

Comment,
PROTECTING CHILDREN: USING
GUARDIANSHIPS AS AN ALTERNATIVES
TO FOSTER CARE AND ADOPTIONS

I. Introduction

Guardianships have historically been defined as a legal arrangement under which the guardian has the legal right and duty to care for the ward and his property.¹ The root of guardianship is benevolence which is reflected in the definition of guardianship.² A guardianship is established because of the ward's inability to legally act on his own behalf and reflects the guardian's intent to protect the ward.³

Guardianships have been used throughout history, the earliest date back to Rome at the time of Cicero, in which legal proceedings were used for the protection of the property of incompetents.⁴ Guardianships first appear in English law with the "passage of the statute *De Praerogativa Regis*."⁵ This statute recognized "guardianship as a duty of the sovereign to protect and care for the person and property of the mentally incompetent."⁶ This duty eventually developed into a set of standards that carried over to the United States after the American Revolution. States began using a modified form of *parens patriae*, by applying common law or acting under their own constitutional or statutory provisions, and exercising jurisdiction "over the persons and property of the mentally incompetent to assure that those unable to care for themselves were protected from harm."⁷ After the Industrial Revolution, society's attitude began to change about childhood development and states began to use

¹ Neil B. Posner, *The End of Parens Patriae in New York: Guardianship Under the New Mental Hygiene Law Article 81*, 79 MARQ. L. REV. 603 (1996).

² *Id.* at 603.

³ *Id.*

⁴ *Id.* at 604.

⁵ *Id.* at 604 citing 17 Edw. 2, c.9 (1324) as cited in Peter M. Horstman, *Protective Services For The Elderly: The Limits Of Parens Patriae*, 40 Mo. L. Rev. 215, 218 (1975)

⁶ Posner, *supra* note 1 at 605.

⁷ *Id.*

guardianships to protect the minor's property or estate when their parents were deceased or could not perform this function.⁸ Guardianships are still used to protect the minor's property but can also be used as an alternative to adoption and as a temporary means of caring for a child when a parent is unable to do so.

Parents have the responsibility of providing their child with a safe, stable and secure environment.⁹ But sometimes parents are not able to provide these basic necessities to their children. Guardianships are a viable alternative for keeping children protected and healthy, without severing the parent-child relationship because the appointment of a guardian confers the legal authority necessary for a third party to act like a parent.

Part Two of this Article discusses the types of guardianships and state variations on these guardianships. Guardianship statutes vary from state to state. For example, Louisiana calls guardianships "tutorships." Various courts have jurisdiction over guardianship proceedings, including the probate courts, chancery courts, family courts or juvenile courts. State statutes also provide the age of majority and the age when the minor may choose a guardian.¹⁰ The article then discusses, in Part Three, the use of guardianships as an alternative to foster care and adoption. The fundamental issue is how guardianships are used to protect children who have been removed from the home due to abuse and neglect and how this placement alternative allows family members to step in and take care of these children without impinging upon their relatives' parental rights.

II. Types of Guardianships

There are three different options available for selecting the person who will have legal authority for the child: guardianship

⁸ Susan Vivian Mangold, *Extending Non-Exclusive Parenting and the Right to Protection*, 48 BUFFALO L. REV. 835, 873 (2000).

⁹ Caroline Palmer and Lynn Mickelson, *Public Interest Law: Improving Access to Justice: Many Rivers to Cross: Evolving and Emerging Issues in the Third Decade of the HIV/AIDS Epidemic*, 28 WM. MITCHELL L. REV. 455, 483 (2001).

¹⁰ Peter Mosanyi, II, Comment, *A Survey of State Guardianship Statutes: One Concept, Many Applications*, 18 J. AM. ACAD. MATRIM. LAW. 253 (2002).

by petition, testamentary guardianships and stand by guardianships.¹¹

A. *Guardianship by Petition*

The guardianship by petition is commonly referred to as the “traditional guardianship.”¹² Under this form of guardianship, the parent petitions the court to appoint a person of their choosing to act as legal guardian of their child.¹³ However, in Delaware the court ruled that a foster family who had cared for the minor most of his life had standing to petition the court for guardianship.¹⁴

When choosing the legal guardian, the Court uses the best interest of the child standard. The use of the best interest standard limits who the Court can appoint as legal guardian, so there is no guarantee that the court will appoint the parents’ choice of legal guardian.¹⁵ Courts can appoint a legal guardian on a limited, temporary or permanent basis.¹⁶ In Pennsylvania, the courts prefer to appoint a legal guardian with the same religious persuasion as the parents of the child.¹⁷ Guardianship by petition also requires that the parent relinquish all parental rights.¹⁸

Connecticut allows “coguardianships,” in which a parent may petition the court to appoint another adult to serve as a coguardian of a child.¹⁹ In appointing the coguardian, the Court will consider, among other things: whether or not the coguardian will be a satisfactory guardian, what is in the best interest of the child and if the child is over the age of twelve, the child’s preference for the coguardian.²⁰

If the Court approves the coguardian, the coguardian and the sole guardian will share guardianship of the child, until the

¹¹ *Id.* at 254.

¹² *Id.*

¹³ *Id.*

¹⁴ *Div. of Family Serv. v. Harrison*, 741 A.2d 1016 (Del. 1999).

¹⁵ *Mosanyi*, *supra* note 13 at 254.

¹⁶ *Id.*

¹⁷ 20 PA. CONS. STAT. ANN. 5113 (2002).

¹⁸ *Mosanyi*, *supra* note 13, at 255.

¹⁹ Joyce E. McConnell, *Securing the Care of Children in Diverse Families: Building on Trends in Guardianship Reform*, 10 YALE J.L. & FEMINISM 29, 41 (1998).

²⁰ *Id.* at 42.

death of the sole guardian, at which time the coguardian would become the child's sole guardian.²¹ However, the coguardianship is limited to single parents who are sole guardians of their children.²²

B. *Testamentary Guardianships*

A testamentary designation of a guardian is a very common and accepted method for appointing a legal guardian.²³ Society views testamentary designations "as the selfless act of a responsible parent to provide for the care of his child."²⁴ Historically, testamentary guardianships have been used by middle and upper class parents to plan for the care of their children after their death.²⁵

In a testamentary guardianship, a parent uses a will or other estate planning device, such as a trust, to appoint a legal guardian. The will or trust must be in written form and attested by two or three witness, depending on the jurisdiction. If both parents are living, they must both nominate the legal guardian.²⁶ New York courts have held that if parents die simultaneously, and their wills appoint different people, the surrogate court will determine which appointment will be in the best interests of the child.²⁷

A single parent may establish a guardianship if he is the sole surviving parent.²⁸ If a single parent designates a legal guardian without the consent of the other surviving parent, some courts will invalidate the designation or simply say that the designation "at best serves only a testamentary nomination of a guardian."²⁹ Parents cannot use a beneficiary designation to interfere with the parental rights of the other parent. However, New York allows a third party to assert rights after the death of a parent, if the third

²¹ *Id.*

²² *Id.*

²³ Mosanyi, *supra* note 13 at 254.

²⁴ McConnell, *supra* note 19 at 36.

²⁵ Deborah Weimer, *Implementation of Standby Guardianship: Respect for Family Autonomy*, 100 DICK. L. REV. 65, 68 (1995).

²⁶ McConnell, *supra* note 19 at 37.

²⁷ Mosanyi, *supra* note 13 at 263.

²⁸ *Id.* at 255.

²⁹ *Id.*

party can establish that the surviving parent is unfit, unable or unwilling to assume responsibility for the child.³⁰

Under this type of guardianship, parents transfer all of their parental rights to the legal guardian because the parent will no longer be living when the guardianship takes effect. As such, the legal guardians' duties only take effect upon the death of the parent.³¹ Courts generally defer to the parental designation in the will or trust because the courts believe the parents know what is in their child's best interest.³²

Parents should obtain consent from the proposed legal guardian before making a testamentary designation and the testamentary instrument must be probated in order for the testamentary guardian to be properly appointed. In Idaho, "a testamentary appointment under an informally probated will terminates if the will is later denied probate in a formal proceeding."³³

C. *Standby Guardianship*

A standby guardianship gives parents the ability to designate a legal guardian for their children without giving up parental control or rights. The standby guardian's duties take effect upon the occurrence of a triggering event, which is defined as, "a specific occurrence stated in that designation which empowers a standby guardian to assume the powers, duties and responsibilities of a guardian."³⁴

The standby guardian will care for the children while the parent is alive but too ill or disabled to care for the child and this care will continue until the parent is once again able to care for the child.³⁵ The parent and standby guardian have concurrent authority over the child.³⁶ This process allows the parent-child relationship to stay intact because the parent retains legal custody of the child during the period that the standby guardian

³⁰ *Id.* at 263.

³¹ *Id.* at 255.

³² McConnell, *supra* note 19 at 37.

³³ IDAHO CODE 15-5-101, 210 (2002).

³⁴ Mosanyi, *supra* note 13 at 254.

³⁵ Weimer, *supra* note 25 at 71.

³⁶ *Id.* at 71.

cares for the child.³⁷ Allowing the parent to maintain legal custody, while having a standby guardian helps to ease the transition after the parent's death.³⁸ This type of guardianship ensures that the child will be cared for during the parent's illness or disability and upon the death of the parent.

The standby guardian can be approved as the child's permanent guardian through a simple court proceeding.³⁹ Because our society places a "high priority on the best interest of the child, standby guardianships provide voluntary permanency planning options that can keep families together and assure continuity in uncertain times."⁴⁰

A standby guardianship is not the same concept as a limited or temporary guardianship. A limited guardianship is used when the guardians duties are limited to certain functions and a temporary guardian maintains power for a limited period of time.

New York was the first state to enact a standby guardianship statute after the state realized how the AIDS epidemic had impacted families, and more importantly single mothers.⁴¹ The New York law was created for parents with "progressively chronic illness" or "an irreversibly fatal disease" to designate a standby guardian.⁴² Standby guardianship statutes have since been enacted in twenty states. These states were motivated into action after seeing the rise in the number of adults and children living with AIDS.⁴³ Studies show that of the ten states with the highest number of adults and children living with AIDS, only Texas and Georgia have failed to enact standby guardianship laws.⁴⁴

The requirements for an appointment of a standby guardian vary from state to state, for example not all states require that

³⁷ Mosanyi, *supra* note 13 at 254.

³⁸ 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, 478 (1998).

³⁹ Mosanyi, *supra* note 13 at 255.

⁴⁰ Palmer, *supra* note 9 at 487.

⁴¹ *Id.* at 485.

⁴² *Id.* at 486.

⁴³ *Id.*

⁴⁴ JEFFREY SELBIN & CAROLYN McALLASTER, AIDS AND THE LAW, ISSUES IN FAMILY LAW FOR PEOPLE WITH HIV, at 321 (3d ed. 1998 & Supp. 2000).

the triggering event be a terminal illness. Connecticut allows a parent to petition the court for a standby guardian “upon the parent’s mental incapacity, physical disability, or death, and the guardianship takes effect for a period of up to one year.”⁴⁵ In Kansas, the standby guardian can act upon the parent’s temporary absence or impairment, or upon the death of the parent.⁴⁶

Under Maryland’s standby guardianship statute, “a guardian may be appointed by the court, upon petition by the parent, when there is sufficient evidence of risk that the petitioner will die or become incapacitated within two years of filing the petition.”⁴⁷ New Jersey requires that the petition for the judicial appointment of a standby guardian state which triggering event will cause the authority of the appointed standby guardian to become effective.⁴⁸

However, parents will often be unaware of their legal options, regarding care for their children, when they become sick or disabled.⁴⁹ Healthcare providers, case workers and social service workers need to urge terminally ill parents to think about and plans for their children’s futures. Many of these families have a relative that is already helping to care for the children but this is no guarantee that the state will allow the living situation to continue upon the parent’s death. Mothers living with AIDS made legal custody arrangements in only 25% of the cases and 91% of the children resided with family members.⁵⁰ Parents need to realize that “too much can go wrong and too much is at stake, to avoid planning.”⁵¹

Traditional guardianships do not adequately address the needs of terminally ill, disabled or incapacitated parents. Under a traditional guardianship scheme, a terminally ill mother would have to relinquish all parental rights and custody of her children, in order to ensure that her children are adequately cared for upon her death. Standby guardianships “promote keeping a fam-

⁴⁵ CONN. GEN. STAT. 45a-624d. (2002).

⁴⁶ 2002 KAN. SESS. LAWS 114 26(a)(1).

⁴⁷ MD. CODE. ANN. EST. TRUSTS 13-101 et. seq. (2002).

⁴⁸ N.J. STAT. ANN. 3B:12-12 to-78 (2002).

⁴⁹ Weimer, *supra* note 25 at 69.

⁵⁰ Palmer, *supra* note 9 at 485.

⁵¹ *Id.*

ily together for as long as possible to ensure that the children and parents cope with the ultimate separation process.”⁵²

D. *Termination of Guardianships*

Guardianships can terminate for various reasons but most terminate because the child has reached the age of majority. Each state provides for the age of majority within their guardianship statutes. Other reasons for termination include: death of the guardian or child, marriage, adoption or emancipation of the child, misconduct by the guardian and removal by the appointing court. However, in most states termination of a guardian does not affect their liability for prior acts nor their obligation to account for funds and assets of the ward.

In California, a guardianship can be terminated when, among other reasons, it is no longer necessary or in the best interests of the child.⁵³ The courts in Kentucky will remove a guardian or terminate a guardianship when there is misconduct by the guardian; the guardian becomes insane or moves out of Kentucky.⁵⁴

Maine’s guardianship statutes provide that, “absent the consent of the guardian, the court may not terminate the guardianship unless the court finds by a preponderance of the evidence that the termination is in the best interests of the ward; the burden of showing the preponderance of the evidence that continuation of the guardianship is in the best interest of the ward is placed on the guardian.⁵⁵ In Michigan, any person interested in the child’s welfare, including the child, if she is over the age of 14, may petition for removal of a guardian if removal would serve be in the child’s best interest.

III. Use of Guardianships as an Alternative to Foster Care and Adoption

Parents have a right to raise their children free from state intervention and children have a countervailing right to protec-

⁵² Molee, *supra* note 38 at 482.

⁵³ CAL. PROB. CODE ANN. 1400 at 1860 (West 2002).

⁵⁴ KY. REV. STAT. ANN. 387.090 (Banks-Baldwin 2002).

⁵⁵ ME. REV. STAT. ANN. TIT. 18-A, 5-212 (2002).

tion from abuse and neglect.⁵⁶ However, states have a right to intervene in the lives of families and protect children when abuse and neglect is present in the home. When the abuse and neglect becomes too severe the state may have to remove the children from their parents and place the children in alternative care. When the state places these children in alternative care, “parental rights are shared by a child’s biological parents, the state as *parens patriae*, and the alternative care providers who provide day-to day care for the child under the contract with a public or private agency.”⁵⁷ This concept is known as “non-exclusive parenting” because each entity shares in the responsibility of raising the child.⁵⁸

After the state removes the child from the home, the child may enter into a system of out-of-home care, which can include foster homes, group homes, or placement in a relative’s home. The case worker assigned to the case will develop a permanency plan for the child and outline steps to take to achieve the goal of the plan.⁵⁹

Some children are immediately placed with relative caretakers. Many family members are willing to step in and care for these children because they do not want to see the children go into the foster care system. Even if a child is placed with a relative caretaker the state will need to have a permanency plan in place for the child, and in many cases the placement in relative care becomes permanent through a guardianship.

Often families prefer the guardianship because it still provides a permanent placement for the child without terminating the parental rights of their relative.⁶⁰ Biological parents are more willing to go along with the guardianship, as well, because they have to consent to the guardianship and are more willing to consent if they know their relative is caring for their child as opposed to a stranger. Also, the biological parents will still have parental rights and can visit the child and help with raising the child.⁶¹ And, “where property is available, guardianship allows

⁵⁶ Mangold, *supra* note 8 at 835.

⁵⁷ *Id.* at 836.

⁵⁸ *Id.*

⁵⁹ *Id.* at 850.

⁶⁰ *Id.* at 872.

⁶¹ Mangold, *supra* note 8 at 872.

the child to inherit from the parent and does not release the parent from financial support.”⁶²

If the child were to be placed in foster care and eventually put up for adoption, the child’s relatives may never see the child again. If several children were taken away from their parents, they may be split up and sent to live with different foster families. Guardianships allow the entire family to remain together and help keep the relationship between the parent and child strong. However, in some cases it does serve the best interests of the child to have further contact with their parents but a guardianship would allow the child to still feel somewhat connected to his parents because he is in the care of relatives.

A profile of a child placed in relative care helps to better demonstrate the situation in which a guardianship can be used as an alternative to foster care and adoption.

Mary was referred to the state Child Protection Agency when it was reported that her mother, Kristen, was repeatedly leaving Mary without proper care and supervision. Kristen had left Mary alone for a period of at least two days without proper supervision. Mary was eleven years old when her mother left her alone for two days. Kristen has substance abuse issues and has been in treatment several times but still frequently engages in the use of cocaine and marijuana and because of her drug use was unable to provide proper care and supervision for Mary.

The Child Protection Agency took Mary into state custody and began to look for temporary placement options. Mary’s father was currently incarcerated, so he was not a viable placement option. The case worker assigned to the case arranged for Mary to be placed in a temporary foster home. Before moving Mary to the foster home, the case worker contacted Mary’s aunt, Tammy. Tammy is Kristen’s sister and has helped out in the past, with Mary, when Kristen has been away at treatment. Tammy did not want to see her niece get caught up in “the system,” so Tammy agreed to take Mary into her home until Kristen could get her life back on track.

Mary moved in with Tammy and has lived there for a period of two years. Because Tammy was supposed to be a temporary placement solution, the Child Protection Agency, has to find a

⁶² *Id.*

more permanent placement for Mary. The case worker asks Tammy about the possibility of Tammy adopting Mary. The case worker explains that Kristen's parental rights will have to be terminated in order for the adoption to go through. Tammy does not want to cut her sister out of Mary's life but does want to keep Mary in her home. Mary has adjusted well to Tammy's house and likes her new school and friends. When Kristen is clean and sober, Tammy allows Kristen to come to her house to see Mary. Tammy wants to keep the relationship between Mary and Kristen alive. The case worker suggests that Tammy become Mary's legal guardian.

If Tammy becomes Mary's legal guardian, Kristen can retain her parental rights and can have contact with Mary and help with her supervision and care. Tammy will be legally responsible for Mary and will make decisions concerning her schooling and religion. Kristen will have to consent to the guardianship and because Mary has turned 14 she will also have to consent to the guardianship. Mary likes the idea of living with her aunt but still being able to see her mother and wants Tammy to be her legal guardian. Kristen realizes she cannot continue to raise Mary without Tammy's help and wants Tammy to be Mary's legal guardian.

The guardianship is filed with the Probate Court. Mary, Tammy and Mary go to the hearing and the judge issues Letters of Guardianship, in which Tammy is named as Mary's legal guardian.

The above scenario demonstrates how relative care guardianships are viable alternatives for families in crisis. Parents can get the help they need without having the added burden of wondering who is providing care for their children. Children can stay in familiar settings, without worrying about being put into foster care.

IV. Conclusion

Guardianships have been used for centuries as a means of protecting children and their property. All fifty states have traditional methods of appointing a legal guardian and almost half of the states allow for standby guardians to be appointed.⁶³ Tradi-

⁶³ Mosanyi, *supra* note 13 at 268.

tional and standby guardianships allow parents to plan for their children's future and feel confident in the fact that their children will be cared for in a safe and secure environment. Relative care guardianships help keep families together and are one way state's can protect children without inferring too much into the parent child relationship.

State statutes vary but one theme runs through out, "the law presumes that parents serve as legal guardians of their children, giving them exclusive rights to care, custody and control along with responsibility to support the child."⁶⁴

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⁶⁴ *Id.*