

HB 2472

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WEST VIRGINIA LEGISLATURE

FIRST REGULAR SESSION, 1999

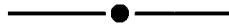


ENROLLED

COMMITTEE SUBSTITUTE
FOR

House Bill No. 2472

(By Delegates Staton, Coleman, Faircloth,
Givens, Mahan, Pino and Smirl)



Passed March 12, 1999

In Effect Ninety Days from Passage

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FOR

H. B. 2472

(BY DELEGATES STATON, COLEMAN, FAIRCLOTH,
GIVENS, MAHAN, PINO AND SMIRL)

[Passed March 12, 1999; in effect ninety days from passage.]

AN ACT to amend chapter forty-four-a of the code of West Virginia, one thousand nine hundred thirty-one, as amended, by adding thereto a new article, designated article five, relating to the creation of standby guardianship; defining terms; setting forth the procedures and requirements for petitions with the circuit court for standby guardianship; requiring that notice be given of any petition filed; providing that an evidentiary hearing be held prior to approval of a standby guardian under certain circumstances; requiring the circuit court to appoint a guardian ad litem prior to any hearing held where the petition is filed by anyone other than the child's parent; setting forth the factors necessary prior to approving a standby guardianship and the form of any order of approval; requiring service of the order; requiring the standby guardian to file a copy of the qualified parent's death certificate, determination of incompetence or consent when his or her authority commences; providing for the written designation of a standby guardianship by a parent; requiring a standby guardian

authorized by a written designation to file a petition for approval after the commencement of his authority; providing for institution of proceedings to determine permanent guardianship; establishing procedures for revocation and refusal; and providing that the standby guardian's authority continues until it is revoked by the qualified parent or rescinded by the circuit court.

Be it enacted by the Legislature of West Virginia:

That chapter forty-four-a of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended by adding thereto a new article, designated article five, to read as follows:

ARTICLE 10A. STANDBY GUARDIANSHIP

§44A-5-1. Title.

1 This article may be cited as the "Standby Guardianship
2 Act."

§44A-5-2. Definitions.

1 (a) "Attending physician" means the physician who has
2 primary responsibility for the treatment and care of a qualified
3 parent.

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

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

16 (d) "Determination of incompetence" means a written
17 determination made by the attending physician that to a
18 reasonable degree of medical certainty a qualified parent is
19 chronically and substantially unable to understand the nature

20 and consequences of decisions concerning the care of a minor
21 child as a result of a mental or organic impairment and conse-
22 quently is unable to care for the child. Such a determination
23 shall include the physician's medical opinion, to a reasonable
24 degree of medical certainty, regarding the nature, cause, extent
25 and probable duration of the parent's incompetence.

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

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

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

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

43 (i) "Standby guardian" means a person who, in accordance
44 with this article, is designated in writing or approved by the
45 circuit court to temporarily assume the duties of guardian of the
46 person or property, or both, of a minor child, on behalf of or in
47 conjunction with a qualified parent, upon the occurrence of a
48 triggering event. A standby guardianship shall be so construed
49 as to enable the parent to plan for the future of a child, without
50 terminating parental or legal rights by creating coguardianship
51 rights between a parent and a standby guardian who has the
52 authority to act in a manner consistent with the known wishes
53 of a qualified parent regarding the care, custody and support of
54 the minor child.

55 (j) "Triggering event" means the event upon the occurrence
56 of which the standby guardian may be authorized to act. The

57 triggering event shall be specified in a court order or written
58 designation and shall be the earlier of a determination of
59 incompetence or the death of a qualified parent. In the case of
60 a standby guardian judicially approved pursuant to section three
61 of this article, the triggering event may also be specified as the
62 qualified parent's written consent to the commencement of the
63 standby guardian's authority. In the case of a standby guardian
64 designated pursuant to section five of this article, the triggering
65 event may also be specified as (i) A determination of debilita-
66 tion of the qualified parent, and (ii) that parent's written consent
67 to the commencement of the designated standby guardian's
68 authority.

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

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

10 (b) The petition shall include:

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

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

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

21 (4) Whether a determination of incompetence or debilita-
22 tion has been made and, if so, when and by whom;

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

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

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

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

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

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

42 (c) Upon filing of a petition, notice of the filing must be
43 promptly given to each parent of the child whose identity and
44 whereabouts are known to the petitioner, the child, if he or she
45 is fourteen or more years of age, the proposed standby guardian
46 and alternate, if any.

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

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

57 (d) A hearing must be held prior to any order approving the
58 standby guardianship if there is another known parent who

59 requests a hearing within ten days of the date that notice of
60 filing was sent or if there is other litigation pending regarding
61 the custody of the child.

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

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

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

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

17 (c) The order shall specify the triggering event and shall
18 provide that the authority of the standby guardian is effective (i)
19 Upon receipt of either a determination of incompetence or a
20 certificate of death, or (ii) if so requested in the petition, upon
21 receipt by the standby guardian of the qualified parent's written
22 consent and filing of this consent with the circuit court. The
23 written consent shall be executed after the entry of the court

24 order and signed by the qualified parent, or by another in his or
25 her presence and on his or her behalf.

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

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

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

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

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

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

12 (2) The triggering event; and

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

15 (b) Following such delivery of the designation, the author-
16 ity of a standby guardian to act for a qualified parent shall

17 commence upon the occurrence of the specified triggering event
18 and receipt by him or her of (i) A determination of incompetence,
19 (ii) a certificate of death of the parent, or (iii) a determination
20 of debilitation and the qualified parent's written consent
21 to such commencement signed by the parent or another on his
22 behalf and at his direction as provided in subsection (a) of this
23 section for the designation.

24 (c) A standby guardian under a designation shall have the
25 authority of a guardian of the person and a guardian of the
26 property of the child, unless otherwise specified in the designation.
27

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

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

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

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

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

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

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

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

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

11 (c) The petition shall be accompanied by:

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

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

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

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

14 (b) When a written designation has been executed, but is
15 not yet effective because the triggering event has not yet

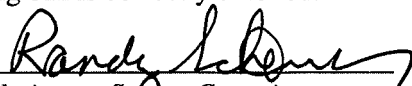
16 occurred, the parent may revoke or the prospective standby
17 guardian may refuse the designation by notifying the other
18 party in writing. A written designation may also be revoked by
19 the subsequent execution of an inconsistent designation.


20 (c) When a standby guardian's authority is effective upon
21 debilitation or incompetence of the qualified parent, the standby
22 guardian's authority to act on behalf of the parent continues
23 after the parent is restored to health unless the qualified parent
24 notifies the guardian and, if appropriate, the county commis-
25 sion, in writing, that the standby guardian's authority is
26 revoked. If at any time the circuit court finds that the parent no
27 longer meets the definition of "qualified parent," it shall rescind
28 its approval of the standby guardian.

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

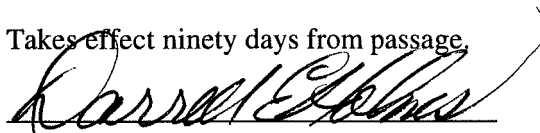
1 A child's parent, stepparent, functional parent, adult sibling
2 or any adult related to the child by blood or marriage may
3 petition the circuit court that approved the standby guardian at
4 any time following such approval for review of whether
5 continuation of the standby guardianship is in the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


That Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

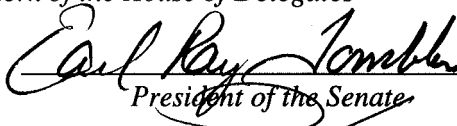

Chairman Senate Committee



Chairman House Committee

Originating in the House.

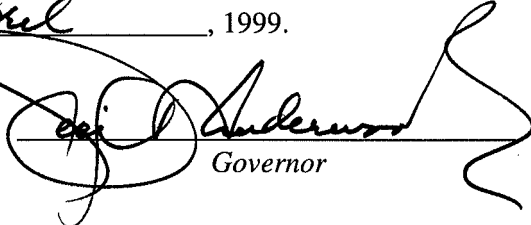
Takes effect ninety days from passage.

Clerk of the Senate


Clerk of the House of Delegates


President of the Senate


Speaker of the House of Delegates

The within approved this the 7th
day of April, 1999.


Governor

PRESENTED TO THE

GOVERNOR

Date 7/6/99

Time 2:32pm