

PHILADELPHIA BAR ASSOCIATION

Testimony of Cathryn Miller, Esquire,
on Behalf of the Philadelphia Bar Association
to the Pennsylvania House Judiciary Committee
Task Force on Guardianships and Estates
Regarding Senate Bill 1051, the Proposed Standby Guardianship Act

Good afternoon Chairman Gannon. Thank you for the opportunity to speak to you today about the proposed Pennsylvania Standby Guardianship Act generally and Senate Bill 1051 in particular.

My name is Cathryn Miller, and I am a staff attorney with the AIDS Law Project of Pennsylvania. On behalf of 1998 Chancellor Mark Aronchick, I am very pleased and proud to be here today representing the more than 14,000 members of the Association.

Enough has been said in the 90's about family values that most of us would be happy never to hear that particular phrase again. But in thinking about my testimony for today and the issues that S.B. 1051 aims to address, I realized that here is a situation where government really can do something to support and reinforce those values which are the essence of family.

This legislation is intended to allow a parent faced with terminal illness or a chronic debilitating disease to designate someone - a trusted relative or friend - literally to "stand by" and be available to step in as the child's legal guardian immediately upon the parent's incapacity or death.

With luck, most of us will never have to consider what might happen to our dependent children if we become unable to care for them.

But consider the situation of a young single mother who has been diagnosed not with a treatable condition but with AIDS or a chronic disease like multiple sclerosis. We know that an AIDS diagnosis is tantamount to a death sentence, and that its progression can be irregular and unpredictable. Multiple sclerosis, while not a terminal disease, likewise has a quirky, unpredictable progression which can leave victims with significant temporary or permanent disability. Bottom line: periodically, this mother's health issues may simply prevent her from being available to her children.

Yet, current Pennsylvania law does not permit her to appoint a future guardian for her children except after death by will or in life by terminating her parental rights. As a result, judicial approval and ultimate resolution of the guardianship issue are delayed until some time after the parent's death leaving the children in a bureaucratic limbo. Under current Pennsylvania law, our hypothetical mother cannot - without relinquishing her own parental rights - make legally binding arrangements for the care of her children in anticipation of her health's deterioration to the point where she no longer can care for them.

Senate Bill 1051 would allow parents facing these situations to take action on behalf of their children in advance of the parents' death or incapacity while allowing them in the meantime to continue to exercise their parental responsibilities unimpaired.

If adopted, S.B. 1051 would permit a parent to make decisions affecting the long-term care and raising of children before the parent's health has deteriorated to the point where the parent can no longer care for the children. It in fact permits the family to make that decision in a positive, thoughtful way. A dying parent could then have the peace of mind that comes from knowing that the children will be cared for after the parent can no longer do so. Permitting a family faced with a parent's deadly disease or chronic debilitating illness to make such arrangements before the illness becomes all-consuming adds a measure a safety and predictability to the lives of children who already face the significant upheaval that accompanies the death or disability of a parent.

The problem S.B. 1051 addresses is not unique to Pennsylvania, nor is the proposed solution. A number of other jurisdictions have adopted standby guardianship laws, and we in Pennsylvania are fortunate to be able to learn from other states' experiences.

For example, some jurisdictions require that a physician certify that there is a significant risk that the parent will become incapacitated or die **within a fixed time** of the filing of the petition. S.B. 1051, instead of using an artificial time period, uses a more functional definition of disability and requires only that the physician need only state the "nature, extent and probable duration" of the parent's incapacity. The parent designating the standby guardian defines the "triggering event" which triggers the effectiveness of the designation. S.B. 1051 also allows a standby guardian to designate an additional guardian to "stand-by" in the event that the original standby guardian - often a grandparent or other older relative - should also become incapacitated, allowing guardians to plan for the ongoing needs of minor children.

Representatives of the Commonwealth's two largest bar associations as well as several other law-related or advocacy groups will testify here today, or have given testimony in support of S.B. 1051. Based solely on the number of lawyers supporting the legislation, one might, quite naturally, draw the conclusion that S.B. 1051 is a bill aimed at helping lawyers, or that it somehow benefits the legal profession. Let's be very clear about this: the legislation will help lawyers only to the extent it provides lawyers with a tool to help their clients in these very, very difficult situations. It will help families, and more specifically, parents, already facing serious

personal challenges, to plan for the possible contingencies of their health problems and how those contingencies might ultimately impact their minor children.

In conclusion, S.B. 1051 represents an opportunity to promote true family values: Peace of mind, security, self-determination, and independence. It offers an opportunity for us to provide families some measure of comfort during very dark times. It is a chance to create a safety net to help keep children out of government programs, permitting parents to make contingency plans with family or friends for the guardianship of minor children. It would give families a measure of control in situations where by definition control must ultimately be given over to doctors and the course of the parents' medical treatment.

We see no reason not to pass S.B. 1051, and every reason for you and your colleagues to support it. Again, thank you for giving me the opportunity to be heard today on this issue. If the Philadelphia Bar Association can help advance this legislation in any way or if there are questions we can help answer, I hope you will feel free to call on us.

The Pennsylvania Standby Guardianship Act

Senate Bill No. 1051 - House Bill No. 1708

What is the Pennsylvania Standby Guardianship Act?

The Standby Guardianship Act is a proposed law to create a legal procedure for a terminally ill parent to appoint a trusted relative or other caretaker as legal guardian to "stand by" and be available to act as a child's legal guardian immediately upon the parent's incapacity or death.

Jacqui, a woman who became ill with an AIDS related illness, was hospitalized, and her children were quickly placed into foster care. The woman recovered only to find that she no longer qualified for government housing since she no longer had her children. At that point, she was not only terminally ill, but homeless and as such, could not reclaim her children. A standby guardianship law could have prevented this situation.

Why Do We Need It?

Pennsylvania faces a rapidly unfolding child custody crisis that current legal options do not address. Children throughout the state are being orphaned at an unprecedented rate as their parents die from cancer, AIDS and other catastrophic illnesses. The Standby Guardianship Act will make it possible for parents with terminal illness to execute a legally secure plan for their children's future care.

Aren't Current Legal Options Effective?

Unfortunately no. Current options are not realistic for parents with terminal illness to name a guardian for their children. For example, even though a parent can designate the future guardian in her/his will, this designation is not binding until a judge approves it well after the parent dies. The parent dies without being sure who will care for the child. While waiting for the guardianship to be approved, children are in "legal limbo," with potential barriers to school enrollment and medical care, and even the possibility of placement in foster care. It also means that no one has legal responsibility to care for the child if the parent becomes incapacitated*.

Children need to receive reliable, continuous care when their parent dies or becomes incapacitated by a serious illness. The Standby Guardianship Act will allow parents and the courts to make decisions that are in the best interests of children.

How Will Standby Guardianship Work?

The Standby Guardianship Act will create a new type of guardian to ensure continuous loving care of children. Parents will be able to use standby guardianship to both make long-term plans or to designate a guardian who will immediately assume care in an emergency or upon a parent's death.

Planning for Standby Guardianship

A parent will nominate a standby guardian for a child. If the parent is healthy enough, s/he petitions the court for approval. The court holds a hearing to determine whether the parent's plan is in the best interests of the child. If the court approves, the standby guardian has the power to make legal, medical and other decisions for the child should the parent become incapacitated or die.

Immediate Guardianship in an Emergency

When a parent becomes unexpectedly seriously ill, or near death, it may not be possible for the parent to seek court approval. Instead, the parent completes legal papers without petitioning the court. Upon the parent's incapacity or death, the standby guardian's authority immediately takes effect and lasts for 60 days. Before the end of the 60 days, the standby guardian must petition the court to continue to serve as guardian.

FOR MORE INFORMATION CONTACT: Bruce Flannery, 610-518-0886; Cathryn Miller, 215-587-9377

*Other options include: petitioning the court to appoint a guardian while a parent is still alive or executing a power of attorney to allow a parent to transfer some authority to another adult. However, the former option requires a parent to relinquish all custody rights immediately, and the latter option only involves the transfer of limited authority and that authority expires upon the parent's death.

How Standby Guardianship Works

1. Parent names standby guardian in writing

The parent completes a simple form that names a standby guardian and specifies when the standby guardian should step in to take care of the child, for example if the parent becomes physically or mentally incapacitated or if s/he dies.

Parent is healthy and able to secure court approval of choice of guardian

2. Parent petitions court for approval

The court schedules a hearing and notifies everyone named in the petition, including any non-custodial parent.

3. Guardian is approved by court

At the hearing, the court determines if the guardianship is in the child's best interest. If so, it grants approval.

4. Standby guardian assumes authority upon parent's illness or death

While the parent is too ill to care for her child, the standby guardian becomes "co-guardian" with the parent. If the parent dies, the standby guardian becomes the child's permanent guardian. In both cases, the standby guardian assumes the authority to make legal, medical and other decisions for the child.

Parent is seriously ill and child needs guardian immediately

2. Parent becomes too ill to care for children or dies; Standby guardian assumes authority for an emergency 60-day period

While the parent is too ill to care for her child, the standby guardian becomes "co-guardian" with the parent. If the parent dies, the standby guardian becomes the child's permanent guardian. In both cases, the standby guardian assumes the authority to make legal, medical and other decisions for the child for an emergency 60-day period.

3. Standby guardian petitions court for approval

Before the end of the 60-day period, the standby guardian must petition the court for approval. The court schedules a hearing and notifies everyone named in the petition, including any non-custodial parent.

4. Guardian is approved by court

At the hearing, the court determines if the guardianship is in the child's best interest. If so, it grants approval, and the guardianship becomes permanent.