

ASSEMBLY JUDICIARY COMMITTEE

STATEMENT TO

ASSEMBLY, No. 4640

with committee amendments

STATE OF NEW JERSEY

DATED: JANUARY 25, 2021

The Assembly Judiciary Committee reports favorably and with committee amendments Assembly Bill No. 4640.

The “New Jersey Standby Guardianship Act,” P.L.1995, c.76 (C.3B:12-67 et seq.) allows parents and guardians to ask the court to appoint temporary guardians for their children without giving up parental rights. This bill as amended would make a number of changes to the Standby Guardianship Act. The bill as amended would also expand N.J.S.A.3B:12-39, which permits parents to delegate their parental powers through a power of attorney without involving the court.

STANDBY GUARDIANSHIP ACT: DEFINITIONS

The bill as amended revises several definitions in the Standby Guardianship Act, P.L.1995, c.76 (C.3B:12-67 et seq.). Currently, an “appointed standby guardian” is defined as a person appointed by the court to assume the duties of guardian over the person and, when applicable, the property of a minor child, upon the death of, or a determination of incapacity or debilitation, and with the consent of, the parent or legal custodian. The bill as amended removes the provision concerning “death or a determination of incapacity or debilitation” and replaces it with “an activating event.”

The bill adds several definitions of events that may constitute an “activating event.” These events include a “criminal proceeding” (defined as any incarceration on criminal charges, including pending charges, or a criminal sentence that separates a parent, custodian, or guardian from a minor child or minor ward); an “immigration administrative action” (any immigration proceeding, enforcement action, detention, removal, or deportation that separates a parent, custodian, or guardian from a minor child or ward); and “military service” (duty by any person in the active military service of the United States or the active military service of the State, including in the National Guard or State Guard, that separates a parent, custodian, or guardian from a minor child or minor ward).

STANDBY GUARDIANSHIP ACT: LEGISLATIVE FINDINGS

In addition, the bill revises section 2 of P.L.1995, c.76 (C.3B:12-68), which sets out legislative findings and declarations for the Standby Guardianship Act. Currently, this section provides that the purpose of a standby guardianship is to enable a custodial parent or legal custodian “suffering from a progressive chronic condition or a fatal illness” to make plans for the child. Under the bill as amended, this language would be deleted, and the stated purpose would be expanded to apply to a parent, custodian, or guardian “who cannot currently, or who anticipates being unable to, provide adequate care” to the minor child or minor ward.

STANDBY GUARDIANSHIP ACT: PROCEDURE

As amended by the committee, the bill provides that, upon petition of a parent, custodian, guardian, or attorney-in-fact appointed pursuant to N.J.S.3B:12-39, the court may appoint a standby guardian of a minor child or minor ward. The court may also appoint an alternate standby guardian. A petition for the judicial appointment of a standby guardian would be required to state: (1) which activating event or events shall cause the authority of the appointed standby guardian to become effective; (2) the name and address of the proposed standby guardian; and (3) the qualifications of the proposed standby guardian. The court would appoint the standby guardian if the court finds that the proposed standby guardian is fit and willing to assume the duties of that role, and that the interests of the minor child or minor ward would be promoted by the appointment of the standby guardian.

The bill as amended deletes the term “triggering event” in current law and replaces it with the term “activating event.” The bill also removes the requirement in current law for an attending physician to provide a copy of his determination concerning the incapacity or debilitation of the parent or legal custodian under certain circumstances.

Under current law, within 60 days following the assumption of guardianship duties, the appointed standby guardian must petition the court for confirmation. The confirmation petition must include a determination of incapacity or debilitation or a death certificate, as appropriate. The amended bill increases this time period from 60 days to 90 days. In addition, the bill removes the requirement that the appointed standby guardian must include a determination of incapacity or debilitation or a death certificate in the confirmation petition. Instead, under the bill as amended, the confirmation petition must include a determination that the activating event has occurred.

DELEGATION OF PARENTAL POWERS BY POWER OF ATTORNEY

N.J.S.3B:12-39 authorizes a parent or legal guardian, by a properly executed power of attorney, to delegate powers regarding care, custody, or property of his minor child or ward to another person. The court is not involved in this process. Under the current statute, the parent or guardian may delegate the parent or guardian's powers with the consent of the other parent, or without such consent if the other parent is incapacitated. The bill as amended expands the instances when a parent, custodian, or guardian may delegate the parent's, custodian's, or guardian's powers. When one parent seeks to make a delegation, or when a custodian who shares legal custody with a parent seeks to do so, the bill requires the consent of the other parent or the consent of the parent who shares legal custody with the custodian, unless such parent is incapacitated or unavailable.

The amended bill defines the term "incapacitated" to mean the parent, custodian, or guardian is impaired by reason of mental illness, intellectual disability, physical illness or disability, chronic use of drugs, chronic alcoholism, or other cause, except minority, to the extent that the person lacks sufficient capacity to manage the affairs of and provide care for the parent's, custodian's, or guardian's minor child or minor ward, and a consequent inability to make these decisions.

The bill also establishes a definition of the term "unavailable" as applied to a parent. Under the bill, "unavailable" means: (a) a parent who has not been involved in raising or financially supporting the child for two years or a third of the life of the child, whichever is less, immediately preceding the delegation; (b) a parent whose identity or whereabouts are unknown to the delegating parent; or (c) a parent who cannot be reached after diligent efforts.

The bill provides that a delegation of parental powers may become effective upon proper execution of the power of attorney or upon another "activating event." The bill defines an "activating event" as an event stated in the delegation that empowers the attorney-in-fact to assume the duties of the office. Activating events include, but are not limited to: the execution of a power of attorney pursuant to the bill; the parent's, custodian's, or guardian's attending physician concludes that the parent, custodian, or guardian is incapacitated; the parent's, custodian's, or guardian's attending physician concludes that the parent, custodian, or guardian is debilitated; the parent, custodian, or guardian is subject to immigration administrative action; the parent, custodian, or guardian is subject to criminal proceedings; the parent, custodian, or guardian is in military service; or the death of the parent, custodian, or guardian in circumstances in which no testamentary guardianship or other more permanent care arrangement has been made for the minor child or minor ward. The bill specifies that in no

case shall a power of attorney activated by the death of a parent, guardian, or custodian extend beyond the year that the power of attorney is in effect.

Current law allows the delegation of parental powers for a period of up to six months. Under the bill as amended, the delegation would expire after one year, and could be renewed for additional one-year periods. The delegation of parental powers could also be extended for an additional six months in exigent circumstances, as defined in the amended bill.

Under the bill as amended, a parent, custodian, or guardian may revoke a delegation by notifying the attorney-in-fact orally, in writing, or by any other act evidencing a specific intent to revoke the power of attorney.

The bill as amended specifies that a delegation would not deprive the parent, custodian, or guardian of the parent's, custodian's, or guardian's existing powers regarding care, custody, or property of the minor child or minor ward, but the parent, custodian, or guardian would exercise such powers, insofar as the parent, custodian, or guardian is able, concurrently with the attorney-in-fact named in the power of attorney.

The bill also specifies that it shall not be construed to involuntarily deprive any parent of parental rights.

SUGGESTED FORM

The bill as amended sets out a suggested form for a power of attorney and delegation of authority pursuant to N.J.S.3B:12-39. The form provides in pertinent part:

By this delegation, I/we provide that the attorney-in-fact's authority shall take effect upon the following "activating event" (check all that apply):
☐ The execution of this document on the latest date below; or
☐ My attending physician concludes that I am incapacitated, and thus unable to care for my minor child(ren)/minor ward(s); or
☐ My attending physician concludes that I am physically debilitated, and thus unable to care for my minor child(ren)/minor ward(s); or
☐ I am detained in immigration detention, removed, or deported; or
☐ I am incarcerated based on criminal charges, including pending charges, or conviction; or
☐ I am deployed in military service; or
☐ Upon my death, if I have made no more permanent care arrangements for my minor child or minor ward; or

___Other (specify reason).

Among other provisions, the suggested form provides:

In the event that an activating event occurs and a power of attorney is activated pursuant to this statement, I declare that it is my intention to retain full parental rights to the extent consistent with my condition and circumstances and, further, that I retain the authority to revoke the power of attorney consistent with my rights herein.

COMMITTEE AMENDMENTS

The committee amendments:

- delete the definition of “ward” in the bill, and provide that standby guardianship under P.L.1995, c.76 (C.3B:12-67 et seq.) and a delegation of parental powers under N.J.S.3B:12-39, in addition to applying to a minor child, also apply to a minor ward (a minor child for whom a guardian is appointed);
- provide that a delegation of parental powers may be extended for an additional six months in exigent circumstances;
- add a definition of “exigent circumstances”;
- replace the term “triggering event” with “activating event”;
- provide that the death of the parent, custodian, or guardian constitutes an activating event if the death takes place in circumstances in which no testamentary guardianship or other more permanent care arrangement has been made for the minor child or minor ward;
- replace certain language throughout the bill with gender neutral language; and
- make technical changes as to grammar, punctuation, and syntax.