

## Standby Guardianships

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### What is a Standby Guardianship?

In NYS, under a Standby Guardianship, parents or legal guardians who have a chronic, debilitating or terminal illness, can make care and custody plans for their minor children (that is, a child under the age of 18 years) that will take effect at a future time.

### How is a Standby Guardian appointed?

In NYS, there are 2 ways that a parent or legal guardian can appoint a Standby Guardian: 1) the parent or legal guardian can sign a written Designation of Standby Guardian in front of 2 witnesses who are at least 18 years of age and not the person named as the Standby Guardian; or 2) the parent or legal guardian can file a petition with the Surrogate Court that names the person chosen to be the Standby Guardian and ask that the Surrogate Court to appoint or name that person as the Standby Guardian. If you go to court, you will have to pay a filing fee. The current filing fee as of January, 2012 is \$20.00. In either instance, the parent or legal guardian will need to decide whether the guardianship will be over their child's person, property or both.

### What is Guardianship over the Person?

Guardianship over the Person, allows a guardian to make all daily decisions concerning the child such as where the child will live, go to school or obtains medical care.

### What is Guardianship over the Property?

Guardianship over the Property, allows the guardian to make decisions about the child's property (that is, if the child has any property such as monies received from a settlement) and other financial decisions.

### What is the difference between a regular guardianship and a Standby Guardianship?

There are several differences between a regular guardianship and a Standby Guardianship:

1. Under a regular guardianship, a guardian takes control over your child(ren) as soon as he/she is appointed as guardian by the court. Under a Standby Guardianship, the guardian can be approved by the court now BUT their authority as guardian will not take effect until a later time.
2. The only person who can appoint a Standby Guardian is the parent who suffers from a terminal illness.
3. Under a Standby Guardianship, the parent does not lose their parental rights over their child(ren). Under a regular guardianship, the parent does give up their parental rights.

### **When does a Standby Guardianship begin?**

Under the written Designation of Standby Guardianship, the named Standby Guardian must go to Surrogate Court after they have received proof that they need to become responsible for the child. In this instance, the named Standby Guardian must go to Surrogate Court within **60 DAYS** after they receive such proof that the parent or legal guardian can no longer take care of their child, or the parent or legal guardian has consented or has died.

If the parent or legal guardian already went to court to name a Standby Guardian, the Standby Guardian has **90 DAYS** after they receive proof that the parent or legal guardian can no longer take care of their child or has died to confirm their appointment as Standby Guardian.

It is important that the named Standby Guardian follow the above time periods. If not, the person named as the Standby Guardian may lose the authority or power to act as the child's guardian.

### **Do the rights of the parent or legal guardian end when a Standby Guardian is chosen for the child?**

No. The rights of parents or legal guardians are not ended when a Standby Guardian is chosen. A Standby Guardian's authority begins only when the parent or legal guardian is not able to take care of their child because of illness or the parent or legal guardian has died.

### **What if the birth parent objects?**

If there is a birth parent, the court will decide what is in the best interest of the child. If the birth parent objects to the appointment of the Standby Guardian, the birth parent has the primary rights to custody of the child. If the birth parent is not fit to have custody or if extra ordinary circumstances exist which require someone else to receive custody, the birth parent may not be able to get custody.

### **How does a Standby Guardian know when they need to become the child's guardian?**

In NYS, the Standby Guardian's authority does not go into effect until any of the following events have occurred:

1. the parent's or legal guardian's doctor states in writing that the parent or legal guardian is mentally incapacitated and unable to care for their children; **OR**
2. the parent's or legal guardian's doctor states in writing that the parent or legal guardian is physically debilitated and unable to care for their children **AND** the parent or legal guardian consents in writing before 2 witnesses to the Standby Guardian's authority to take effect; **OR**
3. the parent or legal guardian has died.

### **Why can't I simply name a guardian under my Last Will and Testament?**

You can, but your wish may not necessarily be followed by the court. Wills are designed to disburse property, not children. If you state the intended guardian of your children in your Will, your proposed guardian will have to file a petition with the court following your death. Remember, the terms of a Last Will and Testament do not go into effect until the court has approved the Will after you died. A Last Will and Testament has no effect while someone is alive.

**My parental rights have been terminated. Can I still nominate a Standby Guardian for my child(ren)?**

No. You have no rights with respect to your child following a total termination of your parental rights.

**My proposed Standby Guardian once had her children taken away temporarily by CPS following a neglect finding. What effect will this have?**

This will create some difficulties. The judge will have to obtain the original reports and court findings and other related information and give this information "due consideration" in making its determination as to the appointment of the Standby Guardian. In this case, you should definitely obtain the advice of counsel before you begin this process.

**If I change my mind, can I revoke and change my designated Standby Guardian?**

Yes. If you have signed a written Designation of Standby Guardian, you may revoke the Standby Guardian's appointment at any time by executing a written renunciation and notifying the Standby Guardian.

Similarly, the person appointed as Standby Guardian by the court, may renounce their appointment by executing a written document, filing it with the court, and notifying the parent/petitioner.