

# VIRGINIA ACTS OF ASSEMBLY -- 2021 SPECIAL SESSION I

## CHAPTER 241

*An Act to amend and reenact §§ 16.1-349, 16.1-350, 16.1-351, 16.1-352, and 16.1-353 of the Code of Virginia, relating to standby guardianship; triggering event.*

[S 1184]

Approved March 18, 2021

**Be it enacted by the General Assembly of Virginia:**

**1. That §§ 16.1-349, 16.1-350, 16.1-351, 16.1-352, and 16.1-353 of the Code of Virginia are amended and reenacted as follows:**

**§ 16.1-349. Definitions.**

"Attending physician" means the physician who has primary responsibility for the treatment and care of a qualified parent.

"Designation" means a writing which (i) is voluntarily executed in conformance with the requirements of § 16.1-351 and signed by a parent and (ii) names a person to act as standby guardian.

"Determination of debilitation" means a written determination made by an attending physician that a qualified parent is chronically and substantially unable to care for a minor child as a result of a debilitating illness, disease or injury. Such a determination shall include the physician's medical opinion to a reasonable degree of medical certainty, regarding the nature, cause, extent and probable duration of the parent's debilitating condition.

"Determination of incompetence" means a written determination made by the attending physician that to a reasonable degree of medical certainty a qualified parent is chronically and substantially unable to understand the nature and consequences of decisions concerning the care of a minor child as a result of a mental or organic impairment and is consequently unable to care for the child. Such a determination shall include the physician's medical opinion, to a reasonable degree of medical certainty, regarding the nature, cause, extent and probable duration of the parent's incompetence.

"Parent" means a genetic or adoptive parent or parent determined in accordance with the standards set forth in § 20-49.1 or § 20-158, and includes a person, other than a parent, who has physical custody of a child and who has either been awarded custody by a court or claims a right to custody.

"Qualified parent" means a parent who has (i) been diagnosed, as evidenced in writing, by a licensed physician to be afflicted with a progressive or chronic condition caused by injury, disease or illness from which, to a reasonable degree of medical probability, the patient cannot recover or (ii) reason to anticipate possible detention, incarceration, or deportation connected to an immigration action.

"Standby guardian" means a person who, in accordance with this article, is designated in writing or approved by the court to temporarily assume the duties of guardian of the person or guardian of the property, or both, of a minor child on behalf of or in conjunction with a qualified parent upon the occurrence of a triggering event. The term shall be so construed as to enable the parent to plan for the future care of a child, without terminating parental or legal rights, and to give the standby guardian the authority to act in a manner consistent with the known wishes of a qualified parent regarding the care, custody and support of the minor child.

"Triggering event" means the event upon the occurrence of which the standby guardian may be authorized to act. The triggering event shall be specified in the court order or written designation and shall be the earlier of a determination of incompetence or the death of the qualified parent. However, in the case of a standby guardian judicially approved pursuant to § 16.1-350, the triggering event may also be specified as the qualified parent's written consent to the commencement of the standby guardian's authority. In the case of a standby guardian designated pursuant to § 16.1-351 or 16.1-352, the triggering event may also be specified as (i) a determination of debilitation of the qualified parent and or evidence of the detention, incarceration, or deportation of the qualified parent connected to an immigration action or (ii) that parent's written consent to the commencement of the designated standby guardian's authority.

**§ 16.1-350. Petition for court approval of standby guardian.**

A. Upon petition of any person, the juvenile court of the jurisdiction in which a child resides may approve a person as standby guardian for a child of a qualified parent upon the occurrence of a specified triggering event. If requested in the petition, the court may also approve an alternate standby guardian identified by the petitioner, to act in the event that at any time after approval pursuant to this section the standby guardian is unable or unwilling to assume the responsibilities of the standby guardianship.

B. The petition shall state:

1. The name and address of the petitioner and his relationship to the child and the name and address of the child's qualified parent, and the name and address of any other parent of the child whose identity

and whereabouts are known to the petitioner or can reasonably be ascertained;

2. The name, address and birthdate of the child;
3. The nature of the proposed triggering event, including when a qualified parent's consent would be effective in those cases where such consent is chosen as the triggering event;
4. Whether a determination of incompetence or debilitation has been made and, if so, when and by whom;
5. Whether there is a significant risk that the qualified parent will imminently become physically or mentally incapable of caring for the child or die as the result of a progressive chronic condition or illness, *or be detained, incarcerated, or deported in connection with an immigration action*; however, a petitioner shall not be required to submit ~~medical~~ documentation of a parent's medical *or immigration* status with the petition;
6. The name and address of the person proposed as standby guardian and any alternate and whether the petition requests that such person be given authority as a guardian of the person or guardian of the property of the minor, or both;
7. A statement of any known reasons as to why the child's other parent is not assuming or should not assume the responsibilities of a standby guardian;
8. Whether there is any prior judicial history regarding custody of the child or any pending litigation regarding custody of the child; and
9. The name and address of the attending physician.

C. Upon the filing of a petition, notice of the filing shall promptly be given to each parent of the child whose identity and whereabouts are known to the petitioner. The court shall direct the issuance of summonses to the child, if the child is ~~twelve~~ 12 or more years of age and the proposed standby guardian and alternate, if any, and such other persons as appear to the court to be proper or necessary parties to the proceedings including the child's parents, guardian, legal custodian or other person standing in loco parentis, if the identity and whereabouts of such persons are known. Service of the summons shall be made pursuant to § 16.1-264.

An order approving the standby guardian shall not be entered without a hearing if there is another known parent, stepparents, adult siblings, or other adult related to the child by blood, marriage, or adoption who requests a hearing within ~~ten~~ 10 days of the date that notice of the filing was sent or if there is other litigation pending regarding custody of the child.

Prior to any hearing on the petition, the court may appoint a discreet and competent attorney at law as guardian ad litem to represent the child pursuant to § 16.1-266.1. In the case of a petition filed by anyone other than a parent of the child, the court shall appoint a guardian ad litem. The qualified parent shall not be required to appear in court if the parent is medically unable to appear, except upon motion for good cause shown.

#### **§ 16.1-351. Court order approving standby guardianship; authority; when effective.**

Upon consideration of the factors set out in § 20-124.3 and finding that (i) the child's parent is a qualified parent and (ii) appointment of a standby guardian is in the best interest of the child, the court shall appoint a proper and suitable person as standby guardian and, if requested, a proper and suitable person as alternate standby guardian. However, when a petition is filed by a person other than a parent having custody of the child, the standby guardian shall be appointed only with the consent of the qualified parent unless the court finds that such consent cannot be given for medical reasons.

The order shall specify the triggering event and shall provide that the authority of the standby guardian is effective ~~(i)~~ (a) upon receipt by the standby guardian of (1) a determination of incompetence *or of the parent*, (2) a certificate of death *of the parent*, (3) *evidence of the detention, incarceration, or deportation of the parent connected to an immigration action*, or (4) the earlier of either clause (1), (2), or (3) or ~~(ii)~~ (b) if so requested in the petition, upon receipt by the standby guardian of a written consent of the qualified parent and filing of the consent with the court. The written consent shall be executed after the entry of the court order and signed by the qualified parent, or by another in his presence and on his behalf.

As soon as practicable after entry of the order, a copy shall be served on the standby guardian.

A standby guardian shall have the powers and duties of a guardian of the person and a guardian of the property of a minor, unless otherwise specified in the order.

The standby guardian shall file with the court, as soon as practicable but in no event later than ~~thirty~~ 30 days following a parent's death, determination of incompetence *or*, consent, *or* *detention, incarceration, or deportation connected to an immigration action*, a copy of the certificate of death, determination of incompetence *or*, consent, *or* *evidence of such detention, incarceration, or deportation* of the qualified parent upon which his authority is based. Failure to file within the time specified shall be grounds for the court to rescind the authority of the standby guardian sua sponte or upon petition of any person but all acts undertaken by the standby guardian on behalf of and in the interests of the child shall be valid and enforceable.

#### **§ 16.1-352. Written designation of a standby guardian by a parent; commencement of authority; court approval required.**

A. A parent may execute a written designation of a standby guardian at any time. The written

designation shall state:

1. The name, address and birthdate of the child affected;
2. The triggering event; and
3. The name and address of the person designated as standby guardian or alternate.

The written designation shall be signed by the parent. Another adult may sign the written designation on behalf of the parent if the parent is physically unable to do so, provided the designation is signed at the express request of the parent and in the presence of the parent. The designated standby guardian or alternate may not sign on behalf of the parent. The signed designation shall be delivered to the standby guardian and any alternate named as soon as practicable.

B. Following such delivery of the designation, the authority of a standby guardian to act for a qualified parent shall commence upon the occurrence of the specified triggering event and receipt by him of (i) a determination of incompetence; (ii) a certificate of death of the parent; **or**; (iii) *evidence of the detention, incarceration, or deportation of the parent connected to an immigration action; or* (iv) a determination of debilitation and the qualified parent's written consent to such commencement, signed by the parent or another on his behalf and at his direction as provided in subsection A for the designation.

C. A standby guardian under a designation shall have the authority of a guardian of the person and a guardian of the property of the child, unless otherwise specified in the designation.

D. A designated standby guardian or alternate shall file a petition for approval as standby guardian. The petition shall be filed as soon as practicable after the occurrence of the triggering event but in no event later than ~~thirty~~ 30 days after the date of the commencement of his authority. The authority of the standby guardian shall cease upon his failure to so file, but shall recommence upon such filing. The petition shall be accompanied by a copy of the designation and any determinations of incapacity or debilitation or a certificate of death.

The provisions of *subsection C of § 16.1-350* shall apply to a petition filed pursuant to this section. The court shall enter an order approving the designated guardian as standby guardian upon finding that:

1. The person was duly designated as standby guardian pursuant to this section and the designation has not been revoked;
2. A determination of incompetence was made; a determination of debilitation was made and the parent consented to commencement of the standby ~~guardians~~ guardian's authority; **or** the parent has died as evidenced by a death certificate; *or the parent has been detained, incarcerated, or deported in connection with an immigration action;*
3. The best interests of the child will be served by approval of the standby guardian; and
4. If the petition is by an alternate, that the designated standby guardian is unwilling or unable to serve.

#### **§ 16.1-353. Further proceedings to determine permanent guardianship, custody.**

A. If the triggering event was death of the qualified parent, within ~~ninety~~ 90 days following the occurrence of the triggering event or, if later, commencement of the standby guardian's authority, the standby guardian shall (i) petition for appointment of a guardian for the child as otherwise provided by law or (ii) initiate other proceedings to determine custody of the child pursuant to Chapter 6.1 (§ 20-124.1 et seq.) of Title 20, or both.

B. In all other cases a standby guardian shall promptly after occurrence of the triggering event initiate such proceedings to determine permanent custody, absent objection by the qualified parent.

The petition shall be accompanied by:

1. The court order approving or written designation of a standby guardian; and
2. The attending physician's written determination of incompetence or debilitation **or**; a verification of death; *or evidence of the parent's detention, incarceration, or deportation in connection with an immigration action.*