

CHAPTER 43
FORMERLY
HOUSE BILL NO. 104

AN ACT TO AMEND TITLES 10, 13 AND 31 OF THE DELAWARE CODE RELATING TO
DSCYF CUSTODY AND THIRD PARTY VISITATION.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAWARE:

WHEREAS, the Child Protection Accountability Commission (“CPAC”) is charged with monitoring Delaware’s child protection system; and

WHEREAS, CPAC determined in May of 2005 that a user-friendly statute to govern custody and visitation matters between parents and third parties, including the Department of Services for Children, Youth and Their Families (“DSCYF”), needed to be developed, and created the CPAC Custody Subgroup to accomplish same; and

WHEREAS, the CPAC Custody Subgroup, comprised of representatives from the Family Court, the DSCYF, the Department of Justice, the Office of the Child Advocate, GrandParents United, the adoption community, the Child Placement Review Board, and lawyers from the Delaware State Bar Association’s Family Law Section, met on a regular basis from May of 2005 until December of 2008 to develop such a user-friendly statute; and

WHEREAS, the Child Protection Accountability Commission believes the statutory changes will benefit the children and families involved in the child protection system it is required to monitor;

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAWARE:

Section 1. Amend Section 901(20) of Title 10 of the Delaware Code by striking “or” and replacing it with “,”, and inserting the following after the phrase “first cousin”:

“, great-grandparent, grand aunt or uncle, half brother or sister.”

Section 2. Amend Section 921(1) of Title 10 of the Delaware Code by inserting the word “abused” prior to the phrase “or delinquent.”

Section 3. Amend Section 1031 of Title 10 of the Delaware Code by striking subsection (7) in its entirety.

Section 4. Amend Section 721(e) of Title 13 of the Delaware Code by striking the second sentence and subparagraphs (1) and (2).

Section 5. Amend Section 724(f) of Title 13 of the Delaware Code by adding a second sentence to read as follows:

“This section shall apply to all proceedings governed by this Title as well as to all proceedings set forth in Subchapter II of Chapter 9 of Title 16.”

Section 6. Amend Section 728(b) of Title 13 of the Delaware Code by striking the phrase “or any other person” as it appears in the second sentence.

Section 7. Amend Section 728(c) of Title 13 of the Delaware Code by striking the phrase “or custodian” as it appears in the first sentence.

Section 8. Amend Section of 928 of Title 13 of the Delaware Code by inserting “; subsidy” after the word “fee” in paragraph (a), and inserting a subsection (c) to read as follows:

“(1) The Department, in its discretion in accordance with federal law and the regulations and interpretations thereof, may award subsidy moneys to the adoptive parent of a child who was in Department custody prior to the adoption petition being filed. The amount and duration of the subsidy shall be in the sole discretion of the Department.”

Section 9. Amend Title 13 of the Delaware Code by inserting a new Chapter 24 to read as follows:

“CHAPTER 24. THIRD PARTY VISITATION

Subchapter I. General Provisions

§ 2401. Intent and purpose.

- (a) The General Assembly hereby declares that there is a need for a clear statutory framework for the proper procedures and requirements for visitation between children and persons other than their

parents. The General Assembly further declares that, with the exception of DSCYF, guardianship as set forth in Chapter 23 of this Title is the appropriate legal authority for persons who wish to pursue legal custodial and guardianship rights over a child for which they are not the parent.

- (b) This Chapter shall be liberally construed so that these purposes may be realized. To that extent, modification of any orders pertaining to visitation involving persons other than parents that were entered under previous versions of the Code shall now be considered under this Chapter. Modification of any orders pertaining to custody involving persons other than parents that were entered under previous versions of the Code shall now be considered under Chapter 23 of this Title.

§ 2402. Definitions.

For the purposes of this chapter, unless the context indicates differently:

- (1) "Abuse" or "abused child" is as defined in Section 901 of Title 10;
- (2) "Adult" is as defined in Section 901 of Title 10;
- (3) "Best interests" is determined in accordance with Section 722 of this Title;
- (4) "Child" is as defined in Section 901 of Title 10;
- (5) "Court" or "court" is as defined in Section 901 of Title 10;
- (6) "Department" or "DSCYF" is as defined in Section 901 of Title 10;
- (7) "Dependency" or "dependent child" is as defined in Section 901 of Title 10;
- (8) "Guardian ad litem" is as defined in Section 2302 of this Title;
- (9) "Guardian" is as defined in Section 2302 of this Title;
- (10) "Licensed agency" is as defined in Section 901 of this Title;
- (11) "Neglect" or "neglected child" is as defined in Section 901 of Title 10;
- (12) "Parent" is as defined in Section 2302 of this Title;
- (13) "Relative" is as defined in Section 901 of Title 10.

§ 2403. Jurisdiction and venue.

(a) The Family Court shall have jurisdiction over proceedings under this chapter to grant, modify and/or terminate third party visitation orders.

(b) A petition for third party visitation under this chapter may be filed in the Family Court of any of the following counties:

- (1) The county in which the organization or persons, having legal or physical care, custody, or control of the child is located; or
- (2) The county in which the child resides.

(c) The provisions of sections 722, 724, 728(d)-(f) and Chapter 7A of this Title shall be applicable to proceedings filed under this chapter.

§ 2404. Hearing procedure and notice requirements.

(a) When a petition is filed under this chapter, the Court shall set a date for a hearing on the petition, and shall cause notice of time, place and purpose of the hearing to be served as required in this section.

(b) Notice of the time, place and purpose of the hearing shall be served upon the parent or parents, guardian or guardians, person or persons, DSCYF, or licensed agency holding parental rights at the respondent's last known address or to the address received in the petition.

(c) If the Court shall find that personal service within the State cannot be accomplished upon a party, the petitioner shall cause notice to be published in a newspaper of general circulation in the county where the respondent is most likely to be residing.

(d) Personal service at any time prior to the hearing shall be sufficient to confer jurisdiction upon the Court.

(e) Notice provided pursuant to this section shall constitute conclusive evidence of service and a hearing will then proceed at the time and date set, with or without the appearance of the parent or parents, guardian or guardians, person or persons, Department, or licensed agency holding parental rights so notified.

§ 2405. Sanctions.

The Court may impose such sanctions or remedies as the Court deems just and proper to ensure compliance with this Chapter, including but not limited to:

- (1) extra visitation or contact with the child when it is in the child's best interest to do so;
- (2) the payment of costs and reasonable counsel fees of the person applying for relief under this section;
- (3) a fine in the discretion of the Court; or
- (4) a term of imprisonment if a person is found to be in contempt of prior orders of the Court.

§ 2406. Confidentiality of proceedings.

All proceedings under this chapter and all records of such proceedings shall be held before the Court privately, except for reasons found sufficient to the Court, a hearing in any particular case may be made open to the public.

§ 2407. Appeals.

Appeal from any order or decree entered under this Chapter shall lie to the Supreme Court. No appeal shall lie from any order or decree under this Chapter unless taken within 30 days from the date of such order or decree.

Subchapter II. Third Party Visitation Proceedings

§ 2410. Persons eligible to petition for third party visitation.

(a) Unless otherwise specified in this chapter, any adult person(s) may file a petition for a third party visitation order regarding a child not his, hers, or theirs against the child's guardians, parents, or DSCYF, provided that the adult person(s) can establish that the adult person(s) petitioning for visitation:

1. has a substantial and positive prior relationship with the child; or
2. is a relative of the child.

(b) Unless otherwise specified in this chapter, a guardian *ad litem* may petition for a third party visitation order on behalf of the child against the child's guardian, parent, and/or DSCYF if:

1. the adult person with whom visitation is sought consents to visitation with the child and;
2. the adult person with whom visitation is sought:
 - a. has a substantial and positive prior relationship with the child; or
 - b. is a relative of the child.

(c) Any child, through a guardian *ad litem*, may file a petition seeking visitation with any other child with whom they have at least one parent in common.

(d) Notwithstanding subsections (a) through (c), if a parent's rights have been terminated in the child with whom a parent seeks third party visitation, such person and their relatives are prohibited from filing for third party visitation unless:

1. more than three (3) years have passed since the termination of parental rights order was entered and the child has not been adopted; or
2. the adoptive parents are agreeable and their notarized consent is attached to the petition; or
3. the adoptive parents have previously entered into a written notarized agreement or court-approved agreement for continued visitation and a copy of the agreement is attached to the petition.

§ 2411. Contents of third party visitation petition.

Every petition for third party visitation with a child filed under this chapter shall be verified and contain:

- (1) Name and place of residence of the petitioner or petitioners;
- (2) Name, sex, and date of birth of the child;
- (3) A statement regarding the eligibility requirements set forth in section 2410 of this chapter;

(4) The name and address of the mother and the name and address of the father, alleged father, and/or presumed father. If either the name and/or address of any parent is not known, the petition shall include detailed information setting forth the efforts made to locate the parent.

(5) The name and last known address of the person or persons or organization holding parental rights, custody, and/or guardianship of the child; and

(6) A statement setting forth the grounds for visitation in section 2412 of this title.

§ 2412. Grounds for persons obtaining third party visitation with a child.

(a) Prior to granting a third party visitation order the Court shall, find after a hearing on the merits, or accept the agreement of the parties that:

- (1) third party visitation is in the child's best interests; and,
- (2) one of the following as to each parent:
 - a. the parent consents to the third party visitation;
 - b. the child is dependent, neglected or abused in the parent's care;
 - c. the parent is deceased; or
 - d. the parent objects to the visitation, however the Court having given special weight to the parent's objection finds the visitation will not substantially interfere with the parent/child relationship.

Notwithstanding the above, if the child has two parents and the child is not dependent, neglected or abused in either parent's care, visitation may not be granted where both parents object.

(b) Prior to granting an order for third party visitation between children, the Court shall find after a hearing on the merits, or accept the agreement of the parties, that the visitation is in the best interests of all children subject to the petition.

§ 2413. Modification of orders granting third party visitation.

An order granting third party visitation may be modified at any time if the best interests of any child subject to the order would be served by modification."

Section 10. Amend Title 13 of the Delaware Code by inserting a new Chapter 25 to read as follows:

"CHAPTER 25. DSCYF CUSTODY

Subchapter I. General Provisions

§ 2501. Intent and purpose.

- (a) The General Assembly hereby declares that there is a need for a clear statutory framework for the proper procedures and requirements for when the Department of Services for Children, Youth and Their Families is granted custody of a dependent, neglected or abused child.
- (b) This Chapter shall be liberally construed so that these purposes may be realized.
- (c) For the purposes of applicable state and federal law, any dependent, neglected or abused child in DSCYF custody shall be considered a ward of the State.

§ 2502. Definitions.

For the purposes of this chapter, unless the context indicates differently:

- (1) "Abuse" or "abused child" is as defined in Section 901 of Title 10;
- (2) "Adult" is as defined in Section 901 of Title 10;
- (3) "Best interests" is determined in accordance with Section 722 of this Title;
- (4) "Child" is as defined in Section 901 of Title 10;
- (5) "Court" or "court" is as defined in Section 901 of Title 10;
- (6) "Department" or "DSCYF" is as defined in Section 901 of Title 10;
- (7) "Dependency" or "dependent child" is as defined in Section 901 of Title 10;

(8) "Division" or "DFS" means the Division of Family Services of the Department of Services for Children, Youth and Their Families;

(9) "Foster parent" is as defined in Section 2302 of this Title;

(10) "Guardian ad litem" is as defined in Section 2302 of this Title;

(11) "Guardian" is as defined in Section 2302 of this Title;

(12) "Licensed agency" is as defined in Section 901 of this Title;

(13) "Neglect" or "neglected child" is as defined in Section 901 of Title 10;

(14) "Parent" is as defined in Section 2302 of this Title;

(15) "Parental responsibilities" is as defined in Section 1101 of this Title;

(16) "Permanency" is as defined in Section 2302 of this Title;

(17) "Relative" is as defined in Section 901 of Title 10;

(18) "School of origin" is defined as the school the child attended at the time the child was placed in the custody of DSCYF.

§ 2503. Jurisdiction and venue.

(a) The Family Court shall have jurisdiction over proceedings under this chapter to grant, modify and/or terminate DSCYF custody orders.

(b) A petition for DSCYF custody under this chapter may be filed in the Family Court of any of the following counties:

(1) The county in which the organization or persons, having legal or physical care, custody, or control of the child is located; or

(2) The county in which the child resides.

(c) The provisions of sections 722, 724, 728(d)-(f) and Chapters 7A and 24 of this Title shall be applicable to proceedings filed under this chapter.

§ 2504. Hearing procedure and notice requirements.

(a) When a petition is filed under this chapter, the Court shall set a date for a hearing on the petition, and shall cause notice of time, place, and purpose of the hearing to be served as required in this section.

(b) Notice of the time, place, and purpose of the hearing shall be served upon the parent or parents, guardian or guardians, person or persons, DSCYF, or licensed agency holding parental rights at the respondent's last known address or to the address received in the petition.

(c) If the Court shall find that personal service within the State cannot be accomplished upon a party, the petitioner shall cause notice to be published in a newspaper of general circulation in the county where the respondent is most likely to be residing.

(d) Personal service at any time prior to the hearing shall be sufficient to confer jurisdiction upon the Court.

(e) Notice provided pursuant to this section shall constitute conclusive evidence of service and a hearing will then proceed at the time and date set, with or without the appearance of the parent or parents, guardian or guardians, person or persons, DSCYF, or licensed agency holding parental rights so notified.

(f) When a petition is filed under this Chapter, the Court shall appoint an attorney authorized to practice law in this State or a Court-Appointed Special Advocate to represent the best interests of the child. The Court, in its discretion, may also appoint an attorney to represent the child's wishes. The rights, responsibilities and duties in representing the child's best interests are set forth in § 9007A of Title 29 and Chapter 36 of Title 31. When determining whether to appoint an attorney or Court-Appointed Special Advocate, the Court, in its discretion, should assign the most complex and serious cases to attorneys through the Office of the Child Advocate.

§ 2505. Sanctions.

The Court may impose such sanctions or remedies as the Court deems just and proper to ensure compliance with this Chapter, including but not limited to:

- (1) extra visitation or contact with the child when it is in the child's best interest to do so;
- (2) the payment of costs and reasonable counsel fees of the person or agency applying for relief under this section; or
- (3) a fine in the discretion of the Court.

§ 2506. Confidentiality of proceedings.

All proceedings under this chapter and all records of such proceedings shall be held before the Court privately, except for reasons found sufficient to the Court, a hearing in any particular case may be made open to the public.

§ 2507. Appeals.

Appeal from any order or decree entered under this Chapter shall lie to the Supreme Court. No appeal shall lie from any order or decree under this Chapter unless taken within 30 days from the date of such order or decree.

Subchapter II. DSCYF Custody Proceedings

§ 2510. Applicability.

The provisions of this Subchapter shall apply exclusively to the State of Delaware Department of Services for Children Youth and Their Families ("DSCYF") when seeking and/or obtaining custody of a child on the basis of dependency, neglect or abuse. This Subchapter shall not be construed as preventing DSCYF from obtaining or seeking guardianship, termination of parental rights and/or adoption regarding a child as provided for in Chapters 9, 11 and 23 of this Title. This Subchapter shall be liberally construed such that the child's health and safety is the highest priority and of paramount concern as required by the Adoption and Safe Families Act, 42 U.S.C. Section 671, et seq. and State Law.

§ 2511. Contents of DSCYF petition for custody.

- (a) The petition for DSCYF custody shall state:
 - (1) Name and address of the petitioning agency;
 - (2) Name, sex, date of birth of the child and, if known, the child's school of origin;
 - (3) The name and address of the parents, alleged father or presumed father, and if applicable, the name and address of any custodian or guardian.
 - (4) If the name or address of any person or organization described in subsection (3) is unavailable or unknown, DSCYF shall furnish detailed information concerning the efforts made to identify and locate such individual or organization;
 - (5) The DSCYF allegations of dependency, neglect, and/or abuse against each parent;
 - (6) Efforts, where practical, made by DSCYF to identify a fit and willing relative to care for the child;
 - (7) A statement regarding why continuing the placement of the child in the home of the parents, guardian, custodian or caretaker is contrary to the welfare of the child; and
 - (8) A statement why it is in the best interests of the child to be placed in DSCYF custody.

§ 2512. Grounds for DSCYF custody; preliminary injunction.

(a) When emergency custody or other emergency relief is sought by DSCYF, the Court may issue an *ex parte* order awarding emergency custody to DSCYF and order removal of a child from the home upon the establishment that:

- (1) continuation in the home is contrary to the welfare of the child; and
- (2) probable cause exists to believe that:
 - a. a child continues to be in actual physical, mental or emotional danger or there is a substantial imminent risk thereof or;
 - b. immediate or irreparable harm may result to the child if such an order is not issued.

(b) Prior to granting an adjudicatory order for DSCYF custody, the Court shall find after a hearing on the merits, or accept the agreement of the parties, that:

- (1) as to each parent, the child is dependent, neglected or abused;
- (2) it is in the child's best interests to be in DSCYF custody.

(c) Should the elements of subsection (b) be met, the Court shall also determine after a hearing on the merits or accept the agreement of the parties, the nature and extent, if any, of any contact, sharing of information and/or visitation between the parent and the child. In making such a determination, the Court shall apply the best interests of the child standard set forth in section 722 of this Title, unless Chapter 7A or section 728 (d)-(f) apply.

§ 2513. Termination, Modification or Rescission of DSCYF custody order.

(a) *Termination.* Except as otherwise specified in this chapter, DSCYF custody of a child terminates:

- (1) Upon the child's death;
- (2) Upon adoption of the child;
- (3) When the child reaches the age of majority;
- (4) Upon the granting of a guardianship petition pursuant to Chapter 23 of this Title; or
- (5) As otherwise ordered by the Court.

(b) *Modification.* Except as otherwise specified in this chapter, a DSCYF custody order may be modified at any time. In making a determination to modify the order the Court shall apply the best interests of the child standard and Chapter 7A and section 728(d)-(f) of this Title, if applicable.

(c) *Rescission.* Except as otherwise specified in this chapter, DSCYF custody may be rescinded upon a judicial determination that the child is no longer dependent, neglected or abused in the parent's care. The Court may rescind custody to the original custodial arrangement between the parents or an alternative custodial arrangement as determined by the Court to be in the child's best interests.

Subchapter III. Powers and Duties

§ 2520. Duties and rights of parents under a DSCYF custody order.

(a) Unless the parental rights have been terminated, a parent whose child is in DSCYF custody may petition for and seek enforcement of:

- (1) an order for visitation, contact, and/or information regarding the child if not otherwise prohibited by law;
- (2) unless otherwise ordered by the Court or authorized by statute, an order that DSCYF is required to make reasonable efforts at reunifying the child with such parent;
- (3) an order rescinding custody from DSCYF to the parent.

(b) Unless the parental rights have been terminated, a parent whose child is in DSCYF custody maintains the right, unless otherwise ordered by the Court, to:

- (1) consent to certain medical or mental health care for the child as set forth in Section 2521(2) of this Title.
- (2) consent to educational decisions for the child, subject to applicable state and federal law, as set forth in Section 2521(4) of this Title.
- (3) attend and participate in school related meetings and activities related to the child, attend extra curricular activities, attend medical/dental appointments, and access medical/dental records regarding the child.

(c) Unless parental rights have been terminated, a parent whose child is in DSCYF custody shall have the following duties:

- (1) to support the child financially as provided for in Chapter 5 of this Title, unless just cause exists under Section 506 of this Title;
- (2) to engage in offered services to alleviate or mitigate the causes necessitating placement in DSCYF custody, in cases where the DSCYF is providing reunification services to the parents.

§ 2521. Powers and duties of the DSCYF as custodian of the child.

Upon the Court granting custody to DSCYF, DSCYF shall be vested with the following powers and duties:

- (1) to provide for appropriate placement of the child, within or outside of this State, unless otherwise ordered by Court or controlled by statute, with reasonable notice prior to any change in placement given to the guardian ad litem for the child;
- (2) to consent to medical care for the child, including medical examination, medical treatment including surgical procedures and mental health treatment other than inpatient psychiatric hospitalization. DSCYF shall make reasonable efforts to obtain the consent of the parent, and to notify the guardian ad litem, prior to obtaining medical care.
- (3) to continue the child in the child's school of origin, or when not feasible or not in the child's best interests, to immediately enroll the child in school pursuant to Section 202 of Title 14. The Court shall determine if the school placement is in the child's best interest;
- (4) to consent to educational decisions, subject to applicable state and federal law, including but not limited to, disciplinary proceedings and consequences, academic needs and extra-curricular activities of the child, and to request the appointment of an educational surrogate parent when appropriate DSCYF shall make reasonable efforts to obtain the consent of the parent, and to notify the guardian ad litem, prior to making any educational decisions on behalf of the child; and
- (5) to maintain any other powers and duties as conferred by statute in the Delaware Code.”

Section 11. Amend Section 304 of Title 31 of the Delaware Code by striking it in its entirety.

Section 12. Amend Section 701(c) of Title 13 of the Delaware Code by striking it in its entirety.

Section 13. If any provision of this Act or the application thereof to any person or circumstance is held invalid, the invalidity shall not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable.

Approved June 16, 2009