

A Social Worker's Guide:
How Laws and Lawyers
Can Help You Help Seriously Ill Parents
Plan Stable Futures for Their Children

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Introduction

Shock, denial, and grief often follow the discovery that one has a life-threatening illness. It takes time to move through the sequence of emotions to reach a state where clear thinking and planning can occur. A single parent who has the added tasks of finding a future permanent home for the children and explaining sickness and death to them, often is simply overwhelmed.

Nevertheless, it can be crucial for the children's sake to have a plan. Otherwise, uncertainty about where they will live and who will care for them can cloud the children's futures; so many things can go wrong. The parent's estate may be examined by a probate court that has no knowledge of responsible friends or relatives, and may send the children through dependency court and into foster care; other parents who did not live with the family may now claim their children, splitting siblings apart. Grandparents, who assumed that they needed no legal authority to raise the children within the extended family, may discover that they have no rights against a child's other parent. Even though the other parent may not be a nurturing, stable person, relatives could find it impossible to challenge his or her fitness to raise the child. Many such potential difficulties can be anticipated and settled while the parent still is alive.

When a family is in crisis, it can be difficult for the social worker to raise the question of how the children will live if the parent cannot care for them. This process can be made easier for the family if lawyers and social workers have already developed a simple process for transferring custody of the children to another responsible adult. This guide will describe how to work with a lawyer to put together a legally secure plan to provide a permanent future home for the children of seriously ill parents.

Do Families Need Legal Support for Their Plans?

Families do not need legal support for every plan to assure their children's stable future. Most plans, however, do require some legal support, and a few plans may require a decision by a judge. Much of the pressure on a parent burdened with illness is lifted if the social worker and lawyer work out in advance a

simple process for each of the handful of options that the State's laws provide. The parent can describe to the social worker the children's needs, the social worker and lawyer can identify the legal strategy that best supports that plan, and the parent can easily see how the plan can become a reality.

What Are Standby Guardian Laws and Other Legal Options?

Every State has its own group of laws that permit transfer of guardianship authority from a parent to another adult. The laws in your State may be quite different than the laws of the neighboring States, however, the differences are mostly in the details. In a broad sense, most States have the same few ways that transfers can be made.

One way a transfer can occur is by **will**. A parent can specify that after death he or she wants a certain person to care for the children. A judge in a probate court (the court that has a responsibility to distribute a person's goods and rearrange his or her legal relationships after death) will weigh that request carefully, but ultimately will decide whether it is in the best interests of the children.

While a parent is alive, there are a number of ways a transfer of custody can occur. If a parent is sick, has to go out of town for a long while, or for some other reason will not be able to supervise her children, many States permit a **temporary transfer of authority** to another adult. In this case, the children often go to live with a relative or family friend who obtains a court order (often from the Clerk of the Court without having to go before a judge) that permits the guardian to enroll the children in school and obtain medical care for them. In some States these temporary orders are limited to 1 year, but are renewable.

Other ways custody transfers can occur are by **order of a family court judge**—for example, in the context of a neglect-abuse case or a divorce case. Sometimes these orders permit two or more people to be joint guardians or custodians and share child-raising tasks, as when divorcing adults have joint custody of their children. Foster parents for children report to a child welfare agency that retains legal authority over the children; the foster parents have physical custody and make day-to-day decisions.

One of the newest ways to transfer custody is through a **standby guardian** law. Many States developed their standby guardian law specifically to help families living with HIV that want to plan a legally secure future for their children. Most standby guardian laws have these features:

- A parent can designate a certain person whom she wishes to be guardian for her children.
- The guardianship can go into effect during the parent's lifetime and can continue in effect after death.
- The parent retains much control over the guardianship. She or he can decide when it will commence (although it can commence automatically if the parent becomes seriously ill or mentally incapacitated), and can withdraw the authority if the arrangement does not work to the parent's satisfaction.
- The parent shares decision-making responsibility with the guardian. During the parent's lifetime the guardian is expected to be in the background, coming to the fore when needed, stepping back when the parent is feeling well.
- The court order is backed by the authority of a court that has examined facts relating to this particular family.

Standby guardian laws tend to offer a combination of security for the children and flexibility for the parent. That extra authority that a standby guardian law evokes comes at a price: a judge usually will scrutinize the arrangements. Whenever that occurs, there always is the possibility that the judge will not agree with some detail, or that he or she may decide that further inquiry must be made—for example, as to the fitness of the designated guardian. This extra scrutiny is balanced by the finality of the decision: once the judge has pronounced the arrangements good, it is unlikely that any other judge will disturb the guardianship after the parent's death, without sufficient reason. (Sufficient reason might be death of the guardian or a valid claim to custody by another parent who is willing and able to care for the child.)

It is important to understand that it is not only standby guardians that are subject to a court's scrutiny. *Every* transfer of child custody can be examined by a judge. Whenever children are involved with the court, a judge may (and in many cases must) decide whether that action is in the best interests of the child. This includes designations of guardians in **wills**, **temporary transfers of custody** (even if the court order is just a form obtained from the Clerk of the Court), and obviously any **order of a family court judge** in a neglect-abuse or divorce case. Under a standby guardian law, the judge will likely examine the arrangement because it is intended to be long-term; whereas in a temporary transfer of guardianship, the court is less likely to look closely at the family's plan.

Let's see how a standby guardianship might work out in a typical case.

KATE'S PLAN

A mother, Kate, is quite ill; her HIV has progressed into AIDS. She has four children, two of whom share a father, and two of whom have different fathers. She expresses to her social worker that she wants her own mother and father to raise the children if she should die. The children already spend a lot of time with their maternal grandparents who live only two houses away, and they are comfortable there. Kate fears, however, that the father of Alisha, one of her children, will make a claim to raise all of the children. Kate is deeply opposed to this because Alisha's father is a minister in a church that she believes has strange rituals. He is strict and rigid with the children and they fear him. He has said he wants to bring all of the children to "Right Thinking." Kate is afraid the children would run away from him.

The social worker explains this to the lawyer, who recommends a standby guardianship for the maternal grandparents. Kate agrees to try this, so the lawyer and social worker show her a simple 1-page form. There is a blank space for her to write the name of her choice for a standby guardian. The form states that the guardianship will not become active until she gives her consent, becomes severely ill or mentally incapacitated, or dies. Kate's sister and the social worker watch her sign the form, and they sign as witnesses. The lawyer files this form with the Clerk of the Court (usually along with a "petition" that the lawyer drafts and signs), receives a date for a court hearing, and sends the notices of that hearing to each of the fathers.

On the day of the court hearing, Kate is too ill to come to court and the law permits her to be excused from an appearance. Two of the fathers do not come to court: one man is in prison, and one man sends a letter agreeing to the guardianship. Alisha's father comes and states that he opposes the guardianship and wants to raise all of the children himself. Kate's mother and father are questioned, and the two oldest children (ages 14 and 16) are asked their wishes. The judge approves the standby guardianship for the grandparents, citing the grandparents' stability, the children's wishes to live with them, and the proximity of the households, which will help to minimize disruption for the children. The judge emphasizes that he is not transferring custody of the children away from Kate. He assures Alisha's father that if Kate should die he will reconsider Alisha's situation, though he warns that it is unlikely that he would disturb the guardianship for the other three children.

After the order is issued, the family's life continues as it has until Kate becomes too ill to provide daily care for the children. The social worker tells the lawyer this fact, and the lawyer writes a letter to the judge, attaching a doctor's report and Kate's written consent. When the lawyer files these papers in court, the clerk makes a note of it and indicates that the guardianship is now active. The children split their time between Kate's and the grandmother's homes. On days when Kate is feeling well, she is consulted by the children and grandmother: she signs field-trip forms, decides whether Alisha can stay out past 11:00 p.m. on Friday night, helps her son with his math, and so forth. On Kate's bad days, grandmother does these things.

One sad day Kate passes on. The children now live full time with their grandparents. The social worker tells the lawyer of Kate's death, and the lawyer then files in court a notice of this along with Kate's death certificate. At the same time, the lawyer files a request that the grandparents be appointed the permanent guardians, and he (or the clerk) sends notice to each of the fathers. This time, none of the fathers respond, and the court issues the requested order.

The standby guardian law has done its work: security for the children and flexibility for the parent. (There is more information on standby guardian laws in Appendices C and D.)

Why Do Lawyers and Social Workers Approach Family Problems So Differently?

Social workers often wonder, “Why do lawyers put up so many obstacles to doing the right thing? Can’t they see the ‘greater good?’ Why can’t they work for the family’s happiness, instead of nit picking at good social service plans?” Here is why lawyers often appear to work in a way contrary to social workers. It has to do with **facts** and **ethics**.

A lawyer decides which law applies based on the **facts** of each case. For example, there are no general laws on permanency planning that apply to all families living with HIV. The law selected always depends on what is going on in a particular family. Has one parent been sentenced to prison for a long period of time? Does the family have a documented history of child neglect? Does the sister chosen as guardian live in a distant city? Does the grandmother have enough money to care for the children? Is the child an infant or a teenager? Depending on the facts, the advice that a lawyer gives will change. A simple plan is appropriate for the Smith family where the children know and feel comfortable with their grandmother. A very secure plan may be necessary to keep the Jones children together after their parent’s death because various fathers have made competing claims. Age matters: teenagers may be headed for independence, whereas a mother might want to consider having her newborn legally adopted.

The best way to work with a lawyer is to give him or her facts about the family, rather than conclusions about what should be done. Get in the habit of describing details of the home: Who lives there? How old are the children? What is the parent’s health and attitude? What is the financial situation? From your description of the family, the lawyer can figure out what legal problems are likely to occur. You may get a series of sharp questions as the lawyer begins to get the “picture” and focus on trouble spots: Does the parent own her house? (finances); Is the father in the army? (finances, benefits); Do the uncle and aunt want the children? (stability); Has the family ever been involved in a neglect-abuse case in court? (risk to family of break-up if they appear in court); Is the mother following a medical regimen? (timing of plans) Questioning often is an efficient way to get legal services identified. (Social workers know this, because they do the same thing when they make a social needs assessment of the family.)

Turning now to **ethics**: While requirements for social workers and lawyers have some elements in common (like confidentiality), there is a big difference in how these professionals are trained to relate to families. Social workers can look for services that promote the good of the whole family. They can protect young children, tell a mother that her plan for the children doesn't make sense, urge a father to seek treatment for substance abuse, or help a guardian grandfather apply for financial support.

Lawyers, on the other hand, are trained to relate to one person at a time. The lawyer's code of ethics (often called Rules of Professional Responsibility) require:

- Absolute confidentiality for information imparted to the lawyer (unless the client consents to share it).
- The obligation to work vigorously on a client's behalf.
- Avoidance of conflicts of interest.

Disciplinary committees take these ethical obligations very seriously; a lawyer can be suspended or expelled from practice for violating them.

That is why a parent's lawyer may, for example, argue vigorously in court to have a developmentally-delayed child enrolled in a strict academic school when it is apparent that the best plan is for the child to enter a special education program. The lawyer must promote the client's preferences, as long as they are not illegal. The parent's lawyer is under no obligation to point out flaws in his client's plan or promote the best plan. It is up to the child's representative, social worker, and the judge to note the problems. The judge's responsibility is to make a decision that furthers the best interests of the child.

It can be difficult to fulfill ethical requirements if a lawyer represents all of the people in a family. If a child tells the lawyer some vital fact—for example that he is terrified of an uncle that the mother wants as a guardian—the lawyer cannot tell the parent this without the child's consent. If the mother has formed a permanency plan that clearly is not in the child's best interests—e.g., her young, bachelor boyfriend is to become the guardian—the lawyer must nevertheless work to promote that plan, as long as it is not criminal or in violation of other laws. If the mother and father have conflicting plans for the children, and the lawyer develops legal support for only one of the plans, he has failed in his duty to vigorously represent the other parent.

So, lawyers can get confused when they are asked to represent an entire family. However, it's not a rare situation for them. Lawyers who practice in dependency court are often asked to represent all of the children in a family, even though one child may want to live with his siblings, while his brother wants to be independent. In many States, only one attorney is appointed to represent both parents in a neglect-abuse case. Moreover, teamwork and collaboration are becoming more prevalent in the legal world, for example, in drug courts. But the wise social worker will be aware that this is an uncomfortable situation for the lawyer. She will not be surprised when the lawyer asks, "Who is the client? The mother or the children?"

How Can Social Workers and Lawyers Best Work Together?

When you, as social worker, take on the task of helping families that are dealing with terminal or chronic progressive illnesses to make a plan for their children, you need to identify a reliable source for legal advice. It might be the local legal services agency. There might be an AIDS law group in the community. Arrangements can even be made with a private law firm to offer free legal services to your clients. (Lawyers are asked by their professional associations to give a certain percentage of their time to people who cannot afford to hire lawyers. Law firms sometimes find it convenient to dedicate the time of one or more lawyers to this counseling.)

Once you have that reliable source, you need to nurture the partnership so that you and the lawyer feel comfortable working together. For instance, you could develop some joint training on HIV issues so that the lawyer can become familiar with the social, medical, and cultural factors that families often face. There may be a conference that the two of you can attend together. Or you may invite local experts to talk to you during a series of brown-bag lunches. Invite the lawyer to describe to you and other social workers what are your State's legal options. Then the lawyer and you can draw up a process for working with families. There isn't just one way a social-legal team can work effectively—there are many ways. Here are two principles that you might wish to put at the center of your planning:

1. **The legal work that a parent must undertake should be as minimal and simple as possible.** The parent is under both physical and emotional stress. It can be impossible for a person in crisis to concentrate on long explanations and choose among many options. Simple 1-page forms that only need a name filled in and a signature are good. If a document needs to be notarized, discuss how that can be done with the least amount of travel and bureaucratic contact for the parent. (The law firm, social service agency, or local bank may have a notary.) Can the lawyer file required documents in the court so that the parent need not appear there? Aim to have a simple process for every legal option.
2. **The social worker should be the “front person” with the family, with the lawyer being the “quiet partner.”** Part of reducing stress to the family is limiting the number of people whom the parent in crisis must see to create the permanency plan. People may have had unpleasant encounters with the legal system—for example, in criminal or dependency court. The idea of talking to a lawyer can in itself be a barrier to completing a permanency plan. A good dynamic from the parent's point of view is for the social worker to scope out the facts and relay them to the lawyer, who of course will have additional questions to be answered. There may have to be several social-legal conversations. Then, when the options have been narrowed, the lawyer can bring the simple forms to be signed and answer any last minute questions. Some forms (like the orders giving an adult authority for school and medical decisions) can be presented by the social worker alone. (Be aware as you develop the process that not all lawyers will be able to accept a social worker intermediary between the lawyer and the person being counseled. A lawyer may interpret the ethics obligation for confidentiality to require direct contact with the parent.)

It is likely that the question of who the client is will arise as you develop the social-legal process. Is it the parent? Is it the children who will benefit from the permanency plan? Or is it, perhaps, the social worker (in situations where the lawyer has little or no contact with the parent). Remember: a lawyer usually needs to know who is being counseled, and on whose behalf he or she is vigorously advocating. It is an important question. A lawyer who represents the children in a family needs to be certain that the children understand which future living arrangements would be best for them. If the lawyer represents the parent, then that parent's plan—regardless of whether someone else has a better plan—will be given legal support. The answer is likely to be that it is the *parent* who is the client; it is the parent's plan for the children. The social worker will be counseling the parent to develop a practical plan that is most protective of the children. On the lawyer's side, largely by telephone and relayed through the social worker, advice will be provided on the legal strengths and weaknesses of various options.

Most parents want what is best for their children, and have a keen sense of what that is. With compassionate and skilled guidance from a social worker and lawyer, a solid plan for the children's future can become reality.

How Will the Team Approach Work in Practice?

In the course of supportive visits, the social worker naturally will seek an opening to discuss a parent's hopes and fears for the children. The parent won't know at the outset what legal plan is best for the children, but often knows what kind of home environment and up-bringing they should have, who is most likely to provide this for them, and who might threaten their security. For example, a common situation involves a mother or father who currently has custody of the children and wants them to be raised by a sister, brother, or grandparent.

RALPH'S PLAN

A father, Ralph, wants his three children to stay together as a family unit and fears that Janet, who is the mother of two of Ralph's children, will try to take her children if Ralph becomes incapacitated or dies. Ralph is strongly critical of Janet, whom he believes is still using heroin. Ralph's sister Antoinette has taken the children on some weekends when Ralph is tired, and has helped out in other ways. She says she would be willing to care for them permanently, if necessary. The social worker listening to all of this realizes that Ralph has identified *what kind* of home he wants for the children (all the children to live together, no parental drug use), *where* he wants them to live (with his sister), and *who* is most likely to threaten that (Janet). The social worker calls the lawyer with that information.

The lawyer makes an initial analysis, taking into consideration the **degree of security** necessary against the threat of Janet's intervention and the **degree of authority** the sister would need to successfully raise the children. A lawyer's analysis is always based on facts about particular people. For example, if Janet will be in prison for a long period of time, the degree of security needed against intervention may not be great. A temporary transfer of custody to Ralph's sister orders giving the sister authority to enroll the children in school and make medical decisions, and a guardian designation in Ralph's will may be a low-stress plan for Ralph that makes sense for the children as well. If, however, Janet has recovered from drug use, remarried, and is a wage earner with a stable home, Ralph might have to obtain a standby guardian order from the court, or make another, more secure appointment of his sister as guardian. It might even involve having to decide in court whether Janet is fit to raise the children. Once the lawyer makes this initial analysis, the social worker may decide to do more preparatory work with Ralph, explaining the options, and leading him to an open mind about the issues. The social worker may ask, "Leaving aside your personal feelings about Janet, what do you think would be the best plan for the children? Do the children know their mother and want to be with her? Is Janet sober and stable now? Does your sister have any backup support in the extended family? Does she have enough money to cover the children's expenses, or will outside funds have to be sought? How about your health? Do you want to share responsibility for the children with your sister, or do you want to be the adult in charge for as long as possible?"

When Ralph is ready to deal with some of these practical problems, it is time for the social worker to bring Ralph and the lawyer together. The lawyer will already know facts about this family from conversations with the social worker, and therefore will know the legal options. Ralph may be able to sign the simple 1-page form at the first meeting, or he may have additional questions for the lawyer, so that the three agree to complete paperwork in a week or two when he has made final decisions.

The dynamic to strive for is this: the main contact should be between the social worker and parent, with the lawyer being a provider of technical, professional services that will be as brief as the legal process allows.

Let's look at another common situation to see how this process works under different conditions.

MARIA'S and MIGUEL'S PLAN

Five children are being raised by Maria, but they have lots of contact with their father, Miguel. Miguel helps the family financially, and they often drop by his house on weekends and always go to an annual reunion of extended family members with him. Miguel says he wants the children to live with him when and if Maria can no longer care for them. Maria agrees that this is the best plan. Is any legal support necessary?

The social worker calls the lawyer and describes the family's situation. The lawyer believes that before the children can go to live with their father, some legal action may be necessary. The lawyer asks some questions: Has Miguel ever been found by a court of law to be unfit to raise the children? Is he the father of all the children? If not, are there other fathers who might have an equal claim to the children? Is it important to Maria that the children stay together?

The social worker takes these questions back to Maria, and a few days later calls the lawyer with the answers. If Maria says that Miguel is the father of all the children and a court has never found him unfit, then Miguel has a straightforward right to raise the children. No legal intervention is required. But life is seldom that simple. For example, all the children may call him "father" but Miguel may be the birth father of only one of the children. It may be that the family of another father has expressed a claim to some of the children in past years.

The lawyer may then advise the social worker that some legal support will be necessary to keep the children together if Maria becomes unable to care for them. This State does not have a standby guardian law. The most legally secure arrangements are joint guardianship that would permit Maria and Miguel to share upbringing and decisions, or permanent guardianship that would shift authority entirely over to Miguel. Maria and Miguel decide that joint guardianship is very close to what they now have. With a joint guardianship court order in hand, transfer of permanent custody of all the children to Miguel after Maria's death is more likely, particularly if the issue of fitness of the other fathers is dealt with in the court hearing. In this way the lawyer assesses the **amount of security** necessary to keep the family together, and the **amount of authority** the father will need. Maria and Miguel then decide whether they have the energy and will to proceed with a court hearing so that the children's futures will be secure.

Sometimes it is unbearable for a parent to think about his or her children's futures. The parent may be blocked by feelings of anger toward the person who would be the most capable caretaker. Or the parent may fear that appearing in court to resolve questions about the other parent's fitness will just encourage the judge to take away the children. In these cases, the social worker has the challenging job of convincing the parent that taking no action is, in fact, taking action. If a parent makes no plan for the children's future, there is likely to be a court hearing after death. A judge will decide what is best for the

children. In some cases where there are no obvious guardians, the children may go into foster care. At that point, there are no guarantees that the children will stay together.

There are unusual situations where a parent cannot risk a court appearance for the sake of the most stable plan for the children. Camille faced such a situation.

CAMILLE'S PLAN

Camille, her companion Jake, and her two daughters were the subjects of a neglect-abuse case two years ago. Jake was suspected of abusing one of the girls, and the court ordered him out of the home. When closing the case, the judge said to Camille, "You have shown terrible judgment in permitting that man into your life. Be more careful in the future. I never want to see you or these poor children in court again."

Camille cut off her relationship with Jake. Now that she has discovered her rapidly progressing illness, she has decided that when she is unable to care for the children, her best friend Tanya should step into her place. Although the lawyer advises her that a standby guardianship for Tanya would be the most secure for the children, Camille cannot bear to go back into court. "No way will I go into that judge's courtroom. That judge will take my kids!" In Camille's small town, there are only two judges to hear all cases, so it is quite likely that she would appear before the same judge.

In view of Camille's resistance, the social worker and lawyer move on to a second-best plan. Camille signs a form that designates Tanya as her choice for guardian. The lawyer keeps this, in case Camille changes her mind about going into court. Under this State's standby guardian law, the lawyer and Tanya can present the designation along with a petition requesting guardianship after Camille becomes incapacitated or dies. Alternatively, the designation can be presented like a will, and although the judge will make the final decision, he will know Camille's wishes and can take them into consideration. Meanwhile, a short-term guardianship usually can be created without a full court hearing. In addition, the Clerk of the Court can issue orders giving Tanya authority to make medical decisions and enroll the children in school.

Legal support for Camille's plan thus proceeds in stages: first a simple signed and witnessed designation of guardian. That designation becomes the basis for either a later court hearing or a will. The designation is supplemented as necessary by other orders.

Camille's children may not have the highest degree of security in their future living arrangements, but sometimes it is the best that the parent can do. You could almost say that this is a description of "the best legal plan": one that provides the most security for the children, while minimizing stress to the parent.

Conclusion

It is essential that a seriously ill parent make a plan for the children's futures—a plan that is as secure and permanent as possible *under the circumstances*. The circumstances include the amount of time the parent has for planning and the amount of stress that planning will cause.

One way to reduce the stress is for a lawyer-social worker team to develop a simple process for every plan that needs legal support. Development of these processes usually requires the social worker to:

- Identify the lawyers who will provide legal advice.
- Agree on how to work as a team, usually with the social worker as a “front person,” and the lawyer as a “quiet partner.”
- Develop with the lawyer a simple 1-page form for each of the 5 or 6 legal tools that can support a plan. A typical plan would include one or two of the following:
 - ◆ a **will**
 - ◆ a request for **orders to permit another adult to obtain medical care and school enrollment for the children**
 - ◆ a request for **temporary transfer of guardianship** from the parent to another adult
 - ◆ designation of a **standby guardian**
 - ◆ **standby adoption.**

Becoming an effective team will require the lawyer and social worker to educate themselves about relevant medical issues, applicable laws, and the cultural characteristics of people in the community. This can be a stimulating activity. Ways to build the team's strength include inviting experts to talk to you during brown-bag lunches; visiting hospitals, hospices, and court; and attending relevant conferences together.

Flexibility is a good quality to develop. While the aim is always to achieve the most secure and permanent plan for the children, that goal often may only be reached in stages. In some cases, time and circumstances permit only a will or temporary transfer of authority. However, if a parent can only accept one of the least secure legal strategies, the team should continue to encourage the family to strengthen the plan, as time permits.

APPENDIX A

A Social Worker's Checklist on Laws and Lawyers

A Social Worker's Checklist on Laws and Lawyers

_____ **Do you have a reliable source of legal advice?**

Name: _____

Telephone: _____

Fax: _____

E-mail: _____

Legal Services

AIDS Law

Private Law Firm

Individual Attorney

Other

_____ **Are you familiar with the legal options available?**

Which laws does your State have?

Wills

Power of Attorney

Orders for enrollment of child in school and medical care

Time-limited guardianships (e.g., 1 year)

Permanent guardianship

Subsidized guardianship

Joint guardianship

Standby guardianship

Standby adoptions

Other

_____ **What kind of association will you have with the lawyer?**

Working in the same office

Social worker on call

Lawyer on call

Office-to-office contractual agreement (e.g., hospital clinic refers all legal issues to Legal Aid Office)

Other

Have the lawyer and you agreed on a process for responding to the family's legal needs?

Determine availability for telephone consultation

Develop simple printed forms for every legal option

Decide who is responsible for initial client contact

Decide where and how legal consultations will take place

Decide who files documents in court

Other

As a lawyer-social worker team, on which subjects will you educate yourselves?

HIV/AIDS medical issues

HIV/AIDS psychosocial issues

Characteristics of other chronic, progressive diseases (e.g., tuberculosis, Hepatitis C)

Community Resources

Cultural Strengths and Barriers

Legal Options

Permanency Planning for Children

Other

Have you arranged joint training to fill in the knowledge gaps?

Lunch-time speakers

Visits to courts, hospitals, hospices, etc.

Interdisciplinary training (lawyers, nurses, social workers, judges, etc.)

Conferences

Other

APPENDIX B

Some Programs with Lawyer-Social Worker Teams

Programs

Brooklyn Legal Services, Corp. B., 105 Court Street, Brooklyn, NY 11201. (718) 237-5546.

Dade County Legal Aid, 123 N.W. First Ave., Miami, FL 33137. (305) 579-1024.

Family Advocacy, Care and Education Services (FACES), Children's Hospital, 3308 Tulane Ave., Suite 600, 6th Floor, New Orleans, LA 70119. (504) 821-4611.

The Family Center, 75 East 7th Street, New York, NY 10003. (212) 766-4522.

Family Ties Project, Consortium for Child Welfare, 300 I Street N.E., Suite 106, Washington, DC. 20002-4389. (202) 547-3349.

Gay Men's Health Crisis, Inc., 129 West 20th Street, New York, NY 10011-0022. (212) 337-3504.

Legal Services for Children, 1243 Market Street, 3rd Floor, San Francisco, CA 94102. (415) 863-3762.

LSC and Associates, 53 West Jackson Blvd., Suite 409, Chicago, IL 60604. (312) 786-9255.

Volunteers of America, 9 Vassar Street, Poughkeepsie, NY, 12601. (914) 485-1849.

Publications Describing Collaboration Between Social Workers and Lawyers

Brooklyn Legal Services, Corp. B. and Gay Men's Health Crisis. Facing the Future: A Legal Handbook for Parents with HIV Disease. (Available from Gay Men's Health Crisis, 212-337-3504.)

Retkin, Randye; Stein, Gary L.; Draimin, Barbara Hermie. *Attorneys and Social Workers Collaborating in HIV Care: Breaking New Ground*, 24 Fordham Urb. L. J. 533 (Spring, 1997).

Selbin, Jeffrey; Del Monte, Mark. A Waiting Room of Their Own: The Family Care Network as a Model for Providing Gender-Specific Legal Services to Women with HIV, 5 Duke J. of Gender L. & Policy 103 (Spring, 1998).

Taylor-Brown, Susan; Teeter, Judith Ann; Blackburn, Evelyn; Oinen, Linda; and Weddrburn, Lennard. 1998. Parental loss due to HIV: caring for children as a community issue—the Rochester New York experience. *Child Welfare League of America*. 77(2) (March/April). 137–161.

APPENDIX C

States That Have Standby Guardian Laws as of September 1999

Principal Legal Citations to State Standby Guardian Laws

As of March 1, 2000

Arkansas	Arkansas Code of 1987 Annotated, sec. 28-65-221
California	California Probate Code, sec. 2105
Connecticut	Connecticut General Statutes Annotated; Probate Courts and procedures, sec. 45a-624(a)-(g)
Florida	Florida Statutes Annotated, sec. 744.304; 744.3046
Illinois	Smith-Hurd Illinois Compiled Statutes Annotated, 5/11-5.3
Iowa	Iowa Code Annotated, sec. 633.560; 633.591A
Maryland	Annotated Code of Maryland, sec. 13-901 through 13-907
Massachusetts	Massachusetts General Laws Annotated, sec. 201-2B through 201-2G
Nebraska	Nebraska Revised Statutes of 1943, sec.30-2601, 30-2611, 30-2613, 30-2601; 30-2611; 30-2613; 30-2614
New Jersey	New Jersey Statutes Annotated, sec. 3B:12-72 through 3B:12-77
New York	McKinney's Consolidated Laws of New York Annotated, Surrogate's Procedure Act, sec. 1726
North Carolina	General Statutes of North Carolina, sec. 35A-1370 through 35A-1382
Ohio	Ohio Revised Code, Commercial, sec. 1337.09(B); Probate, sec. 2111.02, 211.042, 2111.12, 2111.121, 2111.13
Pennsylvania	Pennsylvania Consolidated Statutes Annotated, Title 23 Domestic Relations, Chapter 56 Standby Guardian Act, sec 23-5602; 23-5611; 23-5612; 23-5613; 23-5614
Virginia	Code of Virginia, Juvenile, sec. 16.1-349 through 16.1-354
West Virginia	West Virginia Code Annotated, sec. 44A-5-1 through 44A-5-8
Wisconsin	Wisconsin Statutes Annotated, Children's Code, sec. 48.978
Wyoming	Wyoming Statutes (1985 & Supp 1995), Probate sec. 3-2-101; 3-2-104; 3-2-108; 3-2-201; 3-3-301 through 3-3-305

APPENDIX D

Common Elements of Standby Guardian Laws

Common Elements of Standby Guardian Laws

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, 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 that 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, PA, and WY do not limit use of standby guardianships to those who can show initially that they are very sick.

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.

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

- Major Variation: In IL, 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 Variations: FL: Incapacity or death are the only bases for standby guardianship.
- IL, MA: Parent’s inability to make day-to-day decisions for the child activates guardianship.
- CT, IA, OH, and WY permit addition of triggering events other than illness and death.

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.

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: Only State to specify a standard of "reasonable efforts" in the law.

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.

Variation: CA: There is no triggering event. Guardian duties are assumed as soon as the court appointment is made.

B. 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, IL, MD, MA, 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, 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: CT, IA, OH and WY: Law is silent on concurrent decision-making.

FL: Standby guardianship is activated only after parent is incapacitated (as determined by a committee of experts) 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. 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: 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 interest factors are listed in family code and in case law referenced in the probate code.

AK: Probate laws silent on best interests standard.

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

Major Variation: In some States a parent can choose between 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 two tracks in sense that it has two laws. Under one law, a hearing occurs when designating document is filed; under other law, it does not occur until after triggering event.

Other Variations: 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.

C. The guardianship can be confirmed officially only after evidence is filed with the court that the triggering event or condition has occurred.

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

CT, IA, NE, and OH: No court process for approval is stated.

NY (including NC, PA, and WI): In States following New York model of a two-track process, a full hearing would occur at this post-triggering event stage for persons choosing a late-filing strategy.

VA and WV permit designating document to be filed any time, even after triggering event. Thus, a full hearing would come when filing occurred, possibly at this stage.

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.

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

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

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

CA: Joint guardianship is permanent as soon as established.

PA: Specifically states that standby guardianship will be permanent.

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.

APPENDIX E

Exercises

Exercises

Form a lawyer-social worker team. (There must be one lawyer in each team; there may be more than one social worker.)

1. Each person on the team describes to the others how they meet clients that have family issues.
 - Where do you meet them? In their homes? In the hospital? In your office?
 - Who are they? People who come for medical treatment? People who know they have family issues?
2. Each team will develop a strategy for permanency planning with parents and children. (Assume that each member of the team will remain in your current employment, and that your agency has a contract for legal consultation.)
 - How will the social worker meet the family?
 - How will the social worker reach the lawyer?
 - When will the lawyer meet the family?
3. Using the following checklist, ask the lawyer to describe which of these legal tools are available in your State:
 - Wills
 - Power of attorney
 - Orders for enrollment of a child in school and/or medical care
 - Time-limited guardianship
 - Permanent guardianship
 - Subsidized guardianship
 - Joint guardianship
 - Standby guardianship
 - Standby adoption
 - Other
4. Select a case study (attached) and role-play the developing relationship between the social worker, lawyer, and client.
 - **First social worker/lawyer conversation about this client:** social worker explains facts (as outlined in the case study) and lawyer poses questions that must be answered by the client.
 - With a third person, role-play the subsequent **conversation between the social worker and client** to answer the lawyer's questions.

- Role-play the **second conversation between the social worker and lawyer** during which the two of you develop legal options for the client.
- Role-play the **first three-way conversation between the lawyer, social worker, and client**, during which the client selects a strategy and the lawyer explains how it will all work.

Case Studies

1. KATE'S PLAN

A mother, Kate, is quite ill; her HIV has progressed into AIDS. She has four children, two of whom share a father, and two of whom have different fathers. She expresses to her social worker that she wants her own mother and father to raise the children if she should die. The children already spend a lot of time with their maternal grandparents who live only two houses away, and they are comfortable there. Kate fears, however, that the father of Alisha, one of her daughters, will make a claim to raise all of the children. Kate is deeply opposed to this because Alisha's father is a minister in a church that she believes has strange rituals. He is strict and rigid with the children and they fear him. He has said that he wants to bring all of the children to "Right Thinking." Kate is afraid the children would run away from him.

2. RALPH'S PLAN

A father, Ralph, is raising his three children, working to support the family, and also receiving medical treatment for HIV. If he should become incapacitated or die, he wants his children to stay together as a family unit. Ralph fears that Janet, the mother of two of the children, will try to take her children. Ralph is strongly critical of Janet, whom he believes is still using heroin. Ralph's sister Antoinette has taken the children on some weekends when Ralph is tired, and has helped out in other ways. Antoinette is single, has a job as a schoolteacher, and has a comfortable house. She says she would be willing to care for the children permanently, if necessary.

3. MARIA'S AND MIGUEL'S PLAN

Maria is raising five children, but they have lots of contact with Miguel. The children consider Miguel to be their father, even calling him "Father," though he is, in fact, the biological parent of only one of the children. The two other fathers have no contact at all with the family; one is in prison serving a long-term sentence and the other has disappeared. Miguel helps the family financially, and the children often drop by his house on weekends and always go to an annual reunion of extended family members with him. Miguel says he wants the children to live with him when and if Maria can no longer care for them. Maria agrees that this is the best plan.

4. CAMILLE'S PLAN

The father of Camille's two daughters, to whom Camille was married, died 8 years ago. Subsequently, Camille and her daughters lived with Jake. Camille, Jake, and her two daughters were subjects of a neglect-abuse case 2 years ago. Jake was suspected of abusing one of the girls, and the court ordered him out of the home. When closing the child abuse case, the judge said to Camille, "You have shown terrible judgement in permitting that man into your life. Be more careful in the future. I never want to see you or these poor children in court again."

Camille cut off all relationship with Jake. Now that she has discovered her rapidly-progressing illness, she has decided that when she is unable to care for the children, her best friend Tanya should step into her place. She is worried, however, that the paternal grandparents, who maintain a keen interest in the children, will intervene. Camille doesn't feel that she can go to court again to settle the issue. In Camille's small town, there are only two judges to hear all the cases, so it is quite likely that she would appear before the same judge that heard the neglect-abuse case. Camille fears, "That judge will take my kids!"