

STATE OF NEW YORK

6217--A

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 -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee

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

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

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1 shares such responsibility, or where a physician is acting on the
2 attending physician's behalf, any such physician may act as the attend-
3 ing physician pursuant to this section. Where no physician has such
4 responsibility, any physician who is familiar with the parent's, legal
5 guardian's, legal custodian's or primary caretaker's medical condition
6 may act as the attending physician pursuant to this section.

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

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

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

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

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

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

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

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

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

1 standby guardian, and may in its discretion appoint a guardian ad litem
2 or an attorney for the infant to recommend whether the appointment of a
3 standby guardian as proposed in the application is in the best interest
4 of the infant.

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

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

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

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

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

46 (iii) Where the decree provides that the authority of the standby
47 guardian is effective upon the standby guardian's receipt of documenta-
48 tion of the petitioner's administrative separation, the standby guardi-
49 an's authority shall commence upon the standby guardian's receipt of
50 documentation of the petitioner's administrative separation pursuant to
51 subdivision seven of this section, and receipt of the petitioner's
52 consent to the commencement of the standby guardian's authority as
53 required pursuant to the provisions of subdivision seven of this
54 section. The standby guardian shall file the documentation of adminis-
55 trative separation with the court that issued the decree within sixty
56 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 consents to the commencement
47 of the standby guardian's authority as required pursuant to the
48 provisions of subdivision seven of this section; or (D) dies prior to
49 the commencement of a judicial proceeding to appoint a guardian of the
50 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 days after commencing unless by such date he or
35 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 and consent as required

23 pursuant to the provisions of subdivision seven of this section or
24 [~~(iii)~~] (iv) the standby guardian's receipt of a certificate of death,
25 funeral home receipt or other such document indicating that the parent,
26 legal guardian, legal custodian or primary caretaker has died. The
27 standby guardian shall file a petition pursuant to paragraph (d) of this
28 subdivision within sixty days of the date of its commencement pursuant
29 to this paragraph or such standby guardian's authority shall cease after
30 such date, but shall recommence upon such filing.

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

43 (i) append the written designation of such person as standby guardian;
44 and

45 (ii) append a copy of: (A) the determination of incapacity of the
46 parent, legal guardian, legal custodian or primary caretaker; or (B) the
47 determination of debilitation and the parental, guardian's, custodian's
48 or caretaker's consent; [~~or~~] (C) documentation of an administrative
49 separation and consent as required pursuant to the provisions of subdi-
50 vision seven of this section; or (D) a copy of the parent's, legal
51 guardian's, legal custodian's or primary caretaker's death certificate,
52 or other such evidence of death that may be satisfactory to the court;
53 and

54 (iii) if the petition is by a person designated as alternate standby
55 guardian, state that the person designated as standby guardian is

1 unwilling or unable to act as standby guardian, and the basis for such
2 statement.

3 (e) Subject to the provisions of paragraph (c) of subdivision three of
4 this section, if the court finds that the petitioner was duly designated
5 as standby guardian, that the parent, legal guardian, legal custodian or
6 primary caretaker of the infant is (i) incapacitated, (ii) debilitated
7 and consents, (iii) has become subject to an administrative separation
8 and consents as required pursuant to the provisions of subdivision seven
9 of this section, or (iv) has died, as established by a copy of a death
10 certificate or other such evidence of death as may be satisfactory to
11 the court, that the interests of the infant will be promoted by the
12 appointment of a standby guardian of the person and/or property, and
13 that, if the petition is by a person designated as alternate standby
14 guardian, the person designated as standby guardian is unwilling or
15 unable to act as standby guardian, it must make a decree accordingly.
16 Prior to making its finding, the court may, in its discretion, appoint
17 an attorney for the infant to recommend whether the appointment of the
18 standby guardian as proposed in the petition is in the best interests of
19 the infant.

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

36 5. The standby guardian may also file a petition for appointment as
37 guardian in any other manner permitted by this article or article six of
38 the family court act, on notice to the parent, legal guardian, legal
39 custodian or primary caretaker and may append a designation of standby
40 guardian to the petition for consideration by the court in the determi-
41 nation of such petition.

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

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

54 (c) The standby guardian shall ensure that the parent, legal guardian,
55 legal custodian or primary caretaker is informed of the commencement of
56 the standby guardian's authority as a result of a determination of inca-

1 pacity and of the parent's, legal guardian's, legal custodian's or
2 primary caretaker's right to revoke such authority promptly after
3 receipt of the determination of incapacity, provided there is any indi-
4 cation of the person's ability to comprehend such information.

5 7. Documentation of an administrative separation (a) shall consist of
6 an administrative order, judicial order, affidavit or affirmation indi-
7 cating the parent, legal guardian, legal custodian or primary caretak-
8 er's administrative separation as defined in this section and (b) shall
9 be accompanied by written consent of the parent, legal guardian, legal
10 custodian, or primary caretaker, signed by the parent, legal guardian,
11 legal custodian, or primary caretaker in the presence of two witnesses
12 at least eighteen years of age, other than the standby guardian, who
13 shall also sign the writing. Consent contained in the formal petition
14 submitted pursuant to subdivision three of this section or the written
15 designation made pursuant to subdivision four of this section shall be
16 sufficient to satisfy the requirement for consent set forth in this
17 subdivision.

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

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

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

37 § 2. This act shall take effect immediately.