue. Depending on when an application for child’s benefits is submitted, the child may receive benefits of the account of the natural or adoptive parent.</td>
</tr>
</tbody>
</table>

Adoption provides a higher degree of legal permanence of a child because it requires the termination of parental rights, or the death of the parents, and it lasts for life. In Illinois, an adoptive parent gains all legal rights and responsibilities for a child and legally becomes that child’s parent.