House
Legislative
Analysis
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STANDBY GUARDIANSHIP ACT

House Bill 5541
Sponsor: Rep. David Gubow
Committee: Judiciary

Complete to 9-16-98

A SUMMARY OF HOUSE BILL 5541 AS INTRODUCED 2-5-98

The bill would amend the Revised Probate Code to allow for the appointment or designation of a standby guardian who would be authorized to temporarily assume guardianship of a minor child or ward upon the death, incapacity, debility, or consent of the parent or guardian. Debility would refer to a petitioner's or designator's chronic and substantial inability, due to a physical illness, disease or injury, to provide primary care for the minor child. Incapacity would refer to the petitioner's or designator's chronic and substantial inability, due to mental or organic impairment, to understand the nature and consequences of decisions concerning the care of his or her minor child and consequent ability to make those decisions. The provisions of the Probate Code regarding guardians would generally also apply to standby guardians; however, where the provisions of the code conflicted with the specific sections regarding standby guardianships, the specific standby guardianship provisions would control. The bill would specify that empowering a standby guardian would not terminate the parental rights of a living parent or guardian and that the parent or guardian and the standby guardian would have concurrent authority over those aspects of the minor child's person or property that were under the standby guardian's authority.

Petition. A standby guardian could be appointed by the court upon the petition of a parent or guardian. The petition could also identify an alternate guardian who would be appointed if the standby guardian died or otherwise refused or was unable to assume the duties of a standby guardian. A petition for the appointment of a standby guardian would have to contain at least all of the following:

* The proposed standby guardian's name and address.

* A statement that there is a significant risk of the parent's or guardian's death, incapacity, or debility due to a progressive chronic condition or a fatal illness. The petitioner would not be required to submit medical documentation of his or her terminal status.

* The event or events that would trigger the standby guardian's assuming guardianship of the minor child that was the subject of the petition (such as the death, debility, incapacity, or consent of the petitioner or designator).

A petitioner would not be required to appear in court if he or she were unable to do so; however, a petitioner could be required to appear on a showing of good cause on a motion by the court or a party.

Appointment. Within 30 days after a petition was filed, notice would have to be served on the minor child's parent or guardian, or on the proposed standby guardian, as appropriate. During the time the petition was pending, the court would have to give preference to maintaining custody with the current parent or guardian, or the proposed standby guardian. If the parent or guardian could not be found after a diligent search, the parent or guardian could be served as allowed by supreme court rules. As part of the process, a noncustodial parent would be given an opportunity to litigate his or her fitness. A temporary guardian could be appointed after the proceeding had started in order to ensure continuity throughout the process. The petitioner would have to be in sufficient good health to provide appropriate care for the minor child.

A court would be required to appoint a standby guardian in response to a petition if it determined there was a significant risk of the petitioner's death, debility, or incapacity due to a progressive chronic condition or fatal illness and that the minor child's interests would be promoted by the appointment of a standby guardian.

Designation. A parent could designate a qualified person to assume guardianship of his or her unmarried minor child or child likely to be born upon the occurrence of a triggering event (the parent's death, debility, or incapacity). The guardianship could apply to the child, to the child's estate, or both. If the child had reached the age of reason (generally by age 14, or such time as the child is capable of understanding the nature and consequences of decisions concerning his or her own care), he or she could name a standby guardian of his or her own choice. A parent or guardian of an unmarried minor or a child likely to be born could also designate in writing a person to be a successor guardian to the standby guardian for the minor, the estate, or both.

A designation for standby guardianship would have to be in writing and be witnessed by at least two credible adult witnesses, neither of whom could be the person designated as guardian. The designation itself could also be made using the form provided in the bill; however, the use of the form would not be required.

A designation could be provided by any competent evidence under certain circumstances, such as where the parent or guardian was so ill that he or she could die before the court date, where the parent was reluctant to file in court, or as a first step, where pro bono counsel would be utilized but had not yet been obtained.

A designated standby guardian would assume guardianship upon the occurrence of a triggering event listed in the designation. If the triggering event were the incapacity or debility of the designator, the standby guardian and the presiding court would be provided with a copy of the attending physician's determination within 60 days of that event.

A person designated as a standby guardian could decline such a designation by notifying the designator in writing at any time before he or she assumed the duties of guardian. Further, the designator could revoke the designation of standby guardianship by notifying the designated person orally or in writing, or by any other act that would evidence a specific intent to revoke the designation.

Unless a petition for court appointment of a standby guardian were made by the designator or the designated standby guardian, a designation would expire two years after the date of the written designation and could be renewed by refiling the petition. Except as otherwise noted, the petition for court appointment of a designated standby guardian would have to comply with the procedures for an appointment of a standby guardian by petition.

In a court proceeding for the appointment of a standby guardian, a designation would constitute a rebuttable presumption that the proposed standby guardian was capable of serving as a guardian. If the designator died, the designated standby guardian would be preferred for the choice of permanent guardian, subject to the rights of the other parent, and would be intended to facilitate the direct standby open adoption of the child. (Direct standby open adoption would mean a direct adoption of the at-risk child by a standby guardian upon the death of the child's parent or guardian, in which communication and support with the adopted child's extended family, as well as the child's community, are sought, obtained and maintained.)

MCL 700.6, 700.10, and 700.421

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■This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.