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## Standby Guardianship

### December 2005

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#### Definition of Standby Guardianship

The purpose of standby guardianship is to allow parents to make care and custody plans for their children now that will become effective at some future date (Simms, 1996). A standby guardian is chosen by a parent to become the legal guardian of the parent's minor children in the event the parent becomes unable to care for the children. In general, the standby guardian becomes the active caretaker of the children after a "triggering event" such as:

- 1) the death of the parent;
- 2) the parent becomes mentally or physically incapacitated; or
- 3) the consent of the parent (National Adoption Information Clearinghouse [NAIC], 2003).

Without standby guardianship, the range of legal options available to parents to plan for the future care and custody of their children is inadequate (Levine, 1995; Mellins, Erhardt, Newman, & Conard, 1996; Waysdorf, 1994). These options include informal arrangements, a will, power of attorney, transfer of guardianship, foster care, and adoption (Andino, 2003; HIV Law Project & Cicitelli Associates, 1994). Informal arrangements, though common, do not provide the new caregiver with a legal bond to the children or the legal authority to serve as their decision-maker (Child Welfare League of America [CWLA], 1997). A signed will designates a guardian to take care and custody of the children only after the death of the parent. Transfer of guardianship, foster care, and adoption require a parent to relinquish care of the children immediately (Ettinger, Feyler, Miller, & Polineni, 1996; Families' and Children's AIDS Network [FCAN], 1995).

Standby guardianship, on the other hand, provides a middle ground. This guardianship arrangement enables the parent to retain rights and decision-making responsibilities while still able, and facilitates the transfer of legal custody upon a triggering event (NAIC, 2003; Waysdorf, 1994). Standby guardianship helps to protect the psychological and emotional health of the family by reducing stress and providing stability and support for the child during transition (McAllaster, 2000; Mellins et al., 1996).

#### History and Background

Much of the recent discussion about the emotional, social, and legal issues involved in future care and custody planning relates to the HIV epidemic (Willis, Peck, Sells, & Rodabaugh, 2001). This connection developed out of a concern for the growing number of parents infected with HIV and the number of children orphaned by the epidemic. In 1992, researchers from the Centers for Disease Control noted the increasing numbers of women infected with HIV and estimated that, as of December 1991, 19,300 children had been orphaned due to AIDS (Caldwell, Fleming, & Oxtoby, 1992). Updated estimates suggest that between 1980 and 1998, AIDS accounted for 97,376 children who were left motherless (Lee & Fleming, 2003).

To better meet the needs of families affected by HIV, advocates began working to pass standby guardianship legislation (Palmer & Mickelson, 2001). In addition, federal and state dollars were made available for programs to help families affected by HIV/AIDS address the social, emotional, and legal issues involved in making future care and custody plans. Currently, federal funding is provided for voluntary permanency planning projects for families affected by HIV through both the Abandoned Infants Assistance Act (P.L. 100-505, as amended, P.L. 104-235) and Title IV of the Ryan White CARE Act (P.L. 106-345).

#### The Need for Standby Guardianship

A review of the figures indicates that the number of AIDS orphans in the United States has declined in recent years, which is largely a reflection of a decrease in the number of AIDS-related deaths as a whole (Lee & Fleming, 2003). However, there has been a concomitant increase in the incidence of HIV/AIDS among women; in fact, the number of new women diagnosed with AIDS has increased 15% from 1999 to 2003 (CDC, 2004). The most recent CDC report states that as of 2003, 87,940 women were living with AIDS in the United States (CDC, 2004). Such findings present a challenge to current and future caregiving of children, as 76% of women receiving HIV treatment are also mothers (Kaiser Family Foundation, 2004).

Though standby guardianship is often associated with HIV, expansion of the discussion about voluntary permanency planning beyond the HIV service community is clearly warranted. Many situations prevent parents from caring for their children. For example, thousands of children are orphaned every year due to the death of a parent from an illness or another medical condition (Levine, 1994). The Centers for Disease Control's National Center for Injury Prevention and Control (CDC, 2005) reported that in 2002, the last year for which statistics are available, over 140,000 people between the ages of 18 and 45 in the United States died from an illness or other medical condition, an accident, or intentional injury. In particular, cancer is already the second most common cause of death for people of child bearing/rearing age (CDC, 2005; Willis et al., 2001). However, compared to families affected by HIV, there has been considerably less attention paid to permanency plans for families affected by cancer, or other medical conditions, and there are few programs designed to help them cope with the emotional, social, and legal issues involved in future care and custody planning (Willis et al., 2001).

The increase in single parenthood over the past three decades suggests another reason for the expansion of voluntary permanency planning. Estimates suggest that about 30% of children in the United States, or approximately 22 million children, lived in single parent homes in 2003 (Annie E. Casey Foundation, 2005). This figure represents a considerable increase since 1960, when only 9% of children under 18 years old resided in single parent households (Sado & Bayer, 2001; U.S. Department of Health & Human Services, 2001). In addition, the convergence of single parenthood and medical conditions like HIV and cancer has led to increasing numbers of children orphaned due to illness (McConnell, 1998; Willis et al., 2001).

The number of children living in kinship care arrangements also provides a strong case for the need for access to future care and custody planning, as approximately 2.3 million children reside in the primary care of their grandparents (U.S. Census Bureau, 2003). Particularly, older grandparents caring for young grandchildren may need to appoint a future caregiver, with the understanding that advancing age and/or poor health may prevent the grandparents from continuing to provide care to the children (Coon, 2000).

#### **Protecting the Welfare of Orphans**

In planning for these potential orphans, identifying new, safe, and permanent homes is a priority (Geballe, 2000; Levine 1994). Permanence for children is the central component of child welfare legislation. As explained in *Adoption 2002: The President's Initiative on Adoption*

*and Foster Care Guidelines for Public Policy and State Legislation Governing Permanence for Children* (Duquette, Hardin, & Dean, 1999):

The concept of permanency has assumed a central place in American child welfare law and policy because permanency establishes the foundation for a child's healthy development. The basic needs of children include safety and protection; a sense of identity; validation of themselves as important and valued persons; stability and continuity of caregivers; an opportunity to learn and grow cognitively, physically, and emotionally; and a protected custodial environment that is legally secure. Permanency, as epitomized by a safe, stable relationship with a nurturing caregiver, allows these basic needs to be met. (p. 3)

*Adoption 2002* (Duquette et al., 1999) also describes the hierarchy of permanence. For children who cannot remain with their birth parents, adoption and legal guardianship provide the most assurance of safety and stability. In addition, priority should be given to assisting the children to remain within the family's kinship network. Informal arrangements, however, are not preferred, as the caregivers do not have legal standing. Such arrangements may create difficulties for the caregiver and children in obtaining public benefits and in interacting with schools and medical facilities. Lastly, foster care is considered a temporary plan; therefore, this option should be used only if alternative permanent placement options are not available.

In this context, standby guardianship provides an alternate method for establishing permanence, and parents can make a specific plan for the future care and custody of their children. Through standby guardianship, parents can also maintain custody of their children as long as they are able before transferring care to a designated guardian (Levine, 1995). By offering parents this flexibility in determining the future care of their children, standby guardianship may help to prevent children from entering the child welfare system unnecessarily (Cameron, 2000).

#### **National Support for Standby Guardianship**

As a method of providing permanence for children and assisting families affected by terminal illnesses, standby guardianship has garnered wide support. The federal government adopted a strong position in favor of all U.S. states enacting standby guardianship legislation. In fact, the Preamble to the Adoption and Safe Families Act (1997) reads:

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: 1) the death of the parent; 2) the mental incapacity of the parent; or 3) the physical debilitation and the consent of the parent. (Sec. 403)

This position was reiterated in *Adoption 2002* (Duquette et al., 1999). In addition to the federal government, the Child Welfare League of America (CWLA) (Beatty & Hershfield, 1995), the American Bar Association (Samerson, 1997), and the American Academy of Pediatrics (1999) have all stated their support for standby guardianship legislation. The American Academy of Pediatrics reaffirmed their commitment to this policy position in September 2005 (American Academy of Pediatrics, 2005).

### **Overview of Current Legislation**

Currently, standby guardianship legislation has been enacted in the District of Columbia and 17 states: Arkansas, Colorado, Connecticut, Florida, Georgia, Illinois, Maryland, Massachusetts, Minnesota, Nebraska, New Jersey, New York, North Carolina, Pennsylvania, Virginia, West Virginia, and Wisconsin. Although they do not have specific standby guardianship laws, a few other states (California, Iowa, Ohio, Texas, and Wyoming) have legislation that incorporates important elements of this tool (State Codes).

Although there are differences between the states, most of the standby guardianship laws have several components in common:

1. The statutes allow a parent or a legal guardian to appoint a standby guardian for the minor children. Some states require that the parent be at risk of death or incapacity due to an illness or a medical condition; others, such as Illinois, do not.
2. The events that trigger the activation of the standby guardian include the death, the mental incapacity, or the physical debilitation of the parent or legal guardian. Some states (e.g., Maryland and Massachusetts) also allow the parent to consent to a transfer of guardianship at any time the parent feels is appropriate.
3. The states set forth the procedure for a parent or legal guardian to petition the court for judicial appointment of a standby guardian. A court hearing is then held regarding the petition. Most of the states also allow a parent or legal guardian to designate a standby guardian in writing. After the death or incapacity of the parent or legal guardian, the designated standby guardian must notify the court of the triggering event, file a petition for guardianship, and participate in a court hearing to be appointed legal guardian.

4. The states require that the court be notified about a triggering event within set time limits. If a judge has appointed the standby guardian, few states require an additional court hearing.
5. If a standby guardian becomes active due to parental incapacity, the laws allow for the restoration of parental authority upon the improved health of the parent. The guardian resumes standby status.
6. The statutes allow the parent to revoke the standby guardian agreement at any time.
7. Unless a non-custodial parent's rights have been terminated, all of the statutes require that the non-custodial parent be notified of the standby guardian proceedings, either at the initial court approval or when the standby guardian provides proof of a triggering event and requests legal guardianship (Larsen, 2000).

Although similar in intent to the other states, future care and custody legislation in California and Connecticut is somewhat different. California allows the appointment of a co-guardian, rather than a standby guardian. This law allows for parents with terminal conditions 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 (California Probate Code, Sec. 2105).

Joint guardianship in California operates much like standby guardianship arrangements. At the appropriate time when the parent can no longer provide care for the child due to a life threatening condition such as AIDS or cancer, the court appoints the individual nominated as the joint guardian (Public Counsel, 2005). The custody of the child and decision-making responsibilities are shared between the parent and the designated guardian (Public Counsel, 2005).

Connecticut employs both of these arrangements and allows for both standby guardianship and co-guardianship (Connecticut General Statutes Annotated, Sec. 45a-624(a)-(g)).

### **Standby Guardianship in Practice**

There has been a limited amount research on the implementation and efficacy of standby guardianship. The available research suggests that although the majority of parents discuss future custody options informally, formal standby guardianship is underutilized.

A study of oncology patients who were single parents found that 50% died without a custody plan for their children (Willis et al., 2001). In addition, a review of four studies completed between 1992 and 2004 found that most, if not all, parents with HIV are concerned about the future care and custody of their children (Draimin, 1995; Rotheram-Borus, Lee, Lin, & Lester, 2004). However, most parents appear to rely on informal arrangements with family members, and few parents follow through on making a formal, legal care and custody plan for their children. For example, a 1993 study by the Division of AIDS Services and the Orphan Project in New York City found that only 24 of 43 families had any kind of documented future care and custody plan. Of these 24 families, only 8 had official legal documents drawn up naming a guardian and none utilized the services of the court (Draimin, 1995).

Similarly, in a study of 151 parents with HIV, Rotheram-Borus, Draimin, Reid, and Murphy (1997) found that 81% of mothers and 75% of fathers reported initiating future custody discussions with family and friends almost immediately after being diagnosed with HIV. For a majority of children (75.9%) in the study, parents had spoken to a potential future caregiver, and 99% agreed to care for the children. In contrast, only 24% of parents had discussed this same issue with social service staff, and only 30% had initiated legal planning. Forehand et al. (1999) also found that of 25 HIV positive mothers, only 35% made any legal plans for their children before the mothers died. A similar 1998 study by Boxer et al. (as cited in Forehand et al., 1999) revealed that only a quarter of cases had custody arrangements in place prior to the mother's death.

More recently, a study of parents with HIV revealed that nearly 43% of parents died without having established a future custody plan for their children (Rotheram-Borus, Lester, Wang, & Shen, 2004). In addition to the lack of arrangements prior to death, parents were also found to frequently change custody plans. Among those parents who did make future plans, over 69% used standby guardianships. Looking specifically at the relationship between child age and permanency planning, younger children are more likely than adolescents over the age of 15 to have established custody plans (Lightfoot & Rotheram-Borus, 2004; Rotheram-Borus et al., 2004). Among the younger children, however, children ages 6 to 14 have been found to be most likely to have arrangements in place, even though those under 5 years of age may have the greatest need for permanency planning following the loss of their parent (Rotheram-Borus et al, 2004).

### **Obstacles to the Utilization of Standby Guardianship**

Since most states currently do not have standby guardianship legislation, many parents do not have the option to appoint a standby guardian for their children. In the states with standby guardianship, several obstacles contribute to underutilization. These obstacles can largely be grouped into two areas: emotional and systemic.

The emotional stress of living with a life-threatening illness has been well-documented (Jenkins & Coons, 1996; Lightfoot & Rotheram-Borus, 2004). Along with the fear of their own deaths, parents have the additional worry about their children, and there is the realization that they may not see their children grow up (Mason, 1998). This awareness can be too painful to cope with for some parents. Taylor-Brown (1998) additionally states that the process of designating a guardian is such an emotional challenge that it may hinder the parent from nominating a potential caregiver for the child. Among parents living with HIV, those with greater levels of depression and negative coping styles have also been found to be less likely to form future custody plans for their children (Rotheram-Borus et al., 2004). Furthermore, physical, emotional, and social stressors may impede completion of custody arrangements. These anxieties may be more pressing and require more immediate attention (Rotheram-Borus et al., 2004).

Systemically, all states with standby guardianship legislation require that a non-custodial parent be notified about the request to appoint a standby guardian (Larsen, 2000). Most states assume that the non-custodial parent will take over custody and guardianship of the children, and therefore require extensive efforts by the custodial parent to locate the non-custodial parent. This is true even when the non-custodial parent has had little or no contact with their children, and has not contributed to raising them (McConnell, 1995). A study of 200 mothers with HIV in New York City found that most of 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 (Casey Family Services, 1999). The study reported that the women feared: "(1) giving the father an opportunity to take the children away from them, (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 he will contest the plan" (p. 121). Consequently, requirements to notify non-custodial parents and the underlying assumptions about their responsibility of care for the children may deter a custodial parent from making a formal permanency plan and appointing a standby guardian.

Other systemic barriers hindering future custody planning can include lack of or misinformation about planning, and

complex and insensitive legal and child welfare systems (Casey Family Services, 1999). Parents may not have sufficient knowledge about the range of permanency planning options available, including standby guardianship (O'Neill, Selwyn, & Schietinger, 2003; Taylor-Brown, 1998). They may also not know to whom to turn to get this information or who is available to provide legal services (Kushins, 1998).

The standby guardianship process itself can be complicated and daunting. For example, during the early implementation of standby guardianship legislation in New York City, 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 regularly requested additional documents and hearings that were not mandated by the statute, thereby delaying proceedings and unnecessarily interfering with the privacy of parents and caregivers (Ambia et al., 1998).

Because of the difficulties involved in going to court and getting a judicial appointment, parents who do make future care and custody plans often prefer to designate the standby guardian in writing rather than through the court (Casey Family Services, 1999). This puts the onus on the standby guardian to go to court after the death or incapacity of the parent and petition for guardianship based on the written designation. The disadvantage of this arrangement, however, is that the parent or legal guardian will not be able to attend a full court hearing and provide testimony to support the appointment of the standby guardian (HIV Law Project & Cicitelli Associates, 1994).

Due to these obstacles, many parents either develop no future care and custody plans for their children or rely on informal agreements with relatives and friends (Draimin, 1995; Forehand et al., 1999; Rotheram-Borus et al., 2004). As a result, orphans are unfortunately often left in limbo, with no specific or legal plan to provide for their safety and permanence (Taylor-Brown, 1998). Addressing these obstacles and promoting the use of standby guardianship is a key element in establishing permanence by legalizing the relationship between the new caretakers and the children (Geballe, 2000; Mellins et al., 1996).

### **Overcoming Obstacles to the Utilization of Standby Guardianship**

Because of the emotional and social complexities associated with future care and custody planning, assisting a parent in utilizing standby guardianship, or in making any kind of estate plan or advanced directive, requires a continuum of services. At a minimum, this

continuum should include medical, mental health, case management, and legal services (Selbin & Del Monte, 1998; Taylor-Brown, 1998). Through provision of medical services, parents' illnesses should be addressed and treated. Mental health services for parents should underscore the emotional difficulties of living with a terminal illness, preparing for the possibility of death, and the need for the children to have a safe and permanent home. Children may also need counseling to cope with the loss, or potential loss, of their parents (Taylor-Brown, 1998). As most parents are simultaneously coping with multiple problems, case management services are needed to provide assistance with concrete needs, including housing, income support, and child care (Selbin & Del Monte, 1998). Legal services should 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). Service providers should be knowledgeable about the legal and bio-psycho-social issues involved, and work cooperatively to help provide for the safety and permanence of children whose parents are terminally ill (Retkin, Stein, & Draimin, 1997). Ideally, these care providers would be located together to provide maximum accessibility and continuity of care (Selbin & Del Monte, 1998).

Special consideration should be paid to the needs of single parents with terminal illnesses. For many families, the immediate answer to who will care for the children after the death of one parent is the other parent. Unfortunately, this is not always possible or even desirable. For a variety of reasons, the other parent may be unable or unwilling to become the caretaker for the children (McConnell, 1998). Rather than the other biological parent, extended family members typically assume responsibility for the care of the children following the parent's death (Rotheram-Borus et al., 2004). Although the non-custodial parent may not have lost parental rights, many custodial parents may prefer to have a close family member appointed as guardian, particularly one who already has a good relationship with the children (Casey Family Services, 1999). For this reason, increased services should also be made available to members of the relative network (Rotheram-Borus et al., 2004).

In deciding with whom the children should live after the parent's death or incapacity, the custodial parent's choice should be recognized as being in the best interests of the children. With this presumption, substantial weight should be given to the custodial parent's choice for standby guardian (Ambia et al., 1998). Judicial appointment of the custodial parent's choice for standby guardian is not tantamount to terminating the non-custodial parent's rights to the children, because the non-

custodial parent does not lose legal rights or standing in family court (McConnell, 1998).

The presumption that the custodial parent is acting in the best interests of the children should also strongly inform the court processes of appointing and activating a standby guardian. Family court hearings, paperwork, and other administrative details should be streamlined. Furthermore, standby guardianship laws should be designed and implemented such that they parents are encouraged to begin the permanency planning process early (Ambia et al., 1998).

### Conclusion

Effectively assisting parents in making future care and custody plans for their children requires the development of flexible permanency planning options, such as standby guardianship. Standby guardianship legislation, in intent and implementation, must recognize the unique situations of parents and acknowledge that in making future care and custody plans the parents are acting in their children's best interests. In practice, providing a continuum of services for the children and parents is key to facilitating the utilization of standby guardianship. At a minimum, these services should include medical treatment, legal assistance, mental health counseling, and case management.

Unfortunately, most states do not allow standby guardianship as an option for future care and custody planning. Even where standby guardianship is available, resources to assist parents seeking guardianship arrangements, as well as programs for the newly appointed guardian, are scarce (Geballe, 2000).

Creating laws and developing multidisciplinary services that promote the safety, well-being and permanency of children are important challenges for legislators and for providers of mental health, medical, legal and social services. As Geballe (2000), in a call to action to meet the needs of children and families affected by terminal illness, explains:

How well we ensure the quality and continuity of parental care for children whose parents are living with HIV and AIDS, or who later die of it, is one of the tests of our generation. If we fail to meet this challenge, we are knowingly placing thousands of children and youth at enormous, predictable, and potentially fatal risk. (p. 407)

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Connecticut General Statutes Annotated; Probate Courts and Procedures, Sec. 45a-624(a)-(g)

District of Columbia Official Code, Title 16, Sec.2, Chapter 48

Florida Statutes Annotated, Sec. 744.304; 744.3046

Official Code of Georgia Annotated, Title 29, Chapter 4, Sec. 29-4-1

Smith-Hurd Illinois Compiled Statutes Annotated, 5/11-5.3

Iowa Code Annotated, Sec. 633.560; 633.591A

Annotated Code of Maryland, Sec. 13-901 through 13-907

Massachusetts General Laws Annotated, Sec. 201-2B through 201-2G

Minnesota Statutes 2002, Chapter 257B

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New Jersey Statutes Annotated, Sec. 3B:12-72 through 3B:12-77

McKinney's Consolidated Laws of New York Annotated, Surrogate's Procedure Act, Sec. 1726

General Statutes of North Carolina, Sec. 35A-1370 through 35A-1382

Ohio Revised Code, Commercial, Sec. 1337.09(B); Probate, Sec. 2111.02, 211.042, 2111.12, 2111.121, 2111.13

Pennsylvania Consolidated Statutes Annotated, Title 21 Domestic Relations, Chapter 56 Standby Guardian Act, Sec. 23-5602; 23-5611; 23-5612; 23-5613; 23-5614

Texas Probate Code, Section 676

Code of Virginia, Juvenile, Sec. 16.1-349 through 16.1-354

West Virginia Code Annotated, Sec. 44A-5-1 through 44A-5-8

Wisconsin Statutes Annotated, Children's Code, Sec. 48-978

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The publication of this fact sheet was made possible by grant #90-CB-0126 from the Children's Bureau, Administration on Children, Youth and Families, Administration for Children and Families, US Department of Health and Human Services. The contents are solely the responsibility of the authors and do not represent the official views or policies of the funding agency. Publication does not in any way constitute an endorsement by the Department of Health and Human Services. Readers are encouraged to copy and share this material, but please credit the National AIA Resource Center.