TESTIMONY OF

MATTHEW FRAIDIN
LEGAL DIRECTOR

THE CHILDREN’S LAW CENTER OF WASHINGTON D.C.
1050 CONNECTICUT AVENUE, NW
SUITE 1200
WASHINGTON SQUARE
WASHINGTON D.C. 20036
202.467.4900

BEFORE THE HUMAN SERVICES COMMITTEE
OF THE
COUNCIL OF THE DISTRICT OF COLUMBIA

ON BILL 14-309, THE STANDBY GUARDIANSHIP ACT OF 2001

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Good morning. My name is Matthew Fraidin and I am the Legal Director of the Children’s Law Center here in the District of Columbia. The Children’s Law Center provides free legal services to children, their parents, and foster and kinship caregivers in the District. Our mission is to improve the lives of low and middle-income at-risk children and their families by providing direct legal representation and advocacy and by offering training and technical assistance to the public and other professionals. Thank you for the opportunity to speak with you today about Bill 14-309, the Standby Guardianship Act of 2001.

The Children’s Law Center is pleased that the Council has proposed legislation to implement standby guardianship in the District. As you may be aware, four years ago Congress encouraged states to provide standby guardianship in order to ensure safe and stable placements for children. Currently, 21 states have enacted standby guardianship legislation. The majority of these states provide for standby guardianship to allow a parent with a terminal or chronic illness to plan for the future care of his or her children before that parent succumbs to illness. Standby guardianship is critical in these circumstances to promote stability in the lives of children who are facing the impending loss of a parent. By removing the uncertainty of parents and their children regarding where the children will live and who will take care of them when the parent simply
becomes unable to attend to their daily needs, standby guardianship can help to buffer the trauma of this emotional event. Similar to situations involving terminal illness, however, there are other circumstances that also argue for the stability and permanency that standby guardianship can provide.

The Children’s Law Center urges the Council to pass this legislation to give parents this valuable option. However, we suggest that the legislation be amended to strengthen certain aspects of the bill.

First, we recommend two changes that will increase the flexibility of standby guardianship, making it available to more caregivers and more attractive to them, to increase the probability that they will use it to provide stability for their children. The Council can make standby guardianship more accessible by expanding the definition of who may designate a standby guardian to enable all parents to use standby guardianship to provide for the future needs of their children. Currently, the bill limits designators to parents or legal custodians who have chronic conditions or terminal illnesses from which they are not expected to recover. Limiting the availability of standby guardianship in this way excludes other populations of parents who may also have a need for standby guardianship.

For example, the tragic events of September 11th have forced parents enlisted in the reserves to leave their families and fulfill their duty to our country; unfortunately, existing mechanisms available to them to provide for the care of their children do not meet their needs. Transferring legal custody can be a time-consuming process, and would
force parents to abrogate some of their rights. Nor is simply executing a power of attorney going to provide for a permanent placement that might become necessary in the worst circumstances. By contrast, standby guardianship could offer these caregivers and their children peace of mind in a time of extreme uncertainty.

Similarly, standby guardianship – because it allows a parent to designate when he or she is incapable of caring for a child while providing for resumption of that care when circumstances improve -- could also provide an incentive for parents with substance abuse problems or mental illnesses to seek treatment, and, just as importantly, to remain in treatment knowing that their children are being cared for by someone they trust.

Additionally, the proposed definition of “designator” does not include kinship caregivers who care for children with absent parents but do not already have legal custody of the children in their care. Under the proposed legislation, a kinship caregiver would be required to obtain legal custody in order to have standing to designate a standby guardian. This is unnecessarily restrictive and burdensome, and undermines the purpose of the legislation. We propose that standby guardianship in the District define a “designator” as “a parent, a legal custodian, or a primary caretaker who cannot despite due diligence locate absent parents.” This mirrors the practice in New York, where primary caretakers who, despite diligent efforts, cannot locate absent parents are allowed to petition the court to be able to appoint a standby guardian for the children in their care.

The Council could also provide for additional flexibility by amending the legislation to give a parent the option to delineate the specific responsibilities and duties he wishes to confer upon the standby guardian. As the bill stands now, a parent must provide the standby guardian with blanket authority to act as the child’s legal custodian.
Allowing a parent to detail in the designation the specific duties that the standby guardian is to assume would give parents additional control over the process and thus may make them more willing to use standby guardianship. Knowing that a standby guardian has not been granted complete responsibility may allay any uneasiness a parent may have regarding potential conflict between the parent and the standby guardian about the care of the child. Further, specifying the guardian’s responsibilities may prevent a standby guardian from abusing his or her duties and excluding the parent from decisionmaking for and care of the child; it would also provide guidance to the court in determining whether the standby guardian has exceeded his or her authority. Again, with this flexibility, a parent would still have the option to grant the standby guardian complete authority.

Our final three recommendations focus on the procedural aspects of the legislation, ensuring proper review to protect the best interests of children. First, the notice provisions in the legislation should be amended to require full and adequate notice and to ensure that notice has been given properly in all circumstances. As it stands, the proposed bill does not adequately protect the interests of noncustodial parents and other interested parties and more importantly, does not comply with the notice provisions of the Uniform Child Custody Jurisdiction and Enforcement Act. There are inconsistencies in the notice provisions of the legislation regarding when notice must be given. More importantly, the legislation only requires that notice to parties be made by certified mail instead of by preferencing personal service, as in other custody actions. Finally, the proposed bill requires notice to be given to noncustodial parents but fails to establish the documentation necessary to prove service of notice to those parents.
To resolve these problems, we suggest that the standby guardianship bill be amended to conform to the notice requirements of other actions involving the custody of a child. A petition for court approval of a designation should be treated as a complaint for custody that must be served with a copy of a summons and becomes ripe only after proof of service has been filed with the court and interested parties have had a designated period of time to file a response.

Second, in order to protect the best interests of children, the legislation should require a hearing on all petitions for standby guardianship in conformity with the standard practice regarding custody actions. In its current form, the bill would permit the court to rubberstamp petitions in certain circumstances, with no independent inquiry regarding the fitness of the proposed guardian. The CLC believes that court review is necessary in all cases to confirm that a standby guardian is able to provide the necessary care for the child involved. While it is to be hoped that parents would exercise good judgment in designating a standby guardian, court review could prevent approval of a standby guardian who may not be an appropriate caretaker for a child.

Finally, the legislation permits a parent to petition the court for approval of the standby guardianship designation in advance of the triggering event, without requiring that noncustodial parents receive notice of the occurrence of the triggering event that initiates the permanent authority of the guardian. Consequently, a designation could receive court approval years before the actual occurrence of the triggering event. In this situation, the child whose care is at issue may have reached an age where his or her wishes regarding future placement should be considered by the court. Alternatively, the circumstances of the standby guardian may have changed such that it is no longer feasible
for the guardian to care for the child.

In order to ensure that a proposed guardianship serves the best interests of a child, the legislation should be amended to require renotification to noncustodial parents and other interested parties of the occurrence of the triggering event. This added protection would inform an otherwise interested party of the change in the child’s circumstances, and allow the party an opportunity to file a motion to modify the guardianship order in accordance with standard custody practice when warranted. Because an interested party must meet a higher legal standard to support modification of the guardianship order, this process ensures a measure of protection to the standby guardian while protecting the welfare of the child.

The CLC commends Councilmember Allen for introducing this critical piece of legislation and urges the Council to enact it, with the modifications we have suggested, to promote stability in the lives of children in the District. The recommendations we have proposed will effectuate the overarching purpose of standby guardianship, and help to ensure that all of the children in the District have the opportunity to grow up in safe and nurturing homes. We thank you for your attention to the needs of vulnerable children, and thank you for your consideration.