



# PLANNING FOR THE POSSIBILITY OF ENFORCEMENT: STANDBY GUARDIANSHIP FOR IMMIGRANT PARENTS

## WHAT IS STANDBY GUARDIANSHIP?

Standby guardianship is an important tool that enables parents to plan for the future care of their children. It allows a parent to designate an adult to be on standby to assume guardianship of a child only when a triggering event occurs, for example, incarceration, a terminal illness, or death, that could render the parent incapable of caring for a child, typically without losing the parent's legal or parental rights. Once the triggering event occurs, the standby guardian takes custody of the child, makes important decisions concerning the child's education and medical care, and provides for the child's basic needs, such as food, clothing and shelter. Twenty-nine states and the District of Columbia have standby guardianship laws.<sup>1</sup>

## HOW IS A STANDBY GUARDIAN APPOINTED?

There are two ways to appoint a standby guardian – either by signing a legal form nominating the individual as the standby guardian, or through a court process. In Tennessee, for example, a parent may assign a standby guardian through a power of attorney form without court approval.<sup>2</sup> Some states require a judge to approve the nomination and issue an order appointing the standby guardian. Where only one parent is naming a standby guardian, the nominating parent may be required to obtain the other parent's consent, or submit proof to the court that he or she attempted to inform the other parent about the process and provide an opportunity to challenge the nomination.

## WHAT HAPPENS TO PARENTAL RIGHTS AFTER APPOINTING A STANDBY GUARDIAN?

Generally, when the standby guardian's authority is activated, the parent still maintains legal and parental rights over the child. Some states recognize concurrent authority between a parent and standby guardian, allowing both to make decisions together concerning the child. If a parent finds that the standby guardian's care is unsatisfactory, the parent may terminate the guardianship and name someone else. However, a handful of states, such as Florida and Indiana,<sup>3</sup> transfer sole authority over the child to the standby guardian once his or her role becomes effective, suspending the parent's decision-making powers over the child.

## WHY IS STANDBY GUARDIANSHIP IMPORTANT FOR IMMIGRANT FAMILIES?

Due to increased Immigration Customs Enforcement, or ICE, actions, as well as changes to federal immigration policies, such as Temporary Protected Status, or TPS, millions of children are facing the possibility of being separated from their parents. Data from the Pew Research Center indicates that in 2016 approximately 5 million U.S.-born children lived with at least one undocumented parent.<sup>4</sup> Another study published in the Journal on Migration and Human Security reveals TPS holders from El Salvador, Haiti and Honduras have more than 270,000 U.S.-born children.<sup>5</sup> Hence, removing parents from society with little to no warning, or without opportunity to make child care arrangements, forces them to leave their children behind and stranded. Parents

can only hope that a relative or friend will step up to care for their child in their absence, in which case, the caretaker would not have legal authority to act on the child's behalf. Without anyone assuming custody of the child, the state would have to place the child through its foster care system. Both scenarios cause significant disruption in the child's life, and remove the parent's ability to control who may care for their child.

To avoid this problem, some states have included specific provisions in standby guardianship laws to enable parents who are at risk for immigration enforcement action to designate someone as the future guardian for their child. Maryland,<sup>6</sup> New York,<sup>7</sup> and the District of Columbia<sup>8</sup> are among the jurisdictions with explicit language in their laws that recognize "adverse immigration action" or "administrative separation" as a triggering event for standby guardianship purposes. These incidents may include a parent being placed in removal proceedings, being detained, ordered deported or being denied reentry into the United States. Although some state laws do not explicitly mention immigration enforcement as a triggering event, many of the laws are written broadly so that immigration action may still be considered. An attorney licensed in the respective state may be able to provide guidance on local laws.

## TALKING POINTS: STATES SHOULD ADOPT STANDBY GUARDIANSHIP LAWS FOR IMMIGRANT PARENTS

A narrow statute, such as one requiring a parent to be chronically ill or near death as a reason for appointing a standby guardian, does not address the variety of circumstances a parent may face in seeing to a child's welfare, and for which a guardian would be appropriate. Below are a few reasons why more comprehensive standby guardianship laws should be enacted, avoiding the need for the state to take over a child's placement and care.

- **Standby guardianship promotes the best interest of the child.** It enables a parent at risk for immigration detention or deportation to create an emergency child care plan that suits the child's needs. Parents can have time to thoughtfully select someone who will assume guardian responsibilities and provide an environment that is aligned with the parents' goals for the child. This is critical for a child's practical needs and emotional welfare if separated from their parent.

- **Standby guardianship benefits the state.** When a parent appoints a standby guardian, the state avoids spending its own resources to determine placement for the child, either with a relative or through its foster care program. Locating a relative who is willing and able to assume guardianship responsibilities, as well as to go through the court process, takes time and resources.
- **Advance appointment allows the standby guardian to prepare to care for the child.** Although relatives or friends may be willing to care for a child whose parent has been abruptly removed from the community due to an ICE arrest or deportation, they may not be fully prepared to meet the child's needs at a moment's notice. Completing the standby guardianship process allows the appointed adult to make the necessary financial and practical preparations for welcoming an additional child into his or her home.
- **Standby guardianship can help reduce homelessness among youth.** Some youth become homeless as a result of a family member's detention or deportation. For low-income families, losing a financially contributing member of the household, or in some instances, the only breadwinner, can cause severe financial and housing instability. This can lead to other hardships for the child, including disruption in the child's education and increased risk for mental and physical health challenges. A standby guardian can help reduce a child's vulnerability to such instability.

## ENDNOTES

- <sup>1</sup> *Standby Guardianship*, DEP'T OF HEALTH AND HUMAN SERVICES, <https://www.childwelfare.gov/pubpdfs/guardianship.pdf>, (Last accessed October 1, 2019) (As of June 2018 these states were Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Tennessee, Utah, Vermont, Virginia, West Virginia, and Wisconsin).
- <sup>2</sup> Tenn. Code. Ann. § 34-6-302
- <sup>3</sup> *Standby Guardianship*, DEP'T OF HEALTH AND HUMAN SERVICES, <https://www.childwelfare.gov/pubpdfs/guardianship.pdf>, (Last accessed October 3, 2019) (Florida, Illinois, Indiana, and Iowa laws provide that once guardianship is activated, the standby guardian assumes sole authority over the child).
- <sup>4</sup> J.S. Passel, D. Cohn, J. Gramlich, *Number of U.S.-born babies with unauthorized immigrant parents has fallen since 2007*, Pew Research Center, November 1, 2018, <https://www.pewresearch.org/fact-tank/2018/11/01/the-number-of-u-s-born-babies-with-unauthorized-immigrant-parents-has-fallen-since-2007/>.
- <sup>5</sup> Robert Warn and Donald Kerwin, *A Statistical and Demographic Profile of the US Temporary Protected Status Populations from El Salvador, Honduras, and Haiti*, *Journal on Migration and Human Security*, Vol. 5 No. 3: 577-592 (2017).
- <sup>6</sup> MD. Code, Estates & Trusts § 13-904
- <sup>7</sup> NY Consolidated Laws, S.C.P.A. § 1726
- <sup>8</sup> The D.C. Council passed the “Standby Guardian Emergency Amendment Act of 2019,” amending D.C. Code § 16-4801 to temporarily add adverse immigration action as a triggering event.