

**Department of Legislative Services**

Maryland General Assembly

2018 Session

**FISCAL AND POLICY NOTE**

**Third Reader - Revised**

House Bill 1613

(Delegate Sanchez)

Judiciary

Judicial Proceedings

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**Appointment or Designation of Standby Guardian - Adverse Immigration Action**

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This emergency bill authorizes a parent of a minor to designate or to petition a court to appoint a standby guardian of the person or property of a minor effective on the initiation of an “adverse immigration action” against the minor’s parent. The bill also specifies the court procedures for considering a petition for standby guardianship filed either by a parent or the person designated by the parent to be a standby guardian and stipulates when a standby guardianship becomes effective.

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**Fiscal Summary**

**State Effect:** Potential minimal increase in general fund expenditures to the extent additional petitions must be managed by the Administrative Office of the Courts. Revenues are not affected.

**Local Effect:** Potential minimal increase in local expenditures due to additional petitions filed in the orphans’ courts and circuit courts. Local revenues are not affected.

**Small Business Effect:** None.

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## Analysis

**Bill Summary:** An “adverse immigration action” includes:

- detention for purposes of immigration enforcement by Immigration and Customs Enforcement (ICE) officers or any other federal, State, or local agency or official charged with immigration enforcement;
- deportation from the United States; or
- the imposition of voluntary departure in lieu of formal deportation as provided for under the Immigration and Nationality Act.

### *Petition for Judicial Appointment of a Standby Guardian*

A petition for a court to appoint a standby guardian must state (1) whether the authority of the standby guardian is to become effective on the initiation of an adverse immigration action against the petitioner; (2) that there is a significant risk that there will be an adverse immigration action against the petitioner within two years after the filing of the petition; and (3) the basis for the significant risk.

In accordance with existing court procedures for considering standby guardianship, a court must issue a decree for standby guardianship if it finds that there is a significant risk that an adverse immigration action will be initiated against the petitioner within two years after the filing of the petition.

A decree issued by the court must specify whether the authority of the standby guardian is effective on the receipt of an official document indicating that an adverse immigration action has been initiated against the petitioner. If the decree is effective on receipt of an official document indicating that an adverse immigration action has been initiated against the petitioner, the standby guardian’s authority begins on the standby guardian’s receipt of the copy of the official document.

The standby guardian must file a copy of the official document with the court that issued the decree within 90 days of the date of receiving the official document. A court may rescind a standby guardian’s authority for failure to comply with the filing requirement.

### *Written Designation of a Standby Guardian by a Parent of a Minor*

A written designation must indicate that the parent intends for the standby guardian to become the minor’s guardian in the event that the parent is subject to an adverse immigration action and consents to the beginning of the standby guardian’s authority.

The authority of a standby guardian designated by a parent begins on the standby guardian's receipt of:

- a copy of an official document related to an adverse immigration action;
- a copy of the parent's written consent to the beginning of the standby guardianship, signed by the parent in the presence of two witnesses at least age 18, neither of whom is the standby guardian, and signed by the standby guardian; and
- a copy of the birth certificate for each child for whom the standby guardian is designated.

The bill requires a standby guardian designated by a parent to file a petition for appointment as a standby guardian after receipt of copies of an official document related to an adverse immigration action and the parent's written consent to the beginning of the standby guardianship. The petition must include a copy of the official document related to an adverse immigration action and the parental consent to the beginning of the standby guardianship. The court must appoint the person to be a standby guardian if it finds that an adverse immigration action has been initiated and parental consent to the beginning of the standby guardianship has been given.

## **Current Law:**

### *Immigration Enforcement*

Immigration is controlled by federal law. Federal law does not mandate that state and local law enforcement agencies become involved in immigration efforts. However, federal law does prohibit a state or local government from prohibiting or in any way restricting any government entity or official from sending to or receiving from the Immigration and Naturalization Service (now known as ICE) information regarding the citizenship or immigration status, lawful or unlawful, of any individual. It also prohibits restrictions on any of the following with respect to information regarding the immigration status, lawful or unlawful, of any individual: (1) sending such information to, or requesting or receiving such information from, ICE; (2) maintaining such information; or (3) exchanging such information with any other federal, state, or local government authority.

### *Definitions*

“Debilitation” means a person's chronic and substantial inability, as a result of a physically incapacitating illness, disease, or injury, to care for the person's dependent minor child. Accordingly, “debilitated” means the state of having a debilitation.

“Incapacity” means a person’s chronic and substantial inability, as a result of mental impairment, to understand the nature and consequences of decisions concerning the care of the person’s dependent minor child, and a consequent inability to care for the child. Accordingly, “incapacitated” means the state of having an incapacity.

### *Standby Guardianship, Generally*

State law authorizes a standby guardian of the person or property of a minor to be appointed by a court *or* designated in writing by the minor’s parent(s). A court appointed standby guardianship becomes effective on the parent’s incapacity, or death of the minor’s parent, or on the consent of the parent. A standby guardianship designated in writing by a parent becomes effective on the incapacity of the minor’s parent, or on the debilitation and consent of the parent. Although a parent may create a standby guardianship by designating such in writing, once a triggering event occurs, the designee standby guardian must seek a decree from a court to continue the guardianship.

Generally, all persons with parental rights are required to consent to a standby guardian regardless of whether the guardianship is initially sought in a court or is initially executed by written designation. However, a decree of standby guardianship may be issued by a court without being joined by all persons with parental rights if a person who has parental rights cannot be located after reasonable efforts (as determined by the court) are made to locate the person.

In addition to the processes discussed above, a standby guardian may also file a petition for appointment as guardian in any other manner permitted by Title 13 of the Estates and Trusts Article, after notifying the parent, and may append the designation of standby guardianship to the petition for consideration by the court.

### *Limitations on the Authority of a Standby Guardian*

The Estates and Trusts Article specifies that the beginning of a standby guardian’s authority in accordance with a determination of incapacity, determination of debilitation, or consent, does not, itself, divest a parent of any parental or guardianship rights. The authority of a standby guardian with respect to the minor is limited to the express authority consented to by the parent(s) and granted to the standby guardian by a court.

### *Petition Process for Judicial Appointment of a Standby Guardian*

A petition for the judicial appointment of a standby guardian of the person or property of a minor may be filed only by a parent of the minor and must be joined by each person with parental rights over the minor, unless waived by the court.

The petition must state:

- the duties of the standby guardian;
- whether the authority of the standby guardian is to become effective on the petitioner's incapacity, on the petitioner's death, or on whichever occurs first; and
- that there is a significant risk that the petitioner will become incapacitated, or die, as applicable, within two years of the filing of the petition, and the basis for the significant risk.

If the petitioner is medically unable to appear, the petitioner's appearance in court may not be required, except on a motion and for good cause shown.

The court must issue a decree for standby guardianship if it finds that there is a significant risk that the petitioner will become incapacitated, or die, within two years of the filing of the petition and that the interests of the minor will be promoted by the appointment of a standby guardian of the person or property of the minor. The court may rescind this order at any time before the start of a standby guardian's authority if the risk of incapacitation or death is no longer present. The decree must (1) specify whether the authority of the standby guardian is effective on the receipt of a determination of the petitioner's incapacity, on the receipt of the certificate of the petitioner's death, or on whichever occurs first and (2) indicate that the authority of the standby guardian may become effective earlier, on receipt of the signed and witnessed written consent of the petitioner to the beginning of the standby guardian's authority.

If a decree of standby guardianship issued by a court states that the authority of the standby guardian is effective on receipt of a determination of the petitioner's incapacity or death, the standby guardian's authority begins on the standby guardian's receipt of (1) a copy of a written determination of incapacity made by an attending physician or (2) the standby guardian's receipt of a death certificate, respectively. However, the authority of a standby guardian may begin earlier than the petitioner's death or incapacitation if the guardian receives a written, signed, and witnessed consent, as specified. A standby guardian must file a copy of a determination of incapacity, a death certificate, or written consent from the petitioner with the court that issued the guardianship decree within 90 days of the date of receipt of the determination, death certificate, or consent. The court may rescind a standby guardian's authority for failing to comply with the filing requirement.

#### *Revocation and Renouncement of Judicially Appointed Standby Guardianship*

A petitioner may revoke a decree of standby guardianship as appointed by a court, by executing a written revocation, filing the revocation with the issuing court, and promptly notifying the standby guardian of the revocation.

A person who is judicially appointed as a standby guardian may renounce the appointment at any time before the beginning of the person's authority by executing a written renunciation, filing the renunciation with the issuing court, and promptly notifying the petitioner of the revocation in writing.

#### *Written Designation of Standby Guardianship by a Parent*

A parent may designate a standby guardian by written designation signed in the presence of two witnesses who are at least age 18 (neither of whom can be the standby guardian) and signed by the standby guardian. A parent may have another person sign on his or her behalf if the parent is physically unable to sign, as specified.

A written designation of a standby guardian must (1) identify the parent, the minor, and the person designated to be the standby guardian; (2) state the duties of the standby guardian; and (3) indicate that the parent intends for the standby guardian to become the minor's guardian in the event the parent either becomes incapacitated or debilitated and consents to the beginning of the standby guardian's authority. A parent may designate an alternate standby guardian in the same writing and in the same manner as the designation of a standby guardian.

The authority of the standby guardian by designation begins on receipt of a copy of (1) a written determination of incapacity or debilitation made by an attending physician; (2) the parent's written consent, as specified; and (3) a copy of the birth certificate for each child for whom the standby guardian is designated.

#### *Duties of the Designated Standby Guardian*

A standby guardian must file a petition for judicial appointment with the court within 180 days of the date of the beginning of the standby guardianship. The standby guardian's authority terminates 180 days from the date the guardianship became effective if the standby guardian fails to comply with the filing requirement; however, the standby guardian's authority begins again on the filing of the petition.

The filed petition must be accompanied by (1) a signed, written designation of the standby guardian by each person having parental rights over the child, unless waived by the court and (2) a copy of the determination of incapacity or debilitation and the parental consent to the beginning of the standby guardianship. If the petition is filed by a person designated as an alternate standby guardian, it must also include a statement and proof that the person originally designated as standby guardian is unwilling or unable to act as standby guardian.

## *Revocation and Renouncement of a Designated Standby Guardianship*

A parent may revoke a standby guardianship established by designation before a standby guardian files the required petition with the court by written or verbal notification or any other act that is evidence of specific intent to revoke the standby guardianship. If a petition has already been filed, the parent may revoke the standby guardianship by executing a written revocation, filing the revocation with the court in which the petition was filed, and promptly notifying the standby guardian of the revocation.

A person who is judicially appointed as a standby guardian may renounce the appointment at any time before the beginning of the person's authority by executing a written renunciation, filing the renunciation with the issuing court, and promptly notifying the parent of the revocation in writing.

The court's ability to appoint a guardian for a minor under the provisions above may be partially or wholly superseded by other existing law relating to the custody of minors, including the Maryland Uniform Child Custody Jurisdiction and Enforcement Act.

### **Background:**

#### *Standby Guardianship Laws in the States*

According to the Child Welfare Information Gateway office in the U.S. Department of Health and Human Services, standby guardianship laws provide parents a way to legally transfer custody of their child without relinquishing parental rights. As of 2015, approximately 28 States (including Maryland) and the District of Columbia have statutory provisions for standby guardianship. Most statutes allow standby guardianship in the case of severe illness, incapacitation, or other disabling conditions. Eight states, including Pennsylvania, allow standby guardianship based on the parent's consent alone.

Most state laws allow a parent to designate a standby guardianship, which may begin during the parent's lifetime and continue after the parent's death. Parents have authority to withdraw the guardianship and usually share decision-making responsibility with the guardian when possible.

#### *Immigration Enforcement Resources at the State Level*

The U.S. Department of Homeland Security (DHS) and ICE have initiated numerous programs that involve state and local law enforcement agencies as allies and additional resources. For example, local jurisdictions share fingerprints of individuals arrested with the Federal Bureau of Investigation (FBI) to check for outstanding warrants or criminal records. Under the Secure Communities program, the FBI automatically sends the

fingerprints to DHS to check against its immigration database. If the individual is revealed to be unlawfully present in the United States, ICE may take enforcement action, which may include the issuance of a detainer.

Another initiative, authorized under Section 287(g) of the Immigration and Naturalization Act, allows the Secretary of Homeland Security to enter into written agreements to delegate limited immigration enforcement authority to state and local law enforcement officers. In Maryland, the 287(g) program has been established in three jurisdictions – Anne Arundel, Frederick, and Harford counties. In 2008, the Frederick County Sheriff’s Office entered into a partnership with ICE to begin the 287(g) Criminal Alien Program within the county. This partnership entailed training office personnel from both the county detention center and law enforcement operations to become authorized to identify and begin deportation proceedings against undocumented immigrants. The Frederick County Sheriff’s Office is one of the few law enforcement offices nationwide that participate in both the jail enforcement program and the law enforcement task force program. In addition, detention centers in Anne Arundel and Harford counties participate in the 287(g) program.

According to the Pew Research Center, a nonpartisan research organization, and based on the most recent data available, Maryland is estimated to have 250,000 unauthorized immigrants as of 2014. The unauthorized immigrant population is defined by DHS as all foreign-born noncitizens who are not legal residents.

**State Expenditures:** The bill creates an additional basis for filing standby guardianship petitions. The Judiciary (Administrative Office of the Courts) advises that expenditures may increase to accommodate additional filings, but that any such increase cannot be reliably estimated at this time. The Department of Legislative Services advises that any increase in expenditures is likely minimal.

**Local Expenditures:** Due to the additional basis for filing the standby guardianship petitions under the bill, expenditures for orphans’ courts and circuit courts may increase minimally.

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### **Additional Information**

**Prior Introductions:** None.

**Cross File:** Although designated as a cross file, SB 1239 (Senator Smith – Rules) is not identical.



**Information Source(s):** Judiciary (Administrative Office of the Courts); Register of Wills; U.S. Department of Homeland Security; Pew Research Center; Child Welfare Information Gateway; Department of Legislative Services

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