

## **USLegal Guide to Temporary Custody**



### **INTRODUCTION**

There are various means of establishing temporary custody of a minor. In the context of family law, custody refers to the care, control, and maintenance of a child awarded by a court to a responsible adult.

### **PRIVATE AGREEMENTS**

In some states, a power of attorney for temporary care and custody of a minor may be created by the parents, agreeing to allow another to temporarily care for the child. A written agreement can be made showing that you have custody of the child with the parents' consent. In some states, such agreements are called standby guardianships.

### **STANDBY GUARDIANSHIP**

A standby guardian is a person appointed to represent the person or estate, or both, of the disabled person. A

standby guardian may be someone who has been appointed by the court as the person who will act as guardian of the child when the child's parents die or are no longer willing or able to make and carry out day-to-day child care decisions concerning the child.

Normally it is also beneficial to secure a medical release for emergencies, especially if a parent is not readily available. The parents may often revoke this type of agreement at any time. Some states specify that such agreements are limited to a certain time period, typically six months or one year.

Many states allow a parent or legal guardian to nominate a standby guardian regardless of the nominator's health status. However, some states prohibit such nomination unless the parent is chronically ill or has been diagnosed with a terminal illness. In certain states, the parent must be at significant risk of death or incapacity within 2 years.

Standby guardianship is typically established one of two ways:

-Some states require the nominating parent to file a petition, followed by a court hearing, prior to the circumstance (referred to as a "triggering event") that necessitates the standby guardianship.

-Some states allow the parent to nominate a standby guardian through a written designation that is signed by two witnesses. The nomination must be affirmed by filing a petition prior to or after the triggering event and by attending a court hearing following the event.

-Some states allow the parent to use either method to nominate a standby guardian.

When confirming an appointment for a guardian, a small number of states require that a child of a certain age must be notified of the hearing and that the court must consider the child's preferences. The age requirement varies by state.

A "triggering event" is the circumstance that

must occur to activate the standby guardian's authority. Many states define this event as the parent's death, mental incapacity, or physical debilitation. In some states, the parent must provide consent when physical debilitation is the triggering event. A number of states require that an attending physician document such incapacity or debilitation. In other states, the parent's consent alone is sufficient to activate the guardianship.

Once nominated, the standby guardian is authorized to assume responsibility for the child immediately upon being notified of the occurrence of a triggering event. In some states, the standby guardian whose nomination was by written designation has a statutorily prescribed amount of time in which to file a petition with the court for official appointment as the child's guardian. In some states, the standby guardian who was previously named guardian in a petition to the court must file documents with the court to confirm the

appointment of guardianship.

Some states provide that once a standby guardianship is activated, the standby guardian and parent, while living, have concurrent or shared authority. Statutes in other states specifically state that the commencement of a guardianship does not in any way limit or terminate the parent's parental rights. However, a few states provide that once the guardianship is activated, the standby guardian assumes sole authority. In a small number of states, a standby guardian's authority becomes inactive upon an attending physician's written certification that the parent is restored to health.

In a number of states, when a nomination of a standby guardian has been made by written designation, the parent may revoke the designation by informing the standby guardian in writing. After an appointment has been approved by the court, other states require that a written

revocation be filed with the court and that the standby guardian be notified in writing. In some cases, a person may refuse an appointment to be a standby guardian by notifying the court and the parent in writing.

#### OTHER GUARDIANSHIPS

A guardianship is a fiduciary relationship by which one person, the guardian, acts for another, the ward, who is regarded as being incapable of managing his or her own affairs. Statutes in every state provide for the appointment of a guardian of a person and the estate of a minor. A guardianship is a legal relationship created when a person or institution named in a will or assigned by the court to take care of minor children or incompetent adults. It is sometimes called a conservatorship. The person for whom a guardian is appointed is called a ward. Generally, the ward cannot provide food, clothing, or shelter for himself or herself welfare without assistance. Some state statutes provide for temporary or limited guardianships. These

guardianships are generally granted by the courts to achieve a specific purpose for a certain amount of time. Once the purpose is accomplished, the guardianship is terminated.

Also, emergency guardianships have been granted. In these situations, an emergency situation exists and someone is needed to give approval in order for the person to receive emergency services. A temporary guardian is appointed by the court to serve during the existence of the emergency situation. Generally, the person being served by the temporary guardian is disabled or incapacitated in some way. The court must determine that the person being served by the guardian is unable to make the emergency decision because of mental disability, addiction, debilitating disease, or some other similar limitation. The court must also determine that if a guardian is not appointed, the person is at risk of serious harm or even death. Finally, the court must determine that there is no other

person available who can make the emergency determination for the incapacitated person.

The order for emergency guardianship is generally granted for a short period of time which is sufficient to allow the situation to be handled properly. After the emergency situation has ended or subsided, the temporary guardian must file a report with the court detailing the nature of the services rendered by the guardian and describing the outcome of the situation. To become a guardian of a child either the party intending to be the guardian or another family member, a close friend or a local official responsible for a minor's welfare will petition the court to appoint the guardian. The guardianship of a minor remains under court supervision until the child reaches the age of majority. The age of majority is the legally defined age at which a person is considered an adult, with all the rights and responsibilities of adulthood. The age of majority is defined by state laws, which vary by state, but is 18 in most states.

If you wish to be formally appointed as a guardian, a petition for guardianship must be filed. For an appointment as guardian to be valid, the Order Appointing Guardian of Minor must be signed by the judge. The judge's decision is based upon the best interests of the child, which is a subjective determination based on all the facts and circumstances involved. In some states, if the child is a certain age or older, the court must appoint the person nominated by the child unless the court finds the nomination contrary to the child's best interest. In selecting the guardian, the court considers the prospective guardian's character, history, physical capacity, and other relevant attributes. A potential guardian's limited education or financial resources are not disqualifying conditions in and of themselves.

The guardianship statutes of each state detail the specific duties, responsibilities, and powers of the guardian. They should be examined in order to

determine the regulations that apply to each situation. The court may not appoint a person against whom the child has filed a written objection. Local laws vary, but many courts require certain interested parties to be served with notice of guardianship hearings. Such notices often have to be legally served upon the person, with a sworn statement of the person making the service later returned to the court as proof of such service. In some cases, the court may waive the notice requirements. Local court rules should be consulted to determine applicability in your area. Once the court signs the order, the guardian must take prepared Letters of Guardianship to the clerk's office where the clerk will issue the letters. Letters of Guardianship is a legal document that provides proof that you have been appointed and are serving as the guardian for a minor. You should obtain several certified copies of the letters from the clerk. These legal documents will be of assistance to you in the performance of your duties, such as enrolling

the child in school, obtaining medical care, and taking care of estate business.

A guardianship of a child takes away the parents' right to make decisions about their child's life. However, it does not permanently terminate parental rights. This means that although the guardian now has custody and is responsible for raising the child, the parents are still the child's legal parents.

The court can order a guardian to let the parents visit or contact the child, but the court may also put limits or other conditions on the visitation, such as requiring that any visitation be supervised. The time and frequency of parental visitation is often is up to the guardian (or the court) to decide. Parents may, in some cases, regain custody of their child in the future if the court determines the guardianship is no longer in their child's best interests.

#### **DIVORCE**

Temporary custody in the context of divorce is the right of a parent to

have parenting time with his or her child overnight or for an extended time. In cases where the issue of custody is contested, there is often an initial hearing where the court decides issues of custody, visitation, child support, spousal maintenance, occupancy of the homestead, etc. on a temporary basis, enforceable until the final Judgment & Decree or Divorce is entered.

The following may petition for temporary custody:

- an eligible petitioner who has filed for either removal of guardian or termination of parental rights
- the court on its own motion
- the attorney appointed for the child.

In some states, to grant temporary custody, the court must find by a fair preponderance of the evidence that because the parent or guardian has performed acts of omission or commission, the child is suffering from serious physical illness or injury or is in immediate physical danger.

The definition of an unfit parent is governed by state laws, which vary by state. A parent may be deemed unfit if they have been abusive, neglected, or failed to provide proper care for the child. A parent with a mental disturbance or addiction to drugs or alcohol may also be found to be an unfit parent. Failure to visit, provide support, or incarceration are other examples of grounds for being found unfit.

For example, one state declares the power of the juvenile court to terminate the rights of a natural parent (a) who was "unfit or incompetent by reason of conduct or condition seriously detrimental to the child," (b) who "abandoned the child," or (c) who "substantially and continuously or repeatedly refused or failed to give the child proper parental care and protection."

Some state laws provide for a fitness hearing to be held after an adjudication of neglect, dependency or abuse. In such cases, the law may specify a time period after such an

adjudication in which the parent may make efforts to resolve the problem, such as seeking drug or alcohol treatment. A parent's failure to make reasonable efforts and progress within the specified time frame is a ground of unfitness. Local laws should be consulted for specific requirements in your area.

Evidence of parental unfitness toward one child may be grounds for terminating the parental rights to other children even though the parent never abused or neglected those children. The best interest of the child is the determining factor.

In determining the child's best interest, one court has stated that it shall consider, but is not limited to, the following circumstances:

- (i) The willingness of the parent or parents to receive or care for the child;
- (ii) That the child has been removed from the custody of the parent by temporary order of the court for a period of six months and further finds that:

- (A) The conditions which led to the removal still exist;
- (B) There is little likelihood that those conditions will be remedied at an early date so that the child can be returned to the parent in the near future; and
- (C) The continuation of the parent-child relationship greatly diminishes the child's prospects for early integration into a stable and permanent home.

Source:

The Child Information Gateway