# STANDBY GUARDIANSHIP LEGISLATION SUMMER 2019

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## I. INTRODUCTION

### *A. What Is Standby Guardianship Legislation?*

Standby guardianship legislation allows a parent or guardian[1] who suffers from a progressively chronic or irreversibly fatal illness to ensure the current, effective appointment of a guardian of the person or property of his or her minor children to act sometime in the future during the lifetime of the parent, without affecting existing parental rights.[2] The primary motivation behind the introduction of such legislation has been the proliferation of degenerative, incurable diseases, such as HIV/AIDS, cancer, multiple sclerosis, and muscular dystrophy among individuals with minor children.[3] The need is particularly acute for single parents, typically single mothers caring for their children alone.[4] States across the nation should enact standby guardianship legislation which permits parents to plan for impeding disability, incapacity, or death.[5]

### *B. Where Have Standby Guardianship Statutes Been Enacted or Considered?*

As of the writing of this article, twenty-four states have enacted standby guardianship legislation; six, including the District of Columbia have adopted the Uniform Guardianship and Protective Proceedings Act (UGPPA); and five more have passed statutes containing provisions similar to those contained in standby guardianship statutes.[6]

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1. Throughout this article, the word "parent" refers to the adult or adults with legal custody and/or parental rights over the child, whether those adults are technically "parents", "guardians", or "legal custodians" under the law.

2. *See* Gerry W. Beyer, *Standby Guardianships*, WILLS, TR. & EST. PROF. BLOG (June 19, 2007), https://lawprofessors.typepad.com/trusts_estates_prof/2007/06/standby_guardia.html [perma.cc/9K2Q-B8TV].

3. *See* Christina Bach, *Standby Guardianship*, ONCOLINK (Feb. 7, 2020), https://www.oncolink.org/support/insurance-legal-employment-financial-concerns/legal-concerns/standby-guardianship [perma.cc/E7Z5-TZV6].

4. *See id.*

5. *See id.*

6. *See Standby Guardianship*, CHILDWELFARE, https://www.childwelfare.gov/pubpdfs/

The year 1997 proved a watershed year for standby guardianship legislation.[7] Congress passed the Adoption and Safe Families Act of 1997 which in pertinent part states, "It is the sense of Congress that the states should have in effect laws and procedures that permit any parent who is chronically ill or near death, without surrendering parental rights, to designate a standby guardian for the parents' minor child . . . ."[8] In the same year, the National Conference of Commissioners on Uniform State Laws enacted their Uniform Guardianship and Protective Proceedings Act.[9] Only five states—Alabama, Colorado, Hawaii, Massachusetts, Minnesota—and the District of Columbia have adopted the UGPPA model act.[10] Even so, twenty-eight states have enacted their own standby guardianship legislation or laws resembling standby guardianship statutes since the UGPPA's enactment.[11] Prior to 1997, only eight states had any sort of standby guardianship legislation.[12] Today, approximately half of all states continue to lack any type of standby guardianship laws, depriving chronically ill or terminally ill adults of the ability to plan for the future care of their children during their lifetime.[13]

Many standby guardianship statutes exist independently of states' existing guardianship legislation.[14] Some states, however, have melded standby guardianship provisions into existing guardianship statues.[15] While the independently drafted statutes may result in some inconsistencies, the separation or melding of guardianship laws does not appear detrimental to the guardianship statute's effectiveness.[16] Instead, it is the procedural and substantive provisions of these laws which determine how effectively standby guardianship legislation will operate.[17]

All states, whether they have standby guardianship legislation or have considered enacting such legislation, can benefit from a study of existing laws.[18] Additionally, states that either have not considered enacting or have

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guardianship.pdf (last visited Feb. 9, 2020) [perma.cc/KN2H-LNBG].

7. *See id.*
8. *See id.*
9. *Adoption and Safe Families Act* of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (1997).
10. *See Adult Guardianship and Protective Proceedings Jurisdiction Act*, UNIFORM L. COMMISSION, https://www.uniformlaws.org/committees/community-home?CommunityKey=0f25ccb8-43ce-4df5-a856-e6585698197a [perma.cc/726V-PDQM] (last visited Feb. 9, 2020).
11. *See id.*
12. *See id.*
13. *See* Peter Mosanyi, *A Survey of State Guardianship Statutes: One Concept, Many Applications*, 18 J. OF THE AM. ACAD. OF MATRIM. LAW. 253, (2002), https://cdn.ymaws.com/aaml.org/resource/collection/35664435-7DFC-48A0-B8A0-DC4FB0009474/a_survey_of_state_guardianship-comments-18-1.pdf [perma.cc/H8FA-QKS6] (describing the various guardianship statutes that each state has implemented).
14. *See id.*
15. *See id.*
16. *See id.*
17. *See id.*
18. Author's opinion.

opted not to enact standby guardianship legislation should study other states' statutes to maximize the efficacy of any newly-crafted statutes.[19]

This article will begin by exploring the genesis of standby guardianship legislation.[20] It will then compare and contrast the features of the statutes enacted thus far, identify the policies those statutes seek to foster, and analyze which existing statutory features appear to best promote such policies.[21] The goal is for trust and estate lawyers to be better prepared to take an active role in drafting and improving standby guardianship legislation in their respective states.[22]

## II. BACKGROUND

### *A. History and Development of Standby Guardianship Legislation*

The traditional methods for designating a guardian of the person or property of a minor are by will and, in some states, deed of guardianship (an arcane procedure at best).[23] These methods remain viable when, as in most cases, the death of a parent or guardian of a minor child cannot be anticipated, as in the case of an accident, homicide, or a sudden illness.[24] However, with the advent and progression of HIV/AIDS, traditional planning procedures for the care of minors became inadequate to address the needs and concerns of parents suffering from a chronic or fatal illness, knowing it is likely they will one day be unable to care for their minor children.[25] Since guardian adjudication occurs after the parent dies, designations of a guardian by either will or deed do not enable the parent or guardian to know his or her choice of guardian will be respected.[26] Additionally, the designation of a guardian (unlike a designation for executor or trustee) is merely precatory, as it is subject to a post-death determination of the "best interests" of the child.[27]

It is possible for a traditional guardianship proceeding to occur during the lifetime of the parent.[28] Awarding guardianship to someone other than a parent would either terminate parental rights or confer decision-making power upon someone else.[29] As a result, a majority of terminally ill parents are discouraged from traditional guardianship procedures.[30] Adoption and

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19. *See id.*
20. *See supra* Part II.
21. *See supra* Part III.
22. *See supra* Part V.
23. *See* Brette Sember, *The Basics of Guardianship*, LEGALZOOM, https://www.legalzoom.com/articles/the-basics-of-guardianship [perma.cc/X4HR-YAJJ] (last visited Feb. 10, 2020).
24. *See id.*
25. *See* Deborah L. Sheltan, *Aids Orphans: The Forgotten Victims*, 22 HOM. RTS. 18 (Fall 1995).
26. *Id.* at 19.
27. Lenore M. Molee, *The Ultimate Demonstration of Love for a Child: Choosing a Standby Guardian New Jersey Standby Guardianship Act*, 22 SETON HALL LEGIS. J. 475, 481, 490 (1998).
28. *Id.* at 401.
29. *Id.*
30. *See generally id.* at 478–82 (detailing the problems with traditional guardianships for terminally ill parents).

foster care are also poor solutions, as they also entail a permanent surrender of parental rights prior to the death of the parent.[31] Additionally, with foster care the parent is unable to select their child's foster parents, a role left to the agency.[32]

This glaring need for lifetime guardianship proceedings became apparent among the indigent population, where the need still remains the greatest.[33] Within the indigent population, single parents are the most in need of a standby guardianship statute, the single parent bears the responsibility of childcare alone.[34] It is most obvious where a mother has children by different fathers; after her death, each father may assert custody of that child, separating siblings to the detriment of the children.[35] As single parenthood and half-siblings are not the exclusive province of the indigent, the need for standby guardianship legislation exists across socioeconomic lines.[36] There is a rising number of non-traditional, single-parent households: including those in which (1) a spouse dies and the parent either does not remarry or the step-parent does not adopt the child; (2) where a single parent adult adopts a child; (3) where a single-parent births a child and the location or identity of the birth father are unknown; or (4) a single woman has a child with her live-in, non-marital partner.[37]

Any single parent with a chronic or fatal illness, knows he or she has a finite amount of time to see to the welfare of his or her children.[38] There must be a procedure to ensure such a parent has the opportunity to select the person to care for his or her children.[39]

A parent appointing a standby guardian for his or her children has different needs from a parent appointing a traditional guardian.[40] There are several unique components to standby guardianships: (1) the proceeding may be brought during the parents' lifetime; (2) the activation of the guardianship may occur at a future point in time, prior to the patient's death; and (3) the parental rights of the parent alive at the time the guardianship commences

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31. *See id.*; *see also Resource Guide*, NATIONAL CENTER FOR STATE COURTS, https://www.ncsc.org/Topics/Children-Families-and-Elders/Adoption-Termination-of-Parental-Rights/Resource-Guide.aspx [perma.cc/7QVJ-EMJ5] (last visited Mar. 24, 2020) (detailing other available resources).

32. *See Foster Parent Frequently Asked Questions*, LOUISIANA FOSTER & ADOPTIVE PARENT ASSOCIATION, http://www.lfapainc.org/faqanswers.php [perma.cc/JHK5-4K54] (last visited Mar. 24, 2020).

33. *See generally*, Erica Wood, *Report: on New York guardianship and decision supports for people alone and in need*, 41 No. 1 BIFOCAL 143, 144 (2019) (highlighting increases in New York's indigent population).

34. *See* Molee*, supra* note 27, at 478–79.

35. *See* Lisa Westergaard, *What's going to happen to us? The legal rights of half siblings to remain together once their custodial parent has succumbed to a terminal illness*, 70 UMKC. L. REV. 471, 492 (2001).

36. *Id.* at 477–99.

37. *The American Family Today*, PEW RESEARCH CENTER (Dec. 17, 2015), https://www.pewsocialtrends.org/2015/12/17/1-the-american-family-today/ [perma.cc/P2ZL-7P3U].

38. *See* Molee, *supra* note 27, at 478–82.

39. *See* Sheltan, *supra* note 25, at 28.

40. *See id.* at 19.

are not affected.[41] The procedure is tantamount to a declaratory judgment wherein the designation of the standby guardian, made by the ill parent or guardian, is effective.[42] Each statute provides for the guardianship to become effective upon the occurrence of a triggering event.[43] Most statutes minimize the procedural burden by imposing very few, if any, procedural requirements.[44] This ensures that a responsible guardian will see to the child's care immediately after his or her parent becomes unable to.[45]

A testamentary designation may not meet the child's needs while his or her parents are still alive.[46] A lifetime designation procedure will help preserve the wishes of the parent and prevent further disorder in the child's life.[47] For example, without standby guardianship legislation, a child may live with a neighbor or grandparent for an extended period of time while his parent is ill.[48] After the parents die, the child may be placed with a different relative, per the terms of the parent's will.[49] This second move could be extremely disruptive to the child, who has either lost a parent, seen a parent grow very ill, or both.[50] Standby guardianship prevents children from being placed in, then uprooted from, numerous homes.[51] Not only do standby guardianships afford greater continuous care than traditional guardianship proceedings, it also honors the parent's wishes.[52]

Standby guardianship remains important for posthumous guardianship proceedings.[53] In many instances, a parent's explanation as to why the child's other parent would be unfit may be regarded as being libelous.[54] Since wills are public documents, and libelous material can often be excised before a will is probated, this can result in no effective guardianship designation is made in the will.[55] Additionally, many states require that the will be probated for the purpose of testamentary designations, even if the will does not dispose of any assets; the document is not a will until probated, which means that no effective designation has been made.[56]

New York was the first to develop standby guardianship legislation, followed by UGPPA.[57] Most states have followed either the New York

41. *See* Molee, *supra* note 27, at 483–84.
42. *See* Molee, *supra* note 27, at 481.
43. Tianna N. Gibbs, *Paper Courts and Parental Rights: Balancing Access, Agency, and Due Process*, 54 HARV. C.R.-C.L. L. REV. 549, 587 (2019).
44. *Id.*
45. *See id.*
46. *See* Molee, *supra* note 27, at 481–82.
47. *See id.*
48. *See* Deborah Weimer, *Implementation of Standby Guardianship: Respect for Family Autonomy*, 100 DICK. L. REV. 65, 89, 91–92 (1995).
49. *Id.*
50. *Id.* at 92.
51. *Id.*
52. *Id.*
53. *See id.*
54. *Id.* at 93.
55. *See id.*
56. *Id.*
57. *See* Molee, *supra* note 27, at 481–84.

model or the UGPPA Model.[58] Variations on both the Massachusetts and UGPPA models have emerged as more states enact standby guardianship legislation.[59]

The Illinois model does not contain any definitions of the illness, conditions, incapacity, or disability necessary to trigger the standby guardian's authority.[60] Therefore, standby guardianship has the attraction of being simple, but the drawback of unnecessary judicial intervention to administer.[61] Another feature peculiar to the Illinois model is that there are two different offices of guardian, depending upon whether the guardian acts pursuant to court authority or to designation by the parent or guardian.[62]

The New York model provides medical definitions for both the illness that would entitle someone to avail herself of this court proceeding and the degree of incapacity or disability that will trigger the appointment of the standby guardian.[63] In addition, the office of standby guardian is the same whether the guardian is appointed by the court ahead of time or merely designated by the individual beforehand and later confirmed by the court.[64] Like health care proxy and living will legislation, the New York model is the product of the joint efforts of child welfare experts, social epidemiologists, and attorneys.[65] While the New York model is more complicated, it invites less debate over who can avail herself of the procedure and whether the triggering event has in fact occurred.[66]

Apart from the six UGPPA states, each state's standby guardianship legislation contains some unique feature or singular provision.[67] Therefore, states considering the enactment of standby guardianship legislation, as well as states seeking to amend existing legislation, would benefit from a broad examination of other states' standby guardianship statutes.[68]

### *B. Who May Avail Herself of a Standby Guardianship Statute?*

The majority of states with standby guardianship legislation allow the qualifying parent, legal guardian, or legal custodian to designate a standby guardian for a child in his or her care.[69] New York's statute is unique because it also allows for the child's primary caretaker, when the parent or legal guardian cannot be located, to petition for a standby guardianship

58. *See id.*
59. *See id.*
60. *See* 755 ILL. COMP. STAT. ANN. 5/11-5.3 (West 2019).
61. *See id.*
62. *See id.* §§ 5/11-5.3 (e).
63. N.Y. SURR. CT. PROC. ACT. § 1726 (McKinney 2018).
64. *See id.*
65. *Id.*
66. *Id.*
67. CHILDREN'S BUREAU, *Standby Guardianships* (last visited Feb. 10, 2019), https://www.childwelfare.gov/pubPDFs/guardianshippdf [perma.cc/KN2H-LNBG].
68. *Id.*
69. *Id.*

appointment when the actual parents cannot be located.[70] This provision recognizes that, in some families, the primary caretaker may be an adult with no parental or legal relationship with the child, and that this category of caretakers may yet have a need to appoint a standby guardian.[71] West Virginia's statute, which allows anyone acting on the parent's behalf to petition the court, recognizes that the parent herself may be unable to physically get to the courthouse at the time the petition is filed.[72] Missouri's legislation is highly flexible, as it allows the "parent, legal guardian, or other court-approved party interested in the minor's welfare" to petition for appointment of a legal guardian, while Virginia and Kansas legislation allows "any person" to petition for the appointment of a standby guardian.[73] Wyoming has a standby guardianship statute, in addition to an emergency and temporary guardianship statute that contains a provision allowing the child's caregiver to seek such a guardianship.[74]

### *C. Additional Alternative Guardianship Statutes*

Four states have stopped short of enacting standby guardianship legislation, but have enacted laws providing for alternate guardianship forms, such as "temporary", "emergency", or "joint" guardianships.[75] Temporary or emergency guardians cannot function concurrently with a disabled parent, and the duration of these guardianships are severely limited.[76] California's "joint guardianship" statute enables the guardian to make decisions concurrently with the parent; however, the joint guardian is not empowered to make any decisions regarding the child without first consulting the appointing parent.[77]

## III. POLICY CONSIDERATIONS AND RECOMMENDATIONS

There appear to be at least seven classes of interests that the existing standby guardianship statutes seek to balance: (1) the interests of the minors, (2) the interests of the parents, (3) the interests of the standby guardians, (4) the interests of attending physicians, (5) the interests of the court, (6) the interests of schools and other entities and individuals that deal with children, and (7) the practicability of administration.[78] An additional interest that

70. *See* N.Y. SURR. CT. PROC. ACT § 1726(d)-(e).
71. *Id.*
72. W. VA. CODE ANN. § 44A-5-3(a).
73. MO. ANN. STAT. § 475.046; VA. CODE ANN. § 16.0-350 (A); KAN. STAT. ANN. § 59-3074(a).
74. WYO. STAT. ANN. § 3-2-108.
75. *See* CAL. PROB. CODE § 2015 (c) (2); IOWA CODE ANN. § 232D.309; OHIO REV. CODE ANN. § 2111.02; TEX. EST. CODE ANN. § 1251.001(a).
76. *See* CAL. PROB. CODE § 2015(c)(2); IOWA CODE ANN. § 232D.309; OHIO REV. CODE ANN. § 2111.02; TEX. EST. CODE ANN. § 1251.001(a).
77. *See* CAL. PROB. CODE § 2015(c)(2).
78. *See* Naomi Cahn, *Planning Options for the Daily Care of a Minor in the Event of an Adult's Incapacity or Death*, 125 TAX & EST. PLAN FOR MINORS (2006).

should be fostered is the national interest in interstate uniformity.[79] Without such uniformity, the statute may unwittingly encourage terminally ill parents to migrate to those states with the least onerous standby guardianship statutes.[80] Furthermore, in view of the large number of individuals who regularly migrate for employment and other independent reasons, a standby guardianship designation validly made in another state should be valid wherever the client may move.[81]

### *A. Appointment by the Court*

A mechanism for the judicial appointment of a standby guardian by the court during the lifetime of a parent or guardian is a necessary statutory feature.[82] The ability to settle issues relating to a child's custody as early as possible provides peace of mind to a parent or legal guardian.[83] It also permits the preservation of the testimony of the parent or guardian, particularly when the parent's or guardian's choice of standby guardian does not seem like a natural choice (e.g., when the surviving parent or guardian is allegedly unfit).[84]

### *B. The Filing of the Petition*

Whether expressed in terms of standing to file a petition or the court's jurisdiction to proceed upon the petition, this statutory feature should identify with clarity those who can initiate the proceeding.[85]

All persons with parental rights should have standing to file a petition for the appointment of a standby guardian.[86] A provision allowing a legal guardian to file a petition is a desirable statutory feature, particularly when the parents may already be dead and the guardian is ill.[87] A handful of states (including Florida, Missouri, New Jersey, and New York) have included this desirable feature; however, many standby guardianship provisions provide only for the parent's ability to petition the court.[88] Kansas seems to allow "any person" to petition for a standby guardian to be appointed.[89]

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79. *See id.*
80. *See id.*
81. *See id.*
82. *See* Gregory K. Steele, *Report on Appointing a Guardian and Standby Guardianship*, BCLI REPORT (Nov. 30 2004), www.bcli.org/sites/default/files/appoint-guardian.pdf [perma.cc/QR63-E3A6].
83. *See id.*
84. *See id.*
85. *See* Julie Garber, *Learn about Guardianship and Conservatorship*, THE BALANCE (Jan. 12, 2020), thebalance.com/what-is-guardianship-or-conservatorship-3505177 [perma.cc/P34G-T6MX].
86. *See id.*
87. *See id.*
88. *See Standby Guardianship-Child Welfare Information Gateway*, CHILDREN'S BUREAU (June 2018), childwelfare.gov/pubpdfs/guardianship.pdf [perma.cc/D7AK-UNS8].
89. *See id.*

Illinois permits other relatives or friends with an interest in the child's welfare to petition, provided that those with parental rights are joined.[90] While this may be a convenient measure for an ill parent or guardian, if he or she has capacity, then he or she should be able to be the petitioner.[91] If the ill parent or guardian does not have capacity, the court would still be able to entertain a conventional guardianship proceeding brought during the parent's lifetime.[92]

### *C. Notice Requirements*

Almost all the statutes require certain parties receive notice of the proceedings.[93] Most statutes incorporate the notice requirements of their existing guardianship statutes into standby guardianship laws.[94] The UGPPA states, along with Arkansas, Illinois, New Jersey, Missouri, West Virginia, and Indiana have separate notice requirements for a minor age fourteen or older.[95]

Wisconsin, Florida, and Virginia all require such notice for children age twelve or older.[96] In Iowa, minors must receive notice no matter their age, but they may receive it through their attorney or in some other manner if allowed by the court.[97] New Jersey also provides that younger children will receive notice at the court's discretion.[98] Additionally, Illinois requires notice to the child's near relatives.[99] Although it is clear that a teenage minor will receive notice of these proceedings, it is unclear whether the minor's non-custodial relatives will automatically receive notice.[100] Despite relatives' helpful insight, participation of these parties could cause complications and delay.[101] On balance, a notice requirement for a minors' non-custodial relatives could cause more problems than it solves.[102] Ideally, standby guardianship legislation should be incorporated into each state's existing law for traditional minority guardianships to ensure notice requirements remain consistent between guardianship procedures.[103]

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90. *See id.*
91. *See Understanding Capacity*, OFFICE OF THE PUBLIC GUARDIAN (last visited Feb. 10, 2020), https://www.publicguardian.qld.gov.au/__data/assets/pdf_file/0020/620903/Factsheet_Understanding-capacity.pdf [perma.cc/92EZ-3EAL].
92. *See id.*
93. *See Summary of Standby Guardianship Statutes by State*, GRANDFAMILIES (Oct. 2000), https://www.grandfamilies.org/Portals/0/documents/Resources/Care%20and%20Custody/AIA-SBGstate.pdf [perma.cc/A89T-69EU].
94. *See id.*
95. *See id.* at 1-2, 4-5.
96. *See id.* at 2,6.
97. *See id.* at 2.
98. *See id.* at 4.
99. *See id.* at 2.
100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.*

### *D. Contents of the Petition*

#### *1. Basic Information*

A standby guardianship statute should require that all petitions present the following information: (a) the child's identity, (b) the identity and whereabouts of persons with parental rights for the child, (c) information regarding intended appointee as a standby guardian, (d) limitations, if any, on the powers of the standby guardian, and (e) the reasons for filing of the petition.[104] It is necessary that the court have the information listed above in order to promote the best interests of all of the parties involved.[105] The existing statutes generally agree in this respect.[106] North Carolina also requires the disclosure of all pending court proceedings in any jurisdiction that could affect the child for whom a guardian is sought.[107] This provision is a desirable addition because custody or juvenile court proceeding involving a child, could affect the court's designation of a standby guardian for that child.[108]

#### *2. Written Designations of Standby Guardian*

Most of the statutes require both a written designation and a petition.[109] The execution of a written designation imposes separate formalities that combine the burdens of court appointment with the burdens of document appointment.[110] These formalities ensure a parent's careful consideration of a decision for standby guardianship appointment; however, the courtroom should sufficiently serve this purpose.[111]

Many states have a suggested or recommended form for the written designation in their standby guardianship statutes, including Georgia, Connecticut, Maryland, New Jersey, New York, Pennsylvania, and Wisconsin.[112] Depending on the state, the written designation may follow the general format as outlined in the statue, or the statue may require the form to be "substantially" the same as the one contained therein, as is the case in

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104. *U.S. Dep't of Health and Human Services*, CHILDREN'S BUREAU, STANDBY GUARDIANSHIP 2 (2018), http://www.childwelfare.gov/pubPDFs/guardianship.pdf [perma.cc/X3WD-HV5R].

105. *Id.* at 2.

106. *Id.* at 3.

107. *Id.* at 36–37.

108. *Id.*

109. *Id.* at 5–55.

110. *Id.* at 2–4.

111. *Id.* at 4.

112. GA. CODE ANN. § 29-2-11 (West, Westlaw through 2020, Act 322); CONN. GEN. STAT. ANN. §§ 45a-624 (West, Westlaw through 2020 Supplement to General Statutes of Connecticut Revision of 1958); MD. CODE. ANN. EST. & TRUSTS § 13-904(b)(3) (West, Westlaw through 2020 Regular Session of the General Assembly); N.J. STAT. ANN. § 3B:12-74 (West, Westlaw through L.2019, c. 505 and J.R. No. 33); N.Y. SURR. CT. PROC. ACT. § 1726; 23 PA. CONS. STAT. ANN. § 5611 (West, Westlaw through 2020 Regular Session Act 8); WIS. STAT. ANN. § 48.978(3)(b) (West, Westlaw through 2019 Act 102).

Wisconsin.[113] Illinois alone allows the written designation to be made in any form.[114] States may want to include a suggested designation form in their statutes, but may not want to require strict compliance with those forms in court.[115] This would encourage some degree of uniformity and certainty within the state, without imposing unduly rigid procedural burdens on the designating parent.[116]

### *E. Standards for Appointment by the Court*

While all of the statutes provide for consideration of the child's best interest in deciding whether to appoint a guardian, the Illinois statute focuses solely on whether the appointment of the standby guardian is in the best interest of the child.[117] The other statutes also consider the illness or incapacity of the parent or guardian.[118] It is unclear why this procedure should be made available to a parent or guardian who is neither ill nor disabled.[119] Indeed, it would be an abuse of limited judicial resources to permit healthy parents to bring such a proceeding for the purpose of ensuring that a relative with whom they are no longer on speaking terms will never get custody of their child in the unlikely event that they should have an accident, or for some other emotional gratification.[120] Traditional, post-mortem guardianships, and existing inter vivos procedures such as foster care and

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113. *See* WIS. STAT. ANN. § 48.978(3)(b)(2) ("A written designation of a standby guardian complies with this subsection if the written designation substantially conforms to the following form: . . ."; *see also* 23 PA. CONS. STAT. ANN. § 48.978(3)(b)(2) ("A written designation of a standby guardian complies with this subsection if the written designation substantially conforms to the following form: . . ."); CONN. GEN. STAT. ANN. § 45a-624c ("The written statement referred to in section 45a-624 shall be in substantially the following form: . . .").

114. *See* 755 ILL. COMP. STAT. ANN. 5/11a-3.1(d) ("The designation of a standby guardian may, but need not, be in the following form: . . .") (the absence of the key terms "substantially conforms" and alternative of "may, but need not" indicates this contention).

115. *Id,*

116. Author's opinion.

117. 755 ILL. COMP. STAT. ANN. 5/11-5.3(b) ("Upon the filing of a petition for the appointment of a standby guardian, the court may appoint a standby guardian of the person or estate, or both, of a minor as the court finds to be in the best interest of the minor."); *see also* Peter Mosanyi, *A Survey of State Guardianship Statutes: One Concept, Many Applications*, 18 J. AM. ACAD. MATRIM. LAW. 253, 267 (2002) ("A standby guardian, one who must be approved by a court applying the best interests of the minor, . . .").

118. *See, e.g.*, 23 PA. STAT. AND CONS. STAT. ANN. § 5612; *see, e.g.*, WIS. STAT. ANN. § 48.978(3)(b) ("The written designation shall also state the duties and authority that the parent wishes the standby guardian to exercise and shall indicate that the parent intends for the duty and authority of standby guardian to begin on the parent's incapacity, death, or debilitation and consent. . ."); Adoption and Safe Families Act of 1997, Pub. L. 105–89, 403, 111 Stat. 2115 ("to designate a standby guardian for the parent's minor children, whose authority would take effect upon . . . (2) the mental incapacity of the patient; or (3) the physical debilitation and consent of the parent."); CONN. GEN. STAT. ANN. § 45a-624 ("Such designation, in a form as provided in section 45a-624b, shall take effect upon the occurrence of a specified contingency, including, but not limited to, the mental incapacity, physical debilitation or death of the principal . . .").

119. Author's opinion.

120. Author's opinion.

temporary care and custody, appear to meet the legitimate needs of parents or guardians who are neither ill nor disabled.[121]

### *F. Ability to Control the Scope of the Standby Guardianship*

As parents are frequently in the best position to evaluate their needs and the needs of their child they should be allowed a certain degree of freedom in creating the scope of the standby guardianship.[122] On the other hand, the ability to individually tailor the scope of the standby guardianship (as in Maryland) is likely to impose undue burdens on the court and attendant delays on the parties.[123] Consequently, the statute should enumerate several choices for petitioners of events or dates that will both trigger and terminate the standby guardianship, thereby enabling petitioners to define the standby guardianship without sacrificing administrability.[124]

All of the statutes permit a petitioner to appoint a standby guardian of the person or property or both of a minor.[125] Some statutes include a "child likely to be born," which seems like a desirable feature.[126] In fact, adding the ability to make such an appointment for any after-born child might make sense.[127] A model statute should not allow customization of the powers of the standby guardian in the interest of administrability.[128]

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121. *See* Joyce E. McConnell, *Securing the Care of Children in Diverse Families: Building on Trends in Guardianship Reform*, 10 YALE J. L. & FEMINISM 29, 33 (1998) (Under traditional inter vivos guardianship, the natural formal parent must be judged incapacitated or the parent must surrender all parental rights.).

122. *See, e.g.*, MD. CODE ANN., EST. & TRUSTS § 13-903(b)(2) (West, Westlaw through 2020 Regular Session of the General Assembly) ("(b) A petition for the judicial appointment of a standby guardian shall state: . . . (2) Whether the authority of the standby guardian is to become effective on the petitioner's incapacity, on the petitioner's death, or on whichever occurs first.").

123. *Id.* § 13-903(a)(1) (". . . a petition for the judicial appointment of a standby guardian of the person or property of a minor under this section may be filed only by a parent of the minor. . .").

124. *See, e.g.*, WIS. STAT. ANN. § 48.978(2)(L)(1)(2) (West, Westlaw through 2019 Act 102) ("(L) *Commencement of duty and authority of court-appointed standby guardian*. 1. If a standby guardianship order under par. (j) 2. provides that the duty and authority of a standby guardian are effective on the petitioner's incapacity, the duty and authority of the standby guardian shall begin on the receipt by the standby guardian of a copy of a determination of incapacity under sub. (4).").

125. *See, e.g.*, GA. CODE ANN. § 29-2-11 (West, Westlaw through 2020, Act 322); CONN. GEN. STAT. ANN. §§ 45a-624 ((West, Westlaw through 2020 Supplement to General Statutes of Connecticut Revision of 1958); MD. CODE. ANN. EST. & TRUSTS § 13-904(b)(3) (West, Westlaw through 2020 Regular Session of the General Assembly); N.J. STAT. ANN. § 3B:12-74 (West, Westlaw through L.2019, c. 505 and J.R. No. 33); N.Y. SURR. CT. PROC. ACT. § 1726 (McKinney 2018); 23 PA. STAT. AND CONS. STAT. ANN. § 5611 (West, Westlaw through 2020 Regular Session Act 8); WIS. STAT. ANN. § 48.978(3)(b) (West, Westlaw through 2019 Act 102).

126. *See, e.g.*, 755 ILL. COMP. STAT. ANN. 5/11-5-3(a) ("(a) A parent, adoptive parent, or adjudicated parent whose parental rights have not been terminated, or the guardian of the person of a minor may designate in any writing, including a will, a person qualified to act under Section 11-3 to be appointed as standby guardian of the person or estate, or both, of an unmarried minor or of a child likely to be born."

127. *See, e.g.*, *id.*

128. Author's opinion.

### *G. Appointment of an Alternate Standby Guardian by the Court*

Some, but not all of the statutes, provide for the designation of an alternate standby guardian, either by the parent or the court.[129] Ideally, all statutes should provide for the appointment of an alternate standby guardian by the court on the petitioner's request.[130] The availability of an alternate standby guardian promotes the interest of the child and the parents or legal guardians by facilitating the settlement of custody issues in advance.[131] The appointment of an alternate also reduces the burden on the court by consolidating proceedings for the appointment of a standby guardian that may arise at a later date, respects the ill parent's wishes, and further protects the child.[132] New Jersey, North Carolina, and West Virginia have some of the most comprehensive provisions regarding appointment of an alternative standby guardian and should serve as a model for other states.[133]

### *H. Commencement of the Standby Guardian's Authority*

In almost every state with a standby guardianship statute, the standby guardian's authority commences immediately upon the occurrence of the event specified in the relevant court documents (incapacity, debilitation or death of the parent).[134] In Pennsylvania, where the petition to appoint a standby guardian was filed prior to the parent's incapacity, debilitation or death, the guardianship commences immediately.[135] However, where the petition was filed following such an event, the standby guardian receives immediate authority to act as guardian or co-guardian for a period of sixty days.[136] He must file with the court within that sixty-day period to avoid losing all authority over the child.[137] This is a desirable feature because it minimizes procedural burdens where advance planning occurred; however, in the event that a parent becomes incapacitated prior to appointing a standby guardian, the statute provides for immediate child care needs, as well as the possibility of long-term care, without completely eliminating judicial oversight of the appointment.[138]

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129. *See, e.g.*, W. VA. CODE. ANN. §§ 44A-5-3(a) ("If requested in the petition, the court may also approve an alternate standby guardian identified by the petitioner, to act in the event the standby guardian is unable or unwilling to assume the responsibilities of the standby guardianship."); MD. CODE. ANN., EST. & TRUSTS § 13-905.

130. *See generally U.S. Dep't of Health and Human Services*, *supra* note 104, at 2 (showing that twenty-one states and the District of Columbia provide for an alternative, court appointed guardian).

131. *Id.* at 1.

132. *Id.* at 2.

133. *Id.* at 33–34, 36–37, 52–53.

134. *Id.* at 2.

135. *Id.* at 41: 23 PA. CONST. STAT. ANN. § 5613(a).

136. *See U.S. Dep't of Health and Human Services*, *supra* note 104, at 41: 23 PA. CONST. STAT. ANN. § 5613(b).

137. *See U.S. Dep't of Health and Human Services*, *supra* note 104 at 41: 23 PA. CONST. STAT. ANN. § 5613(b).

138. *See U.S. Dep't of Health and Human Services*, *supra* note 104, at 41.

In Illinois, standby guardianship does not take effect prior to court approval.[139] Certain events, such as mental incapacity, physical disability or death of a parent, must be verified before the court.[140] In Florida and New Jersey, however, the guardianship takes effect immediately.[141] In defining the allowable means of verification, drafters should be sensitive to the harmful effect of delaying the commencement of the standby guardianship.[142] While some formality in establishing the occurrence of the triggering event may be necessary (i.e., provision of a death certificate, or, as in Connecticut, the standby guardian's signed affidavit stating that the triggering event has occurred), an excess of formalities will generate delays in the commencement of the standby guardianship that are harmful to the child's welfare.[143] If the occurrence of the triggering event must be verified by the determination of a physician, for example, the standby guardianship should commence as soon as possible after a record of such determination becomes available.[144] None of the statutes contain model forms for verifying that a triggering event has occurred, but Connecticut's signed affidavit provision should serve as a model for other states seeking to introduce some degree of formality without overwhelming the court system, medical personnel, or the standby guardian with excessive procedural burdens.[145]

### *I. Procedure Following Appointment*

After a reasonable period of time (between sixty and ninety days) from the occurrence of the triggering event, the standby guardian should be required to petition the court for confirmation of the appointment.[146] This procedure should involve, *inter alia*, the filing of proofs of the occurrence of the triggering event.[147] Florida's period of 20 days appears too short for this purpose.[148]

The state's minority guardianship statute should govern all procedures related to guardianship or the filing of a bond.[149] Finally, the standby guardian must have the duty to inform the parent or the legal guardian of the beginning of the standby guardianship, provided they can understand the

139. *Supra* note 104 at 18; 755 ILL. COMP. STAT. ANN. 5/11-5.3(c).
140. *Supra* note 104 at 18; 755 ILL. COMP. STAT. ANN. 5/11-5.3(c).
141. *See U.S. Dep't of Health and Human Services*, *supra* note 104 at 13, 33; FLA. STAT. ANN. § 744.3046; N.J. STAT. ANN. § 3B:12-73.
142. UNIF. GUARDIANSHIP, CONSERVATORSHIP, AND OTHER PROTECTIVE ARRANGEMENTS ACT § 207, cmt. (NAT'L CONFERENCE OF COMM'RS OF UNIF. STATE LAWS 2017).
143. *Id.* § 207 cmt.; CONN. GEN. STAT. § 45a-624.
144. *Id.* § 207 cmt.
145. *See U.S. Dep't of Health and Human Services*, *supra* note 104, at 9–10: CONN. GEN. STAT. § 45a-624c.
146. UNIF. GUARDIANSHIP, CONSERVATORSHIP, AND OTHER PROTECTIVE ARRANGEMENTS ACT at § 207(f)–(g).
147. *Id.*
148. *See U.S. Dep't of Health and Human Services*, *supra* note 104, at 13.
149. Author's opinion.

information.[150] The standby guardianship should also inform the parent or legal guardian of their right to revoke the appointment.[151]

### *J. Powers and Duties of the Standby Guardian; Legal Effect of Appointment*

Unless expressly limited by the court when issuing the guardianship decree, a standby guardian should receive all the powers of a legal guardian.[152] In most states, these statutes grant standby guardian power over the person and property of the child.[153]

Most guardianship statues provide that the standby guardian has power for the minor child's property and person.[154] While financial responsibility and parenting skills are not necessarily correlated, the standby guardian, in serving in place of the actual parent, should take on the full parental role and duties.[155] If the child's assets prove too complex for the standby guardian to manage, the standby guardian may appoint a financial advisor or trustee.[156]

### *K. Legal Effect of Appointment*

Every guardianship statute provides that the rights of others with parental rights over the child are not affected by the designation of a standby guardian.[157] This is to encourage sick parents and guardians to use standby guardianship proceedings in times of need.[158]

### *L. Revocation of Appointment by Petitioner*

Approximately half of the states with standby guardianship statutes allow a petitioning parent or guardian to revoke a standby guardianship by notifying both the court and the current standby guardian in writing.[159] In New Jersey and Wisconsin, oral revocations are permitted if proven by clear and convincing evidence.[160] However, if a parent has sufficient capacity to merely sing their own name, then oral revocation is not necessary.[161] Oral revocation may also not be an adequate enough measure to inform parties

150. *Id.*
151. *Id.*
152. *Id.*
153. *Id.*
154. *Id.*
155. *Id.*
156. *Id.*
157. *Id.*
158. *Id.*
159. *See infra* Part III.L.
160. N.J. STAT. § 3b: 12-75; WIS. STAT. ANN. § 54.52.
161. N.J. STAT. § 3b: 12-75; WIS. STAT. ANN. § 54.64.

like the child's school and doctors of the revocation of the standby guardian's authority.[162]

Pennsylvania and Georgia have the most detailed revocation provisions.[163] In Georgia, the rules differ depending on whether a triggering event precedes or follows the revocation of a standby guardianship.[164] If a triggering event has not yet occurred, the standby guardianship requires no notice to others in order to revoke.[165] To revoke the guardianship, the party must either destroy the designating document or explicitly revoke the designation in writing.[166] Once a determination is made that the mental or physical condition of the parent has deteriorated to a point requiring a standby guardian, the revocation must be filed with the court as well as notifying the standby guardian.[167] In Pennsylvania, clear and convincing evidence must demonstrate an unwritten revocation.[168] For a parent to execute a written revocation prior to filing the petition with the court, they must revoke the initial designation by notifying the standby guardian and destroying the initial designation.[169] If the petition has already been filed with the court, the parent must write and file the revocation with the court, in addition to notifying the standby guardian of the revocation.[170]

While allowing subsequent revocation of a standby guardian's appointment is a desirable feature of standby guardian legislation, certain procedural requirements ought to be imposed.[171] The law should encourage serious, final decision-making with regard to appointing standby guardians.[172] If a parent can easily revoke such an appointment, she may make a hasty decision when designating a standby guardian.[173] There must be some punctilio of finality when the initial designation was made, in the interests of certainty and predictability, for the standby guardian as well as the affected child.[174]

Alabama, Arkansas, Florida, Indiana, Ohio, Wyoming, and Nebraska do not have provisions for the revocation of standby guardian appointment, and should amend their statutes to add this desirable feature.[175] Interestingly, the UGPPA states explicitly state that, once the court has confirmed the designation, the designating parent may not revoke the appointment.[176] California, however, recognizes that at times, revocation may become

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162. Author's opinion.
163. 23 PA. CONS. STAT. ANN. § 5614; GA. CODE ANN. § 29-2-13.
164. GA. CODE ANN. § 29-2-13.
165. *See id.* § 29-2-13.
166. *See id*.
167. *See id.*
168. 23 PA. CONS. STAT. ANN. § 5614.
169. *See id.*
170. *U.S. Dep't of Health and Human Services*, *supra* note 104.
171. *See id.*
172. *See id.*
173. *See id.*
174. *See id.*
175. *See id.*
176. *See id.*

necessary, and provides for the removal of a guardian where the court finds that the guardian has acted inappropriately, or must be removed from some other reason.[177] California's statute is a joint guardianship statute, which differs from a standby guardianship statute, but still succeeds at providing the optimal model for removal of a guardian.[178]

### *M. Renunciation by the Standby Guardian*

New York, Maryland, New Jersey, North Carolina, and Wisconsin provide that the standby guardian may renounce a standby guardianship at any time before its commencement by notifying the court and the petitioner of the renunciation.[179] In New Jersey, notice of the renunciation must also be served on a minor over age fourteen.[180]

The opportunity to renounce a guardianship appointment is a desirable feature, as it is not in any party's interest to appoint a standby guardian who is unwilling or unable to be a guardian of the child.[181] Notice to the court and designation of an alternate standby guardian should be in writing, so as to settle conclusively the issue of the child's custody for the parties involved.[182] The statute should not require the petitioner to comply with undue formalities in the execution of the written renunciation.[183]

### *N. Termination of the Standby Guardianship Appointment*

In UGPPA states, the standby guardianship is terminated upon the child's death, adoption, emancipation, attainment of majority, or as ordered by the court.[184] This allows for the child's continual care until the guardianship is no longer needed.[185] By including the scenarios which would terminate the standby guardianship, the UGPPA statute ensures that guardianships will not be terminated for minor reasons or for no reason at all.[186] Arkansas and Nebraska have very similar provisions relating to the standby guardianship's termination.[187]

Missouri allows the affected child, aged 14 or older, to petition the court to terminate the standby guardianship.[188] While this provision may be desirable in certain situations, it seems unwise in the aggregate to allow

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177. *See id.*
178. *See id.*
179. *See id.*
180. *See id.*
181. *See id.*
182. *See id.*
183. *See id.*
184. *See id.*
185. *See id.*
186. *See id.*
187. *See id.*; ARK. CODE ANN. § 28-65-221.
188. *U.S. Dep't of Health and Human Services*, *supra* note 104.; MO. ANN. STAT. §§ 475.083, 457.046.

teenagers to so petition.[189] The proposed Missouri statute contains no provision for termination of the guardianship in other situations; nor do New Jersey, New York, Pennsylvania, Texas, or West Virginia provide for the termination of the guardianship in the event of death, the child's attainment of majority, or the other reasons provided in the UGPPA.[190]

### *O. Whether to Unify or Divide the Standby Guardian's Functions*

States considering standby guardianship legislation are advised to unify the standby guardian's functions.[191] Only Illinois divides the function of the standby guardian into two separate offices—that of the standby guardian and the short-term guardian.[192] This division of function is undesirable as it adds an additional layer of complexity, imposes additional burdens upon the court, and might potentially pose a disruptive force in the life of the minor to have two different individuals dividing the guardianship tasks.[193]

## IV. NOTEWORTHY DEVELOPMENTS

### *A. Noteworthy Provisions in Standby Guardianship Legislation*

Many states with their own standby guardianship statutes have incorporated unique features, not easily categorizable, into their laws.[194] Florida, for one, requires that the potential standby guardian undergo a full criminal record and credit history check.[195] Illinois's statute covers the guardianship of the chronically ill adult's children and "children likely to be born," ensuring that children born or conceived following the designation will receive the same guardianship care as their siblings.[196] North Carolina's statute includes incompetent adults as well as children.[197] Maryland's statute was amended in 2018, allowing standby guardianship to take effect in the event of an adverse immigration action against the parent and the consent of the parent.[198] Similarly, New York's statute was amended in 2018 to allow standby guardianship to take effect upon the "administrative separation" of the parent or custodian.[199] The statute defines "administrative separation" as relating to a federal immigration matter, including arrest, detention,

189. *See supra* Part III.
190. *See id.*
191. *See id.*
192. *See* 755 ILL. COMP. STAT. §§ 5/11-5.4, 5/11-5.3.
193. *See supra* Part III.
194. *See supra* Part III.
195. FLA. STAT. ANN. § 744.309 (West, Westlaw through 2020 Second Regular Session of 26th Legislature).
196. 755 ILL. COMP. STAT. § 5/11-5.3.
197. N.C. GEN. STAT. ANN. § 35A-1373 (West, Westlaw through 2019 Regular Session of the General Assembly).
198. MD. CODE. ANN. EST. & TRUSTS § 13-904(b)(1)(iii).
199. N.Y. SURR. CT. PROC. ACT. § 1726(3)(b)(ii).

incarceration, and deportation, that interrupts a parent or custodian's care and supervision of the child.[200] While these are the most unusual provisions, each statute contains its own variation of the more common provisions.[201] Each state considering such legislation should look carefully to each provision and choose the one that best reflects that state's standby guardianship goals.[202]

### *B. States with Legislation Resembling Standby Guardianship Statutes*

The designation of a standby guardian generally does not affect the rights of other persons with parental rights over the child.[203] This encourages parents and guardians who are ill to take advantage of standby guardianship proceedings.[204] Some states which lack standby guardianship legislation have statutes providing for the long-term care of children in exigent circumstances.[205] Following is a brief summary of each state's currently effective non-traditional guardianship legislation.[206]

#### *1. California*

California's joint guardianship statute allows the custodial parent with a terminal condition to designate a guardian.[207] The court may also appoint the custodial parent and a person nominated by the custodial parent as joint guardians of the minor.[208] The court is free to authorize one joint guardian to act alone on all matters within the order appointing joint guardianship if the other joint guardian is unable to act, thus terminating the joint guardianship and creating a sole guardianship.[209] Joint guardianship is available in California when the custodial parent has a terminal condition, as defined by statute.[210] One drawback is that the statute does not provide for revocation.[211]

#### *2. Iowa*

Of all the non-standby guardianship statutes considered in this article, Iowa's statute most closely resembles an actual standby guardianship law.[212] The appointing parent has a great deal of discretion as to the petition's

200. *See id.*
201. Author's opinion.
202. *Id.*
203. *U.S. Dep't of Health and Human Services*, *supra* note 104.
204. *See id.*
205. *See id.*
206. *See supra* Part IV.1–5.
207. CAL. PROB. CODE § 2105 (West 2000).
208. *See id.* § 2105 (f).
209. *See id.* § 2105 (d) (e).
210. *See id.* § 2105 (f).
211. *See id.* § 2105.
212. *See generally* IOWA CODE ANN. Ch. 232D (detailing the Iowa's guardianship statutes); IOWA CODE ANN. § 232D.101 (West 2020).

contents, such as what sort of event or medical condition empowers the standby guardian to act.[213] A notable aspect of the Iowa statute is that it requires notice to be given to the affected child.[214] Such notice may be given via the child's attorney or through other methods as approved by the court.[215] In appointing a guardian, Iowa courts will grant great weight to the preference of children that are age fourteen or older.[216]

### *3. Ohio*

Ohio allows the appointment of a limited guardian for a specified or indefinite time period with specific limited guardianship powers.[217] An emergency guardian can be appointed for a period of up to seventy-two hours when such action is required to prevent injury to the minor.[218]

Ohio's statute is extremely limited as compared with traditional or standby guardianship legislation.[219] Ohio refrains from granting full parental powers to the guardian and explicitly limits the scope of his authority.[220]

### *4. Texas*

One key feature of Texas's statute is that it designates, in great detail, who should be appointed guardian when the parent made no such provisions.[221] When there is one surviving parent and she becomes incapacitated or dies, the court is obligated to appoint the person designated in the will or declaration to serve as guardian in preference to those otherwise entitled to serve.[222] If the designated guardian is unable, unavailable, or unwilling to serve, the court is permitted to depart from the provisions of the will or declaration.[223]

### *5. Wyoming*

Wyoming's statute, like Ohio's, provides for emergency and temporary guardianship.[224] Additionally, it allows a child's caregiver to petition the court for appointment as the child's temporary guardian for educational,

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213. *Id.* § 232D.301.
214. *Id.* § 232D.302.
215. *Id.*
216. *Id.*
217. OHIO REV. CODE ANN. § 2111.02(B)(1) (West, Westlaw through File 29 of the 133rd General Assembly (2019-2020)).
218. *Id.* § 2111.02(B)(3).
219. *See id.*
220. *Id.*
221. *See* TEX. EST. CODE ANN. § 1104.051.
222. *Id.* § 1104.053(a).
223. *Id.* § 1104.053(b).
224. WYO. STAT. ANN. § 3-2-106 (West, Westlaw through chapters effective March 11 of 2020 Budget Session of the Wyoming Legislature).

medical and dental care purposes.[225] This is a well-thought-out provision as it enables a child's actual or de facto parent to ensure that someone else is empowered to act in their place in case of emergency.[226]

### *C. Newest Legislation*

Delaware adopted a standby guardianship statute in 2008.[227] The Missouri legislature also enacted standby guardianship legislation that allows parents to appoint a standby guardian, which became effective in August of 2009.[228] In 2018, the Kentucky legislature enacted law that allows for standby guardians to be appointed.[229] Additionally, in 2012, the Indiana legislature enacted a new standby guardianship statute.[230] The Indiana statute allows the parent or guardian of a minor or protected person to designate a standby guardian in a written declaration.[231]

## V. CONCLUSION

The past decade has seen the enactment of many new standby guardianship statutes.[232] Currently, half of the states and the District of Columbia have incorporated such statutes into their bodies of law.[233] Hopefully, the remaining states will follow suit in the next decade, protecting the ability of terminally ill residents to provide for and protect their children as fully as in the rest of the country.[234]

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225. *Id.*
226. *See id.*
227. *See generally*, DEL. STAT. ANN. tit. 13, ch. 23 (detailing Delaware's standby guardianships statutes); DEL. STAT. ANN. tit. 13, § 2361 (West, Westlaw through ch. 236 of the 150th General Assembly (2019-2020)).
228. *See generally*, MO. ANN. STAT. ch. 475 ( (West, Westlaw through end of 2019 First Regular and First Extraordinary Sessions of the 100th General Assembly) (detailing Missouri's standby guardianships statutes).
229. *See generally*, KY. REV. STAT. ANN. ch. 387 (West, Westlaw through emergency effective legislation through Chapter 7 of the 2020 Regular Session) (detailing Kentucky's standby guardianships statutes).
230. *See generally*, IND. ANN. CODE § 29-3-2-0.1 (West, Westlaw through 2020 Second Regular Session of the 121st General Assembly).
231. *Id.*
232. Author's opinion.
233. *Id.*
234. *Id.*