MARYLAND FAMILY LAW ADVOCATE

A Publication of the MSBA Family & Juvenile Law Section

TABLE OF CONTENTS

New Standby Guardianship Law for Parents in an Adverse Immigration Action

By Cam Crockett, Esq. and Susan C. Silber, Esq.

On May 15, 2018, Governor Hogan signed into law a new standby guardianship law for parents in adverse immigration actions designed to allow parents in danger of being detained or deported to designate standby guardians for their children. This law was necessary in light of the new federal administration's immigration policies and enforcement activities that affect a significant number of children in Maryland with undocumented parents who are at risk of being placed in foster care if their parents are detained or deported.

According to the Migration Policy Institute's January 2016 report titled, "A Profile of U.S. Children with Unauthorized Immigrant Parents," 90,000 children in Maryland have undocumented parents. Of those children, 67,000 are U.S. citizens. The federal termination of Temporary Protected Status (TPS) programs for Haitians, El Salvadorans, Hondurans, Nicaraguans and Sudanese will also significantly increase these numbers. Many children of parents with TPS status will soon find themselves in Maryland's foster care program due to detention and deportation of their parents after their TPS status terminates in 2019. Specifically, 17,100 U.S.-born children in Maryland have Salvadoran parents with TPS status and 1,300 children in Maryland have Honduran parents with TPS status.

Senate Bill 1239, an emergency bill (immediately effective), introduced in the House of Delegates by Delegate Carlos Sanchez and in the Senate by Senator Will Smith, amended and expanded Maryland's Standby Guardianship law in the Estates and Trusts Article Sections 13-901, 13-904 and 13-907 to allow parents who are at risk to lose their ability to parent their children due to an adverse immigration action to establish a private designation of someone they trust to care for their children as a standby guardian. The new amendments to the standby guardianship law repurposed the standby guardianship law in Maryland, which had previously applied only in cases of incapacity, debilitation or death of a parent.

In the new statute, an adverse immigration action is defined to include (1) arrest or apprehension by a law enforcement officer for an alleged violation of federal immigration law; (2) detention or custody by the Department of Homeland Security (DHS) or a federal, state or local agency authorized or acting on behalf of DHS; (3) departure from the U.S. under an order of removal, deportation, exclusion, voluntary departure, or expedited removal or stipulation of voluntary departure; (4) denial or revocation or delay of the issuance of a visa or transportation letter by the Department of State; (5) denial, revocation or delay of the issuance of a parole document or reentry permit by DHS; or (6) denial of admission or entry into the U.S. by the DHS. Other events may also qualify as an adverse immigration actions even though not enumerated in the statute.

For those parents who need to make the heart-wrenching decision to leave their children behind as a result of an adverse immigration action or who are being detained and are unable to care for their children, this new law allows them to create family safety plans to protect their children. In the alternative, the child would likely be placed into Maryland's overburdened child welfare and foster care system or be subject to informal placements without any legal protections. Such placements could result in serious trauma to the child and have long-lasting effects on the child's future well-being. With the ability to establish a private designation of someone they trust to care for their children, parents are empowered to help ensure the continued well-being of their children and keep them in the care of responsible family members or close friends.

The standby guardian law has several hallmarks which make it unique. First, it allows parents without any court filing to designate someone they trust to care for their children and for the authority to commence immediately at the time the adverse action occurs. The standby guardianship is intended to be given the same legal status as other guardianships by all child-related institutions (e.g. schools, health care providers, child welfare agencies and social service agencies).

The person designated to serve as the standby guardian is authorized under the law to serve for a period of 180 days from the date the standby guardian has (1) a copy of the signed designation and consent form and (2) evidence that the parent has experienced an adverse immigration action, preventing the parent from caring for minor children. If the standby guardian does not file a petition with the Court for judicial appointment as standby guardian within the 180-day period of service, the standby guardian's statutory authority automatically terminates at the end of the 180-day period.

If the standby guardian files a Petition for Judicial Appointment of Standby Guardianship during the 180 days, the standby guardian's service is extended at the time of the filing and continues until the court rules on the request for the judicial appointment of standby guardianship. The court will appoint that person to continue to serve in the capacity of standby guardian if it finds that the interests of the minor children will be promoted by the appointment of the standby guardian. If the court rules

(continued on page 9)

View From the Bench...

(Continued from page 4)

if you cannot verify all expenses, counsel should review the financial statement and get verification for those figures that seem questionable. One or two assertions on a financial statement that are untrue could damage your client's credibility and ultimately cost the client much more than a few hours of the attorney's time double checking the client's methodology and assertions.

4. Utilizing educational resources

Lastly, there are so many CLE live programs, online programs and publications to which practitioners have access. Attorneys get so mired in the daily grind of practice that they sometimes do not keep up with changes in the law or refresh themselves on areas in which they practice. One example is in uncontested divorce hearings. Almost daily the questions are asked 1) have you resided in the state of Maryland at least one year from the date of filing of the complaint? (residency requirement is 6 months); 2) did you separate with the intention of ending your marriage (no longer a requirement for divorce); and 3) is there any hope or expectation of reconciliation (not required for 12 month separation or mutual consent divorce. *See* FL Art. §7-103 to review the grounds for which this remains a requirement). I encourage attorneys to update their form questions to conform with the Code. It will speed up your hearings and it will help to raise the level of practice.

Some resources I suggest include the MSBA (msba.inreachce.com); the local bar association websites; the courthouse libraries and the Maryland Judiciary website.

These are a few suggestions based on what I have gleaned from the bench. As we are not perfect, and we must all continue to learn and grow, I invite you to offer any constructive criticism and tips you might have for me to help improve your experience in my courtroom. Let us work together to ensure that we are providing to the community the best assistance possible. The higher the level of competence of the bar and bench, the more smoothly our legal system works and the more confidence those whom we serve will have in us. It is an honor for me to serve the legal and lay communities and I hope, with your help, to continue to do so faithfully, knowledgeably and humbly.

Guardianship Law...

(Continued from page 5)

in favor of the appointment, the standby guardian's authority continues thereafter unless otherwise terminated by the court or the parent.

The second hallmark of standby guardian law is that parents retain full parental rights even after the beginning of the standby guardian's service, and they can revoke the standby guardian's authority at any time. Before a petition of judicial appointment of standby guardianship is filed with the court, parents can revoke the standby guardianship merely by notifying the standby guardian verbally or in writing or by any other act that evidences a specific intent to terminate the standby guardianship. After a petition for judicial appointment of the standby guardian has been filed, parents may revoke the standby guardianship by executing a written revocation and filing it with the court in which the petition was filed and notifying the standby guardian. No court order terminating the guardianship is required.

The Administrative Office of the Courts of Maryland (AOC) is in the process of completing a standardized form for the Designation and Consent to the Beginning of the Standby Guardianship which will be available on the Maryland Judiciary's website. Go to www.courts.state.md.us and click "E-services" and then go to "court forms" or go to https://mdcourts.gov/courtforms. This form, once issued, will allow parents a straightforward way to make private designations with little cost or red tape. The form includes designation of standby guardian, not only for parents experiencing an adverse immigration action, but also for parents experiencing debilitation, incapacity and death. The form is being translated from English into Spanish, French, Korean, Chinese, and Russian. In the new standardized form, parents elect whether they are designating the standby guardian to make decisions regarding the person of the minor children (i.e., making non-financial decisions about the children's housing, medical care, education, clothing, food and everyday needs) and/or the children's property (i.e., making financial decisions such as paying bills or costs to cover the children's personal needs, applying for federal or state benefits and paying taxes). In addition, under each area parents may select which specific power or duties they wish the standby guardian to exercise.

The AOC also plans on creating a standardized form for the Petition for Judicial Appointment of Standby Guardian. The time frame for that form is still unclear. That Petition, when filed with the court, needs to be accompanied by the Designation and Consent to the Beginning of the Standby Guardianship, copies of the birth certificates or evidence of parentage of the

(continued on page 10)

Guardianship Law...

(Continued from page 9)

minor children and evidence of the adverse immigration action or other ground for the request (e.g. document of determination of incapacity or debilitation). In cases of incapacity, there is not a requirement for the parent's consent to the beginning of the standby guardianship.

Family Safety Planning Clinics are being offered by the Pro Bono Resource Center of Maryland, the Esperanza Center in Baltimore and other Maryland non-profit organizations to assist parents in completing the Designation and Consent to the Beginning of the Standby Guardianship form. Use of the standardized form is not mandatory. Other documents may be submitted to the courts in lieu of this form as long as they comply with the requirements of the standby guardianship law.

There are other developments underway related to Standby Guardianships. The Standing Committee on Rules of Practice and Procedure (Rules Committee) of the Court of Appeals of Maryland, in an effort to create more uniformity throughout guardianship law, approved a number of changes to the standby guardianship rules in Maryland Rules of Procedure Title 10-(Guardians and Other Fiduciaries) Chapter 400 (Standby Guardian). If adopted by the Court of Appeals, the rules will require that the court hold a hearing in all standby guardianship cases, that the Petition for Judicial Appointment of a Standby Guardian state the wishes of minors if they are 14 years of age or older, that the Petition state whether the standby guardian has been convicted of a crime listed in Estate and Trusts Article Section 11-114 or if any criminal charge is pending against the standby guardian; that if 3 months have elapsed since the standby guardianship became effective, the Petition include a statement from the child's healthcare provider and a copy of the child's most recent school report card or school progress report and a reference to all court records pertaining to the child during that period. Finally, the new rules would provide that the court may exercise its other powers in standby guardianship cases, such as appointing an attorney for a minor under Rule 10-106, appointing an independent investigator under Rule 10-106.1, requiring the standby guardian to take guardianship training or to report to the court on an annual basis or more regularly.

Although the authors' believe that the new guardianship law is a good development in protecting children of parents who are detained or deported, they do have concern that some of these procedures are burdensome for the standby guardians. Our hope is that there will be legal services and other resources made available in cases where the standby guardian needs to petition for judicial appointment (i.e. completing and filing the petition, appearing at a hearing, and filing reports) in order to make the judicial appointment process more accessible to standby guardians.

Hurt v. Jones-Hurt...

(Continued from page 6)

agreement the dissolution decree stated that the wife was entitled to 50% of the husband's military retired pay. There was no appeal from the divorce judgment. Mr. Howell retired in 1992 from the Air Force.

About thirteen years later, Mr. Howell applied for VA disability compensation. His VA rating was 20%, meaning that he would receive about $250 a month from the VA. But that also meant that, in making the election for VA payments, he was also electing a "VA waiver," that is, the choice to forfeit the same amount of his pension to get the tax-free VA funds.[5]

Mr. Howell's VA waiver was done without the permission of the court and without his ex-wife's consent. That resulted in Mrs. Howell's receiving about $125 a month less of the pension. The full pension of Mr. Howell was about $1500 per month.

Mrs. Howell filed a petition to enforce the original pension division order, and to require the ex-husband to make up the payments which were lost due to his VA waiver. The trial court approved, ordering pay-back by Mr. Howell, and this was upheld by the Supreme Court of Arizona. Mr. Howell petitioned for review by the U.S. Supreme Court.

Howell v. Howell: Ruling and Rationale

The Supreme Court reversed the Arizona decision. It held that, under the Uniformed Services Former Spouses' Protection Act (USFSPA)[6], the judge may not order pay-back to a former spouse of funds which she or he loses because the military retiree has

[5] 38 U.S.C. § 5304-5305 require a forfeiture of an equal amount of retired pay for retirees who get VA disability compensation. This is often called a "VA waiver." Due to changes in federal law since 2003, the VA waiver now applies only to retirees whose rating is less than 50% or who are receiving Combat-Related Special Compensation. 10 U.S.C. § 1413a and 1414.

[6] 10 U.S.C. § 1408.

(continued on page 11)