

STATE OF NEW YORK

6217

2017-2018 Regular Sessions

IN SENATE

May 11, 2017

Introduced by Sen. SAVINO -- read twice and ordered printed, and when printed to be committed to the Committee on Judiciary

AN ACT to amend the surrogate's court procedure act, in relation to the appointment of a standby guardian due to administrative separation

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

1 Section 1. Section 1726 of the surrogate's court procedure act, as
2 amended by chapter 632 of the laws of 2003, paragraph (c) of subdivision
3 3 and paragraph (e) of subdivision 4 as amended by chapter 71 of the
4 laws of 2007, is amended to read as follows:

5 § 1726. Standby guardians

6 1. For the purpose of this section:

7 (a) "Standby guardian" means (i) a person judicially appointed pursu-
8 ant to subdivision three of this section as standby guardian of the
9 person and/or property of an infant whose authority becomes effective
10 upon the incapacity [~~or~~], administrative separation, or death of the
11 infant's parent, legal guardian, legal custodian or primary caretaker or
12 upon the consent of the parent, legal guardian, legal custodian or
13 primary caretaker; and (ii) a person designated pursuant to subdivision
14 four of this section as standby guardian whose authority becomes effec-
15 tive upon the death [~~or~~], administrative separation, or incapacity of
16 the infant's parent, legal guardian, legal custodian or primary caretak-
17 er or upon the debilitation and consent of the parent, legal guardian,
18 legal custodian or primary caretaker.

19 (b) "Legal guardian" means the court-appointed guardian of the
20 infant's person and/or property.

21 (c) "Attending physician" means the physician who has primary respon-
22 sibility for the treatment and care of the infant's parent, legal guard-
23 ian, legal custodian or primary caretaker. Where more than one physician
24 shares such responsibility, or where a physician is acting on the
25 attending physician's behalf, any such physician may act as the attend-

EXPLANATION--Matter in italics (underscored) is new; matter in brackets
[-] is old law to be omitted.

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1 ing physician pursuant to this section. Where no physician has such
2 responsibility, any physician who is familiar with the parent's, legal
3 guardian's, legal custodian's or primary caretaker's medical condition
4 may act as the attending physician pursuant to this section.

5 (d) "Debilitation" means a chronic and substantial inability to care
6 for one's dependent infant, as a result of (i) a progressively chronic
7 or irreversibly fatal illness, or (ii) a physically debilitating
8 illness, disease or injury. "Debilitated" means the state of having a
9 debilitation.

10 (e) "Incapacity" means a chronic and substantial inability, as a
11 result of mental impairment, to understand the nature and consequences
12 of decisions concerning the care of one's dependent infant, and a conse-
13 quent inability to care for such infant. "Incapacitated" means the state
14 of having an incapacity.

15 (f) "Administrative separation" means a parent, legal guardian, legal
16 custodian or primary caretaker's (i) arrest, detention, incarceration,
17 removal and/or deportation, in connection with a federal immigration
18 matter; or (ii) receipt of official communication by federal, state, or
19 local authorities regarding immigration enforcement which gives reason-
20 able notice of a suspension of responsibilities such that care and
21 supervision of the child by the parent, legal guardian, legal custodian,
22 or primary caretaker will be interrupted or cannot be provided.

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

25 3. (a) A petition for the judicial appointment of a standby guardian
26 of the person and/or property of an infant pursuant to this subdivision
27 may be made only by a parent, a legal guardian of the infant or a legal
28 custodian of the infant; or where the infant is not residing with a
29 parent, legal guardian or legal custodian and, to the satisfaction of
30 the court, such parent, legal guardian or legal custodian cannot be
31 located with due diligence, the primary caretaker of such infant may
32 petition for a judicial appointment of such standby guardian. Applica-
33 tion for standing to petition as a primary caretaker shall be upon
34 motion to the court upon notice to such parties as the court may direct.

35 (b) A petition for the judicial appointment of a standby guardian of
36 an infant shall, in addition to meeting the requirements of section
37 seventeen hundred four of this article:

38 (i) State whether the authority of the standby guardian is to become
39 effective upon the petitioner's incapacity, upon the petitioner's death,
40 or upon the petitioner's administrative separation and, if consent is
41 required pursuant to the provisions of subdivision seven of this
42 section, the petitioner's consent to the commencement of the standby
43 guardian's authority, upon the petitioner's consent, or upon whichever
44 occurs first;

45 (ii) State that the petitioner suffers from (A) a progressively chron-
46 ic illness [~~or~~]; (B) an irreversibly fatal illness and the basis for
47 such statement, such as the date and source of a medical diagnosis,
48 without requiring the identification of the illness in question, or (C)
49 state that the petitioner may become subject to administrative sepa-
50 ration and the basis for such statement.

51 (c) Upon a petition for the judicial appointment of a standby guardian
52 of an infant pursuant to paragraph (a) of this subdivision or for the
53 judicial appointment of a guardian pursuant to paragraph (d) of subdivi-
54 sion four of this section, the court shall conduct a hearing. The court
55 may in its discretion dispense with a hearing for the appointment of a
56 standby guardian, and may in its discretion appoint a guardian ad litem

1 or an attorney for the infant to recommend whether the appointment of a
2 standby guardian as proposed in the application is in the best interest
3 of the infant.

4 (d) (i) If the court finds that the petitioner suffers from a progres-
5 sively chronic illness or an irreversibly fatal illness, or finds that
6 the petitioner may become subject to administrative separation, and that
7 the interests of the infant will be promoted by the appointment of a
8 standby guardian of the person and/or property it must make a decree
9 accordingly.

10 (ii) Such decree shall specify whether the authority of the standby
11 guardian is effective upon the receipt of a determination of the
12 petitioner's incapacity, upon the receipt of the certificate of the
13 petitioner's death, or other such evidence of death that may be satis-
14 factory to the court, or upon the receipt of documentation of the
15 petitioner's administrative separation, and if consent is required
16 pursuant to the provisions of subdivision seven of this section, receipt
17 of the petitioner's consent to the commencement of the standby guardi-
18 an's authority, or upon whichever occurs first[~~, and~~]. The decree shall
19 also provide that the authority of the standby guardian may earlier
20 become effective upon written consent of the parent pursuant to subpara-
21 graph [~~(iii)~~] (iv) of paragraph (e) of this subdivision.

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

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

35 (ii) Where the decree provides that the authority of the standby guar-
36 dian is effective upon receipt of a certificate of the petitioner's
37 death, or other such evidence of death that may be satisfactory to the
38 court, the standby guardian's authority shall commence upon the standby
39 guardian's receipt of a certificate of death, or other such evidence of
40 death as may be specified in the decree. The standby guardian shall file
41 the certificate of death, or other such evidence of death, with the
42 court that issued the decree within ninety days of the date of the
43 petitioner's death or the standby guardian's authority may be rescinded
44 by the court.

45 (iii) Where the decree provides that the authority of the standby
46 guardian is effective upon the standby guardian's receipt of documenta-
47 tion of the petitioner's administrative separation, the standby guardi-
48 an's authority shall commence upon the standby guardian's receipt of
49 documentation of the petitioner's administrative separation pursuant to
50 subdivision seven of this section, and if consent is required pursuant
51 to the provisions of subdivision seven of this section, receipt of the
52 petitioner's consent to the commencement of the standby guardian's
53 authority. The standby guardian shall file the documentation of adminis-
54 trative separation with the court that issued the decree within ninety
55 days of the date of the standby guardian's receipt of documentation of

1 the petitioner's administrative separation or the standby guardian's
2 authority may be rescinded by the court.

3 [~~(iii)~~] (iv) Notwithstanding subparagraphs (i) and (ii) of this para-
4 graph, a standby guardian's authority shall commence upon the standby
5 guardian's receipt of the petitioner's written consent to such commence-
6 ment, signed by the petitioner in the presence of two witnesses at least
7 eighteen years of age, other than the standby guardian, who shall also
8 sign the writing. Another person may sign the written consent on the
9 petitioner's behalf and at the petitioner's direction if the petitioner
10 is physically unable to do so, provided such consent is signed in the
11 presence of the petitioner and the witnesses. The standby guardian shall
12 file the written consent with the court that issued the decree within
13 ninety days of the date of receipt of such written consent or the stand-
14 by guardian's authority may be rescinded by the court.

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

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

24 4. (a) A parent, a legal guardian, a legal custodian, or primary care-
25 taker under the circumstances described in paragraph (a) of subdivision
26 three of this section or under circumstances described in subparagraph
27 (i) of paragraph (b) of this subdivision may designate a standby guardi-
28 an by means of a written designation, signed by the parent, legal guard-
29 ian, legal custodian or primary caretaker in the presence of two
30 witnesses at least eighteen years of age, other than the standby guardi-
31 an, who shall also sign the writing. Another person may sign the written
32 designation on the parent's, legal guardian's, legal custodian's or
33 primary caretaker's behalf and at the parent's, legal guardian's, legal
34 custodian's or primary caretaker's direction if the parent, legal guard-
35 ian, legal custodian or primary caretaker is physically unable to do so,
36 provided the designation is signed in the presence of the parent, legal
37 guardian, legal custodian or primary caretaker and the witnesses.

38 (b) (i) A designation of a standby guardian shall identify the parent,
39 legal guardian, legal custodian or primary caretaker, the infant and the
40 person designated to be the standby guardian, and shall indicate that
41 the parent, legal guardian, legal custodian or primary caretaker intends
42 for the standby guardian to become the infant's guardian in the event
43 the parent, legal guardian, legal custodian or primary caretaker either:
44 (A) becomes incapacitated; (B) becomes debilitated and consents to the
45 commencement of the standby guardian's authority; [~~or~~] (C) becomes
46 subject to an administrative separation and, if consent is required
47 pursuant to the provisions of subdivision seven of this section,
48 consents to the commencement of the standby guardian's authority; or (D)
49 dies prior to the commencement of a judicial proceeding to appoint a
50 guardian of the person and/or property of an infant.

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

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

55 Designation of Standby Guardian

1 (NOTE: As used in this form, the term "parent" shall include a
2 parent, a court-appointed guardian of an infant's person or proper-
3 ty, a legal custodian, or a primary caretaker, and the term
4 "child(ren)" shall include the dependant infant of a parent, court-
5 appointed guardian, legal custodian or primary caretaker

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

9 (You may, if you wish, provide that the standby guardian's
10 authority shall extend only to the person, or only to the
11 property, of your child, by crossing out "person" or "proper-
12 ty", whichever is inapplicable, above.)

13 The appointment of _____ as the standby guardian of
14 the person and property of my child(ren) would be in the best
15 interests of my child(ren) because: (Insert justification for
16 appointment of this person as the standby guardian)
17 _____
18 _____

19 The standby guardian's authority shall take effect: (1) if
20 my doctor concludes in writing that I am mentally incapaci-
21 tated, and thus unable to care for my child(ren); (2) if my
22 doctor concludes in writing that I am physically debilitated,
23 and thus unable to care for my child(ren) and I consent in
24 writing, before two witnesses, to the standby guardian's
25 authority taking effect; (3) If I become subject to an admin-
26 istrative separation such that care and supervision of the
27 child will be interrupted or cannot be provided; or [~~(iii)~~]
28 (4) upon my death.

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

33 I also understand that my standby guardian's authority will
34 cease [~~sixty~~ ninety days after commencing unless by such date
35 he or she petitions the court for appointment as guardian.

36 I understand that I retain full parental, guardianship,
37 custodial or caretaker rights even after the commencement of
38 the standby guardian's authority, and may revoke the standby
39 guardianship at any time.

40 Signature: _____

41 Address: _____

42 Date: _____

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

48 Witness' Signature: _____

49 Address: _____

50 Date: _____

51 Witness' Signature: _____

52 Address: _____

53 Date: _____

54 (iv) Notwithstanding paragraphs (a) and (b) of this subdivision, a
55 designation of standby guardian shall be effective as if made in accord-
56 ance with the requirements of this subdivision if it was validly made:

1 (a) where the parent, legal guardian, legal custodian or primary care-
2 taker was domiciled at the time it was executed; (b) in the jurisdiction
3 where it was executed or (c) where the parent, legal guardian, legal
4 custodian or primary caretaker is domiciled at the time the designation
5 becomes effective.

6 (c) The authority of the standby guardian under a designation shall
7 commence upon either: (i) the standby guardian's receipt of a copy of a
8 determination of incapacity made pursuant to subdivision six of this
9 section; (ii) the standby guardian's receipt of (A) a copy of a determi-
10 nation of debilitation made pursuant to subdivision six of this section
11 and (B) a copy of the parent's, legal guardian's, legal custodian's or
12 primary caretaker's written consent to such commencement, signed by the
13 parent, legal guardian, legal custodian or primary caretaker in the
14 presence of two witnesses at least eighteen years of age, other than the
15 standby guardian, who shall also sign the writing. Another person may
16 sign the written consent on the parent's, legal guardian's, legal custo-
17 dian's or primary caretaker's behalf and at the parent's, legal guardi-
18 an's, legal custodian's or primary caretaker's direction if the parent,
19 legal guardian, legal custodian or primary caretaker is physically
20 unable to do so, provided such consent is signed in the presence of the
21 parent, legal guardian, legal custodian or primary caretaker and the
22 witnesses; (iii) an administrative separation or [~~(iii)~~] (iv) the stand-
23 by guardian's receipt of a certificate of death, funeral home receipt or
24 other such document indicating that the parent, legal guardian, legal
25 custodian or primary caretaker has died. The standby guardian shall file
26 a petition pursuant to paragraph (d) of this subdivision within [~~sixty~~
27 ninety] days of the date of its commencement pursuant to this paragraph
28 or such standby guardian's authority shall cease after such date, but
29 shall recommence upon such filing.

30 (d) The standby guardian may file a petition for appointment as guard-
31 ian after receipt of either: (i) a copy of a determination of incapacity
32 made pursuant to subdivision six of this section; or (ii) (A) a copy of
33 a determination of debilitation made pursuant to subdivision six of this
34 section and (B) a copy of the parent's, legal guardian's, legal custo-
35 dian's or primary caretaker's written consent, pursuant to paragraph (c)
36 of this subdivision; [~~or~~] (iii) documentation of an administrative sepa-
37 ration; or (iv) a certificate of death, or other such evidence of death
38 that may be satisfactory to the court. Such petition must, in addition
39 to meeting the requirements of section seventeen hundred four of this
40 article:

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

43 (ii) append a copy of: (A) the determination of incapacity of the
44 parent, legal guardian, legal custodian or primary caretaker; or (B) the
45 determination of debilitation and the parental, guardian's, custodian's
46 or caretaker's consent; [~~or~~] (C) documentation of an administrative
47 separation; or (D) a copy of the parent's, legal guardian's, legal
48 custodian's or primary caretaker's death certificate, or other such
49 evidence of death that may be satisfactory to the court; and

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

54 (e) Subject to the provisions of paragraph (c) of subdivision three of
55 this section, if the court finds that the petitioner was duly designated
56 as standby guardian, that the parent, legal guardian, legal custodian or

1 primary caretaker of the infant is (i) incapacitated, (ii) debilitated
2 and consents, (iii) has become subject to an administrative separation,
3 or (iv) has died, as established by a copy of a death certificate or
4 other such evidence of death as may be satisfactory to the court, that
5 the interests of the infant will be promoted by the appointment of a
6 standby guardian of the person and/or property, and that, if the peti-
7 tion is by a person designated as alternate standby guardian, the person
8 designated as standby guardian is unwilling or unable to act as standby
9 guardian, it must make a decree accordingly. Prior to making its find-
10 ing, the court may, in its discretion, appoint an attorney for the
11 infant to recommend whether the appointment of the standby guardian as
12 proposed in the petition is in the best interests of the infant.

13 (f) The parent, legal guardian, legal custodian or primary caretaker
14 may revoke a standby guardianship created under this subdivision: (i) by
15 executing a subsequent designation of guardianship pursuant to para-
16 graphs (a) and (b) of this subdivision, or (ii) notwithstanding the
17 provisions of sections seventeen hundred ten and seventeen hundred elev-
18 en of this article, in the case of a standby guardian whose authority
19 becomes effective upon the death of the parent, legal guardian, legal
20 custodian or primary caretaker of the infant, by a subsequent desig-
21 nation of standby guardian set forth in a will of the parent, legal
22 guardian, legal custodian or primary caretaker, or (iii) by notifying
23 the standby guardian verbally or in writing or by any other act evidenc-
24 ing a specific intent to revoke the standby guardianship prior to the
25 filing of a petition. Where the petition has already been filed, by
26 executing a written revocation, filing it with the court where the peti-
27 tion was filed, and promptly notifying the standby guardian of the revo-
28 cation.

29 5. The standby guardian may also file a petition for appointment as
30 guardian in any other manner permitted by this article or article six of
31 the family court act, on notice to the parent, legal guardian, legal
32 custodian or primary caretaker and may append a designation of standby
33 guardian to the petition for consideration by the court in the determi-
34 nation of such petition.

35 6. (a) A determination of incapacity or debilitation must: (i) be made
36 by the attending physician to a reasonable degree of medical certainty;
37 (ii) be in writing; and (iii) contain the attending physician's opinion
38 regarding the cause and nature of the parent's, legal guardian's, legal
39 custodian's or primary caretaker's incapacity or debilitation as well as
40 its extent and probable duration. The attending physician shall provide
41 a copy of the determination of incapacity or debilitation to the standby
42 guardian, if the standby guardian's identity is known to the physician.

43 (b) If requested by the standby guardian, an attending physician shall
44 make a determination regarding the parent's, legal guardian's, legal
45 custodian's or primary caretaker's incapacity or debilitation for
46 purposes of this section.

47 (c) The standby guardian shall ensure that the parent, legal guardian,
48 legal custodian or primary caretaker is informed of the commencement of
49 the standby guardian's authority as a result of a determination of inca-
50 pacity and of the parent's, legal guardian's, legal custodian's or
51 primary caretaker's right to revoke such authority promptly after
52 receipt of the determination of incapacity, provided there is any indi-
53 cation of the person's ability to comprehend such information.

54 7. Documentation of an administrative separation shall consist of
55 either (a) an administrative or judicial order; or (b) an affidavit or
56 affirmation indicating that the parent, legal guardian, legal custodian

1 or primary caretaker has been (i) arrested, detained, incarcerated,
2 deported and/or removed, in connection to a federal immigration matter
3 or (ii) has received an official communication by federal, state, or
4 local authorities regarding immigration enforcement which gives reason-
5 able notice of a suspension of responsibilities such that care and
6 supervision of the child by the parent, legal guardian, legal custodian,
7 or primary caretaker will be interrupted or cannot be provided and is
8 accompanied by written consent of the parent, legal guardian, legal
9 custodian, or primary caretaker, signed by the parent, legal guardian,
10 legal custodian, or primary caretaker in the presence of two witnesses
11 at least eighteen years of age, other than the standby guardian, who
12 shall also sign the writing.

13 [~~7-~~] 8. The commencement of the standby guardian's authority pursuant
14 to a determination of incapacity, determination of debilitation, admin-
15 istrative separation, or consent shall not, itself, divest the parent,
16 legal guardian, legal custodian or primary caretaker of any parental,
17 guardianship, custodial or caretaker rights, but shall confer upon the
18 standby guardian concurrent authority with respect to the infant.

19 [~~8-~~] 9. (a) The clerk of any county upon being paid the fees allowed
20 therefor by law shall receive for filing any instrument appointing or
21 designating a standby guardian pursuant to this section made by a domi-
22 ciliary of the county, and shall give a written receipt therefor to the
23 person delivering it. The filing of an appointment or designation of
24 standby guardian shall be for the sole purpose of safekeeping and shall
25 not affect the validity of the appointment or designation.

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

32 § 2. This act shall take effect immediately.