

The Benefits of Appointing A Standby Guardian



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One of the most common reasons parents plan their estate is to ensure their children are properly provided for and will continue to be cared for in the event that either or both parents pass away. Naming a guardian to care for minor children is an important part of any parent's estate plan; some may even argue the most important part. This article introduces a statutory tool called the standby guardianship, which can help parents construct a more comprehensive plan for the care of their minor children.

Common practice is to name a guardian to a minor child through a parent's last will and testament. Doing so gives parents the peace of mind to know that their children will be cared for in the event of their death. However, it's important to note that a will is merely a testamentary document and therefore, it has limitations. A will has no effect during the lifetime of its creator (the "testator") but only takes effect at death. Therefore, it serves no purpose during the testator's lifetime. What if a parent is living, but incapacitated or unable to care for their children either permanently or temporarily? Who will serve as guardian in such a case and how can parents be sure that the right person will be appointed? The solution to this very real scenario lies in appointing a standby guardian.

Several states including Maryland, Virginia and the District of Columbia have statutes that allow for appointment of standby guardians. This article focuses primarily on the Virginia statute, but if you would like to know more about the specific statute in your own state, contact an attorney licensed in your state for more details.

In Virginia, the statute defines a "standby guardian" as a person who is designated in writing or approved by the court to temporarily assume the duties of guardian of the person and guardian of the property, or both, of a minor child on behalf of or in conjunction with a qualified parent. A "qualified parent" is a parent who has been diagnosed, as evidenced in writing, by a licensed physician to be afflicted with a progressive or chronic condition caused by injury, disease or illness from which, to a reasonable degree of medical probability, the patient cannot recover.

A standby guardian is appointed to serve if and when a certain "triggering event" occurs. A triggering event may be incompetency or death of a qualified parent or even the written consent by the qualified parent to the commencement of the standby guardian's authority. A court is directed to appoint the named standby guardian to serve once the specific triggering event has occurred.

The Benefits of Appointing A Standby Guardian (Cont.)

As is the case with any guardianship situation, it's best to have named the person you want to have as guardian well in advance. Many people assume their families would "do the right thing" in such a case, but it's often a recipe for conflict if a parent fails to name a guardian in their estate plan. More times than not, multiple family members believe that they are the best choice for the child, and a custody battle can result when parents aren't clear as to their wishes.

A standby guardianship enables a parent to plan for the future care of a minor child without terminating his or her parental or legal rights. It also gives the standby guardian the authority to act in a manner consistent with the known wishes of a qualified parent regarding the care, custody and support of a minor child. In order to name a standby guardian, a parent need only put in writing their desire to name an individual to serve in such a role. When the time comes that a guardian is needed, someone, most likely the standby guardian themselves, petitions a court to appoint the standby guardian named in the document. A hearing will be required if a relative requests one within ten (10) days of the date that notice of the petition being filed is given. However, the court is inclined to follow the wishes of the qualified parent, so long as they find that doing so is in the best interest of the child. A standby guardian designation can be revoked at any time prior to the "trigger event." It may also be revoked by filing a notice of revocation with the court at any time.

Best practice dictates providing for guardianship of minor children in a will and also in a standby guardianship document. While it is difficult to plan for every possibility in life, planning for the continued care of your children can be simplified by including guardianship language in both your will and in a standby guardianship document.