WEST VIRGINIA CODE CHAPTER 44A ARTICLE 5

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§44A-5-1. Title.

This article may be cited as the “Standby Guardianship Act”.

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§44A-5-2. Definitions.

(a) “Attending physician” means the physician who has primary responsibility for the treatment and care of a qualified parent.

(b) “Designation” means a writing that is: (i) Voluntarily executed in conformance with the requirements of section five of this article, signed by a parent; and (ii) names a person to act as standby guardian.

(c) “Determination of debilitation” means a written determination made by an attending physician that a qualified parent is chronically and substantially unable to care for a minor child as a result of a debilitating illness, disease or injury. Such a determination shall include the physician's medical opinion to a reasonable degree of medical certainty regarding the nature, cause, extent and probable duration of the parent's debilitating condition.

(d) “Determination of incompetence” means a written determination made by the attending physician that to a reasonable degree of medical certainty a qualified parent is chronically and substantially unable to understand the nature and consequences of decisions concerning the care of a minor child as a result of a mental or organic impairment and consequently is unable to care for the child. Such a determination shall include the physician's medical opinion, to a reasonable degree of medical certainty, regarding the nature, cause, extent and probable duration of the parent's incompetence.

(e) “Functional parent” means a person other than a biological or adoptive parent, who is performing daily caretaking functions for the child.

(f) “Parent” means a biological or adoptive parent and includes a person, other than a parent, who has physical custody of a child and who has either been awarded custody by a court or claims a right to custody.

(g) “Petition” means a writing that is voluntarily executed and filed in the circuit court of the county in which the child resides in conformance with the requirements of section three of this article.

(h) “Qualified parent” means a parent who has been diagnosed, as evidenced in writing, by a licensed physician to be afflicted with a progressive or chronic condition caused by injury, disease or illness from which, to a reasonable degree of medical probability, the patient cannot recover and that is likely to lead to debilitation or incompetence.

(i) “Standby guardian” means a person who, in accordance with this article, is designated in writing or approved by the circuit court to temporarily assume the duties of guardian of the person or property, or both, of a minor child, on behalf of or in conjunction with a qualified parent, upon the occurrence of a triggering event. A standby guardianship shall be so construed as to enable the parent to plan for the future of a child, without terminating parental or legal rights by creating coguardianship rights between a parent and a standby

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guardian who has the authority to act in a manner consistent with the known wishes of a qualified parent regarding the care, custody and support of the minor child.

(j) “Triggering event” means the event upon the occurrence of which the standby guardian may be authorized to act. The triggering event shall be specified in a court order or written designation and shall be the earlier of a determination of incompetence or the death of a qualified parent. In the case of a standby guardian judicially approved pursuant to section three of this article, the triggering event may also be specified as the qualified parent's written consent to the commencement of the standby guardian's authority. In the case of a standby guardian designated pursuant to section five of this article, the triggering event may also be specified as: (i) A determination of debilitation of the qualified parent; and (ii) that parent's written consent to the commencement of the designated standby guardian's authority.

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§44A-5-3. Petition for approval of standby guardian; fees.

(a) Upon petition of a parent, functional parent or any person acting on parent's behalf, the circuit court of the county in which a child resides may approve a person as standby guardian for a child of a qualified parent upon the occurrence of a specific triggering event. If requested in the petition, the court may also approve an alternate standby guardian identified by the petitioner, to act in the event the standby guardian is unable or unwilling to assume the responsibilities of the standby guardianship.

(b) The petition shall include:

(1) The name and address of the petitioner and his or her relationship to the child, the name and address of the child's qualified parent, and the name and address of any other parent of the child whose identity and whereabouts are known to the petitioner or can reasonably be ascertained;

(2) The name, address and birth date of the child;

(3) The nature of the proposed triggering event and, if written consent is chosen as the proposed triggering event, any factors or circumstances that must be present before the qualified parent's written consent is effective;

(4) Whether a determination of incompetence or debilitation has been made and, if so, when and by whom;

(5) Whether there is a significant risk that the qualified parent will die imminently or become physically or mentally incapable of caring for the child or die as a result of a progressive chronic condition or illness; however, a petitioner shall not be required to submit medical documentation of a parent's medical status with the petition;

(6) The name and address of the person proposed as standby guardian and any alternate standby guardian, and if the parent is competent, that the qualified parent approves of the persons proposed;

(7) Whether the petitioner requests that the person proposed as standby guardian be given authority as a guardian of the person or guardian of the property of the minor, or both;

(8) A statement of any known reasons why the child's other parent is not assuming or should not assume the responsibilities of a standby guardian;

(9) Whether there is any prior judicial history or pending litigation regarding custody of the child; and

(10) The name and address of the attending physician.

(c) Upon filing of a petition, notice of the filing must be promptly given to each parent of the

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child whose identity and whereabouts are known to the petitioner, the child, if he or she is fourteen or more years of age, the proposed standby guardian and alternate, if any.

(1) The notice must be accompanied by a copy of the petition and shall be mailed by certified mail return receipt requested, by the petitioner.

(2) The notice should include a statement that no change in custody or other legal rights is effected by the appointment of a standby guardian and that it is not necessary for the recipient of the notice to appear. The notice should also state that any parent may request a hearing on the petition provided that such request is made within ten days from the date the notice was sent.

(d) A hearing must be held prior to any order approving the standby guardianship if there is another known parent who requests a hearing within ten days of the date that notice of filing was sent or if there is other litigation pending regarding the custody of the child.

(e) Prior to any hearing on the petition, the circuit court may appoint a discreet and competent attorney at law as guardian ad litem to represent the child pursuant to section ten, article four, chapter fifty-six of this code. If the petition for standby guardianship is filed by anyone other than a parent of the child, the circuit court shall appoint a guardian ad litem. The qualified parent shall not be required to appear at the hearing if he or she is medically unable to appear, except upon motion for good cause shown.

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§44A-5-4. Circuit court's order approving standby guardianship; authority; when effective.

(a) When a petition is filed by a person other than a parent having custody of the child, the standby guardian may be appointed only with the consent of the qualified parent unless the circuit court finds that such consent cannot be given for medical reasons.

(b) Upon consideration of the factors set out in subsection (b), section three of this article and finding that: (i) The child's parent is a qualified parent; and (ii) appointment of a standby guardian is in the best interest of the child, the circuit court shall appoint the person requested in the petition as standby guardian, and, if requested, the requested alternate standby guardian. However, when a petition is filed by a person other than a parent having custody of the child, the standby guardian shall be appointed only with the consent of the qualified parent unless the court finds that such consent cannot be given for medical reasons.

(c) The order shall specify the triggering event and shall provide that the authority of the standby guardian is effective: (i) Upon receipt of either a determination of incompetence or a certificate of death; or (ii) if so requested in the petition, upon receipt by the standby guardian of the qualified parent's written consent and filing of this consent with the circuit court. The written consent shall be executed after the entry of the court order and signed by the qualified parent, or by another in his or her presence and on his or her behalf.

(d) As soon as practicable after entry of the order, a copy shall be served on the standby guardian.

(e) A standby guardian shall have the powers and duties of a guardian of the person and guardian of the property of a minor, unless otherwise specified in the order.

(f) The standby guardian shall file with the circuit court as soon as practicable but in no event later than thirty days following a parent's death, determination of incompetence or consent, a copy of the certificate of death, determination of incompetence or consent of the qualified parent upon which the standby authority is based and a determination of debilitation. Failure to file within the time specified shall be grounds for the circuit court to rescind the authority of the standby guardian upon petition of any person, but all acts undertaken by the standby guardian on behalf of and in the interests of the child be valid and enforceable until authority is rescinded.

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§44A-5-5. Written designation of a standby guardian by a parent; commencement of authority; approval required.

(a) A parent may execute a written designation of a standby guardian at anytime. The written designation shall be signed by the parent, witnessed by two adults. Another adult may sign the written designation on behalf of the parent if the parent is physically unable to do so, provided the designation is signed at the express request of the parent and in the presence of the parent. The designated standby guardian or alternate may not sign on behalf of the parent. The signed designation shall be delivered to the standby guardian and any alternate named as soon as practicable. The written designation shall state:

(1) The name, address and birth date of the child affected;

(2) The triggering event; and

(3) The name and address of the person designated as standby guardian or alternate.

(b) Following such delivery of the designation, the authority of a standby guardian to act for a qualified parent shall commence upon the occurrence of the specified triggering event and receipt by him or her of: (i) A determination of incompetence; (ii) a certificate of death of the parent; or (iii) a determination of debilitation and the qualified parent's written consent to such commencement signed by the parent or another on his behalf and at his direction as provided in subsection (a) of this section for the designation.

(c) A standby guardian under a designation shall have the authority of a guardian of the person and a guardian of the property of the child, unless otherwise specified in the designation.

(d) A designated standby guardian or alternate shall file a petition for approval with the circuit court as soon as practicable after the occurrence of the triggering event but in no event later than thirty days after the date of the commencement of his or her authority. The authority of the standby guardian shall cease upon his or her failure to so file, but shall recommence upon such filing. The petition shall be accompanied by a copy of the designation and a: (i) Determination of incompetence; (ii) determination of debilitation and consent; or (iii) a certificate of death.

(e) The notice provisions of subsection (c), section three of this article shall apply to a petition filed pursuant to this section. The circuit court shall enter in an order approving the designated guardian upon finding that:

(1) The person was duly designated as standby guardian pursuant to the section and the designation has not been revoked;

(2) A determination of incompetence was made; a determination of debilitation was made and the parent consented to commencement of the standby guardian's authority; or the parent has died;

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(3) The best interests of the child will be served by approval of the standby guardian; and

(4) If the petition is by an alternate, that the designated standby guardian is unwilling or unable to serve.

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§44A-5-6. Further proceedings to determine permanent guardianship.

(a) If the triggering event was death of the qualified parent, the standby guardian shall within ninety days of such death, petition for appointment of a guardian for the child as otherwise provided by law or may initiate proceedings to determine legal and physical custody of the child pursuant to article four, chapter forty-eight, or both.

(b) In all other cases a standby guardian shall promptly after occurrence of the triggering event initiate such proceedings to determine guardianship and custody, absent objection by the qualified parent.

(c) The petition shall be accompanied by:

(1) The circuit court’s order approving the standby guardian or the qualified parent's written designation of the standby guardian; and

(2) (i) The attending physician's written determination of incompetence or debilitation; or (ii) certificate of death.

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§44A-5-7. Revocation, refusal and termination of standby guardianship.

(a) The authority of a standby guardian approved by the circuit court may be revoked by the qualified parent by his or her filing a notice of revocation with the circuit court. The notice of revocation shall identify the standby guardian or alternate standby guardian to which the revocation will apply. A copy of the revocation shall also be delivered to the standby guardian whose authority is revoked and any alternate standby guardian who may then be authorized to act. At any time following his or her approval by the circuit court, a standby guardian may decline to serve by filing a written statement of refusal with the court and having the statement personally served on the qualified parent and any alternate standby guardian who may then be authorized to act.

(b) When a written designation has been executed, but is not yet effective because the triggering event has not yet occurred, the parent may revoke or the prospective standby guardian may refuse the designation by notifying the other party in writing. A written designation may also be revoked by the subsequent execution of an inconsistent designation.

(c) When a standby guardian's authority is effective upon debilitation or incompetence of the qualified parent, the standby guardian's authority to act on behalf of the parent continues after the parent is restored to health unless the qualified parent notifies the guardian and, if appropriate, the county commission, in writing, that the standby guardian's authority is revoked. If at any time the circuit court finds that the parent no longer meets the definition of “qualified parent”, it shall rescind its approval of the standby guardian.

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§44A-5-8. Review of standby guardianship.

A child's parent, stepparent, functional parent, adult sibling or any adult related to the child by blood or marriage may petition the circuit court that approved the standby guardian at any time following such approval for review of whether continuation of the standby guardianship is in the best interest of the child. Notice of the filing of a petition for review shall promptly be given to the standby guardian, the child if the child is fourteen or more years of age, and each parent of the child whose identity and whereabouts are known or could reasonably be ascertained.

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§44A-5-9. Petition and other records pertaining to standby guardianship confidential.

Upon the filing of a petition requesting the approval of a standby guardian, all pleadings, exhibits and other documents contained in the court file are considered confidential and not open for public inspection, either during the pendency of the case or after the case is closed. The contents of the court file are open to inspection and copying by the parties, their designees and their attorneys.

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