§ 1726. Standby guardians

1. For the purpose of this section:

(a) "Standby guardian" means (i) a person judicially appointed pursuant to subdivision three of this section as standby guardian of the person and/or property of an infant whose authority becomes effective upon the incapacity, administrative separation, or death of the infant's parent, legal guardian, legal custodian or primary caretaker or upon the consent of the parent, legal guardian, legal custodian or primary caretaker; and (ii) a person designated pursuant to subdivision four of this section as standby guardian whose authority becomes effective upon the death, administrative separation, or incapacity of the infant's parent, legal guardian, legal custodian or primary caretaker or upon the debilitation and consent of the parent, legal guardian, legal custodian or primary caretaker.

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

(c) "Attending physician" means the physician who has primary responsibility for the treatment and care of the infant's parent, legal guardian, legal custodian or primary caretaker. Where more than one physician shares such responsibility, or where a physician is acting on the attending physician's behalf, any such physician may act as the attending physician pursuant to this section. Where no physician has such responsibility, any physician who is familiar with the parent's, legal guardian's, legal custodian's or primary caretaker's medical condition may act as the attending physician pursuant to this section.

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

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

(f) "Administrative separation" means a parent, legal guardian, legal

custodian or primary caretaker's (i) in connection with a federal immigration matter: arrest, detention, incarceration, removal and/or deportation; or (ii) receipt of official communication by federal, state, or local authorities regarding immigration enforcement which gives reasonable notice that care and supervision of the child by the parent, legal guardian, legal custodian, or primary caretaker will be interrupted or cannot be provided.

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

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

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

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

(ii) State that the petitioner suffers from (A) a progressively chronic illness; (B) an irreversibly fatal illness and the basis for such statement, such as the date and source of a medical diagnosis, without requiring the identification of the illness in question, or (C) state that the petitioner may become subject to administrative separation and the basis for such statement.

(c) Upon a petition for the judicial appointment of a standby guardian of an infant pursuant to paragraph (a) of this subdivision or for the judicial appointment of a guardian pursuant to paragraph (d) of subdivision four of this section, the court shall conduct a hearing. The court may in its discretion dispense with a hearing for the appointment of a standby guardian, and may in its discretion appoint a guardian ad litem or an attorney for the infant to recommend whether the appointment of a standby guardian as proposed in the application is in the best interest of the infant.

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

(ii) Such decree shall specify whether the authority of the standby guardian is effective upon the receipt of a determination of the petitioner's incapacity, upon the receipt of the certificate of the petitioner's death, or other such evidence of death that may be satisfactory to the court, or upon the receipt of documentation of the petitioner's administrative separation, and receipt of the petitioner's consent to the commencement of the standby guardian's authority required pursuant to the provisions of subdivision seven of this section, or upon whichever occurs first. The decree shall also provide that the authority of the standby guardian may earlier become effective upon written consent of the parent pursuant to subparagraph (iv) of paragraph (e) of this subdivision.

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

(e) (i) Where the decree provides that the authority of the standby guardian is effective upon receipt of a determination of the petitioner's incapacity, the standby guardian's authority shall commence upon the standby guardian's receipt of a copy of a determination of incapacity made pursuant to subdivision six of this section. The standby guardian shall file a copy of the determination of incapacity with the

court that issued the decree within ninety days of the date of receipt of such determination or the standby guardian's authority may be rescinded by the court.

(ii) Where the decree provides that the authority of the standby guardian is effective upon receipt of a certificate of the petitioner's death, or other such evidence of death that may be satisfactory to the court, the standby guardian's authority shall commence upon the standby guardian's receipt of a certificate of death, or other such evidence of death as may be specified in the decree. The standby guardian shall file the certificate of death, or other such evidence of death, with the court that issued the decree within ninety days of the date of the petitioner's death or the standby guardian's authority may be rescinded by the court.

(iii) Where the decree provides that the authority of the standby guardian is effective upon the standby guardian's receipt of documentation of the petitioner's administrative separation, the standby guardian's authority shall commence upon the standby guardian's receipt of documentation of the petitioner's administrative separation pursuant to subdivision seven of this section, and receipt of the petitioner's consent to the commencement of the standby guardian's authority as required pursuant to the provisions of subdivision seven of this section. The standby guardian shall file the documentation of administrative separation with the court that issued the decree within sixty days of the date of the standby guardian's receipt of documentation of the petitioner's administrative separation or the standby guardian's authority may be rescinded by the court.

(iv) Notwithstanding subparagraphs (i) and (ii) of this paragraph, a standby guardian's authority shall commence upon the standby guardian's receipt of the petitioner's written consent to such commencement, signed by the petitioner in the presence of two witnesses at least eighteen years of age, other than the standby guardian, who shall also sign the writing. Another person may sign the written consent on the petitioner's behalf and at the petitioner's direction if the petitioner is physically unable to do so, provided such consent is signed in the presence of the petitioner and the witnesses. The standby guardian shall file the written consent with the court that issued the decree within ninety days of the date of receipt of such written consent or the standby guardian's

authority may be rescinded by the court.

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

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

4. (a) A parent, a legal guardian, a legal custodian, or primary caretaker under the circumstances described in paragraph (a) of subdivision three of this section or under circumstances described in subparagraph (i) of paragraph (b) of this subdivision may designate a standby guardian by means of a written designation, signed by the parent, legal guardian, legal custodian or primary caretaker in the presence of two witnesses at least eighteen years of age, other than the standby guardian, who shall also sign the writing. Another person may sign the written designation on the parent's, legal guardian's, legal custodian's or primary caretaker's behalf and at the parent's, legal guardian's, legal custodian's or primary caretaker's direction if the parent, legal guardian, legal custodian or primary caretaker is physically unable to do so, provided the designation is signed in the presence of the parent, legal guardian, legal custodian or primary caretaker and the witnesses.

(b) (i) A designation of a standby guardian shall identify the parent, legal guardian, legal custodian or primary caretaker, the infant and the person designated to be the standby guardian, and shall indicate that the parent, legal guardian, legal custodian or primary caretaker intends for the standby guardian to become the infant's guardian in the event the parent, legal guardian, legal custodian or primary caretaker either: (A) becomes incapacitated; (B) becomes debilitated and consents to the commencement of the standby guardian's authority; (C) becomes subject to an administrative separation and consents to the commencement of the standby guardian's authority as required pursuant to the provisions of subdivision seven of this section; or (D) dies prior to the commencement

of a judicial proceeding to appoint a guardian of the person and/or property of an infant.

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

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

Designation of Standby Guardian

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

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

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

The appointment of _____ as the standby guardian of the person and property of my child(ren) would be in the best interests of my child(ren) because: (Insert justification for appointment of this person as the standby guardian) _____ _____ _____ .

The standby guardian's authority shall take effect: (1) if my doctor concludes in writing that I am mentally incapacitated, and thus unable to care for my child(ren); (2) if my doctor concludes in writing that I am physically debilitated, and thus unable to care for my child(ren) and I consent in writing, before two witnesses, to the standby guardian's authority taking effect; (3) If I become subject to an administrative separation such that care and supervision of the child will be interrupted or cannot be provided; or (4)

upon my death.

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

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

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

Signature: _____

Address: _____

Date: _____

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

Witness' Signature: _____

Address: _____

Date: _____

Witness' Signature: _____

Address: _____

Date: _____

(iv) Notwithstanding paragraphs (a) and (b) of this subdivision, a designation of standby guardian shall be effective as if made in accordance with the requirements of this subdivision if it was validly made: (a) where the parent, legal guardian, legal custodian or primary caretaker was domiciled at the time it was executed; (b) in the jurisdiction where it was executed or (c) where the parent, legal guardian, legal custodian or primary caretaker is domiciled at the time the designation becomes effective.

(c) The authority of the standby guardian under a designation shall commence upon either: (i) the standby guardian's receipt of a copy of a

determination of incapacity made pursuant to subdivision six of this section; (ii) the standby guardian's receipt of (A) a copy of a determination of debilitation made pursuant to subdivision six of this section and (B) a copy of the parent's, legal guardian's, legal custodian's or primary caretaker's written consent to such commencement, signed by the parent, legal guardian, legal custodian or primary caretaker in the presence of two witnesses at least eighteen years of age, other than the standby guardian, who shall also sign the writing. Another person may sign the written consent on the parent's, legal guardian's, legal custodian's or primary caretaker's behalf and at the parent's, legal guardian's, legal custodian's or primary caretaker's direction if the parent, legal guardian, legal custodian or primary caretaker is physically unable to do so, provided such consent is signed in the presence of the parent, legal guardian, legal custodian or primary caretaker and the witnesses; (iii) an administrative separation and consent as required pursuant to the provisions of subdivision seven of this section or (iv) the standby guardian's receipt of a certificate of death, funeral home receipt or other such document indicating that the parent, legal guardian, legal custodian or primary caretaker has died. The standby guardian shall file a petition pursuant to paragraph (d) of this subdivision within sixty days of the date of its commencement pursuant to this paragraph or such standby guardian's authority shall cease after such date, but shall recommence upon such filing.

(d) The standby guardian may file a petition for appointment as guardian after receipt of either: (i) a copy of a determination of incapacity made pursuant to subdivision six of this section; or (ii) (A) a copy of a determination of debilitation made pursuant to subdivision six of this section and (B) a copy of the parent's, legal guardian's, legal custodian's or primary caretaker's written consent, pursuant to paragraph (c) of this subdivision; (iii) documentation of an administrative separation and consent as required pursuant to the provisions of subdivision seven of this section; or (iv) a certificate of death, or other such evidence of death that may be satisfactory to the court. Such petition must, in addition to meeting the requirements of section seventeen hundred four of this article:

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

and

(ii) append a copy of: (A) the determination of incapacity of the parent, legal guardian, legal custodian or primary caretaker; or (B) the determination of debilitation and the parental, guardian's, custodian's or caretaker's consent; (C) documentation of an administrative separation and consent as required pursuant to the provisions of subdivision seven of this section; or (D) a copy of the parent's, legal guardian's, legal custodian's or primary caretaker's death certificate, or other such evidence of death that may be satisfactory to the court; and

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

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

(f) The parent, legal guardian, legal custodian or primary caretaker may revoke a standby guardianship created under this subdivision: (i) by executing a subsequent designation of guardianship pursuant to paragraphs (a) and (b) of this subdivision, or (ii) notwithstanding the provisions of sections seventeen hundred ten and seventeen hundred eleven of this article, in the case of a standby guardian whose

authority becomes effective upon the death of the parent, legal guardian, legal custodian or primary caretaker of the infant, by a subsequent designation of standby guardian set forth in a will of the parent, legal guardian, legal custodian or primary caretaker, or (iii) by notifying the standby guardian verbally or in writing or by any other act evidencing a specific intent to revoke the standby guardianship prior to the filing of a petition. Where the petition has already been filed, by executing a written revocation, filing it with the court where the petition was filed, and promptly notifying the standby guardian of the revocation.

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

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

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

(c) The standby guardian shall ensure that the parent, legal guardian, legal custodian or primary caretaker is informed of the commencement of the standby guardian's authority as a result of a determination of incapacity and of the parent's, legal guardian's, legal custodian's or primary caretaker's right to revoke such authority promptly after receipt of the determination of incapacity, provided there is any indication of the person's ability to comprehend such information.

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

8. The commencement of the standby guardian's authority pursuant to a determination of incapacity, determination of debilitation, administrative separation, or consent shall not, itself, divest the parent, legal guardian, legal custodian or primary caretaker of any parental, guardianship, custodial or caretaker rights, but shall confer upon the standby guardian concurrent authority with respect to the infant.

9. (a) The clerk of any county upon being paid the fees allowed therefor by law shall receive for filing any instrument appointing or designating a standby guardian pursuant to this section made by a domiciliary of the county, and shall give a written receipt therefor to the person delivering it. The filing of an appointment or designation of standby guardian shall be for the sole purpose of safekeeping and shall not affect the validity of the appointment or designation.

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