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HOUSE OF REPRESENTATIVES

141st GENERAL ASSEMBLY

HOUSE BILL NO. 269

AN ACT TO AMEND TITLE 13 OF THE DELAWARE CODE RELATING TO GUARDIANSHIPS AND
PERMANENT GUARDIANSHIPS.

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

1 Section 1. Amend Title 13 of the Delaware Code by inserting the following:

2 “CHAPTER 23: GUARDIANSHIP OF A CHILD

3 Subchapter I – Definitions and Jurisdiction

4 § 2301. Intent and purpose.

5 The General Assembly hereby declares that although the Family Court has jurisdiction to grant
6 guardianship, there does not presently exist any statutory framework for our families, our children and our
7 Family Court judiciary as to the proper procedures and requirements for guardianship in the Family Court.

8 § 2302. Definitions.

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

- 10 (1) 'Abused child' means a child who has suffered any physical injury inflicted by a person responsible
11 for the care, custody and control of the children through unjustified force pursuant to § 468(1) of
12 Title 11, emotional abuse, torture, criminally negligent treatment, sexual abuse, exploitation,
13 maltreatment or mistreatment;
- 14 (2) 'Adequate care' means a type and degree of personalized attention that will tend to advance a
15 child's physical, mental, emotional and general well-being;
- 16 (3) 'Adult' means a person who has reached his or her 18th birthday;
- 17 (4) 'Best interests' is as defined in § 722 of this Title;

- (5) 'Child' or 'children' means persons who have not reached their 18th birthday;
- (6) 'Court' means the Family Court;
- (7) 'Department' means the Department of Services for Children, Youth and their Families;
- (8) 'Dependent child' means a child whose physical, mental or emotional health and well-being is threatened or impaired because of inadequate care and protection by the child's custodian, who is unable to provide adequate care for the child, whether or not caused by the child's behavior; provided, however, that for the purposes of this chapter, 'dependent child' may include a child who has been placed in a non-related home on a permanent basis without the consent and approval of the Division of Family Services, or any agency licensed thereby to place a child in a non-related home, or a child who has been placed with a licensed agency which certifies it cannot complete a suitable adoption plan;
- (9) 'Division' means the Division of Family Services of the Department of Services for Children, Youth and their Families;
- (10) 'Foster parent' means an individual or couple who has been approved by the Department or a licensed agency to provide foster care in exchange for foster care payments provided by the Department or a licensed agency;
- (11) 'Guardian *ad litem*' means an individual appointed by the Court to represent the best interests of a child whether or not that reflects the wishes of the child, who by his or her appointment, shall be a party to the child welfare proceeding;
- (12) 'Guardian' means a non-parent or an agency charged with caring for a child during the child's minority;
- (13) 'Neglected child' means a child whose physical, mental or emotional health and well-being is threatened or impaired because of inadequate care and protection by the child's custodian who has the ability and financial means to provide for the child but does not or will not provide adequate care, or a child who has been abused or neglected as defined by § 902 of Title 16. For purposes of this chapter, no child whose parent, guardian or other person legally charged with care or custody of the child, provides the child treatment in accordance with a religious method of healing, in lieu of medical treatment, shall for that reason alone, be considered a neglected child;

(14) 'Parent' means a biological or adoptive parent whose parental rights have not been terminated under Chapter 11 of this Title;

(15) 'Parental responsibilities' means the care, support and control of the child in a manner that provides for the child's necessary physical needs, including adequate food, clothing and shelter, and that also provides for the mental and emotional health and development of such child;

(16) 'Permanency' means the safe, stable, custodial environment in which a child is raised and the life-long relationship that child establishes with a nurturing caregiver.

§ 2303. Jurisdiction and venue.

(a) The Family Court shall have jurisdiction of proceedings under this chapter to grant, modify and/or terminate guardianship.

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

1. The county in which at least 1 parent resides;
2. The county in which the organization having legal or physical care, custody or control of the child is located; or
3. The county in which the child is located.

Subchapter II – General Procedures for Appointment of Guardians

§ 2320. Persons eligible to file for guardianship.

Notwithstanding any other section of this chapter, any person, or a husband and wife jointly, who are not legally separated and who are not living apart from each other, being a resident of the State at the time of filing the petition, over 21 years of age, may petition the Family Court for an order authorizing the petitioner or petitioners to act as guardian(s) of a child not his, hers, or theirs.

§ 2321. Consent by parent.

Unless otherwise provided by this chapter, the parent or parents may voluntarily consent to the guardianship.

§ 2322. Contents of petition.

Every petition for guardianship of a child filed under this chapter shall contain:

- (1) Name and place of residence of the petitioner or petitioners;

- 74 (2) Name, sex, date of birth and place of birth of the child;
- 75 (3) Relationship of the petitioner(s) to the child or the fact that no such relationship exists;
- 76 (4) The name and address of the mother and the name and address of the father, alleged father or
- 77 presumed father;
- 78 (5) In addition to other pertinent information, the petition, if either the name or address of the
- 79 parent or parents is not included, shall furnish detailed information concerning the efforts made
- 80 to locate the parent or parents;
- 81 (6) The name and last known address of the person or persons or organization holding parental
- 82 rights and the name and address of the person or persons or organization having the care,
- 83 control or custody of the child;
- 84 (7) The name(s) and residence of the person(s) to whom guardianship shall vest, if different from
- 85 the petitioner(s);
- 86 (8) If the child is 14 years of age or older, an affidavit that the child consents to the guardianship;
- 87 and
- 88 (9) A statement regarding each parent that:
- 89 a. the child is dependent and/or neglected, and the reasons therefore; or
- 90 b. the proposed guardian is a stepparent and meets the requirements of § 733 of this Title; or
- 91 c. the parent consents to the guardianship and an accompanying affidavit indicating same.
- 92 (10) Certified copies of the death certificate or such other proof as the Court may require, if one or
- 93 more parents is deceased.

94 § 2323. Religious affiliation.

- 95 (a) Under this chapter, if either natural parent, in a notarized statement made prior to the child's
- 96 placement with the proposed guardian, specifies the religion in which he or she desires the child to
- 97 be raised, the Department or licensed agency shall make placement in accordance with such
- 98 statement. Otherwise, the Department or licensed agency shall make placement without regard to
- 99 religion.
- 100 (b) If the proposed guardian is a stepparent or blood relative, there shall be no restriction regarding the
- 101 religious affiliation.

(c) Whenever the provisions as set forth in subsection (a) of this section appear to create a hardship for the child in obtaining a suitable and prompt placement, the Court, in its discretion, may waive these requirements in the best interests of the child.

§ 2324. Social study and report.

(a) The Court, in its discretion, may order a social study and report (hereinafter ‘social report’) for any petition filed under this chapter. The social report, if ordered, shall be prepared by a licensed child-placing agency retained by petitioner.

(b) The social report shall include:

- (1) Information regarding the child and his or her background;
- (2) Information regarding the guardian(s) and the proposed home;
- (3) Information regarding the physical and mental condition of the child;
- (4) Information regarding the suitability of the placement;
- (5) A statement as to whether all requirements of this chapter have been met; and
- (6) A recommendation.

(c) If a social report is ordered under this section, the person or persons or organization so ordered shall file the social report within 4 months, subject to such additional time as the Court shall determine is reasonably required.

§ 2325. Hearing procedure and notice requirements.

(a) When a guardianship petition is filed, 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, person or persons or organization 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 the parent or parents, person or persons or organization holding parental rights, the Court shall then cause notice of the time, place and purpose of the hearing to be published one time in such newspaper of the county, 1 or more, as the Court may judge best for giving the parent or parents, or person or persons or organization holding parental rights notice, the formal wording of the said notice to be

approved by the Court. Publication shall also be made in the locality in which the parent or parents, person or persons or organization holding parental rights is believed to be located if different from the county where the publication just described has been caused. The Court may, upon request by the petitioner, order that personal service and publication occur simultaneously.

(d) If any publication is ordered pursuant to this section, the Court shall also order that the petitioner, at least 3 weeks prior to the hearing, send by regular and registered or certified mail to the parent or parents or person or persons or organization holding parental rights, at the address or addresses given in the petition, a copy of the same notice, or a similar notice of the time, place and purpose of the hearing.

(e) Personal service at any time prior to the hearing shall be sufficient to give jurisdiction.

(f) 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, person or persons or organization so notified.

§ 2326. Decision within 30 days.

The Court shall issue a decision and order on a petition for guardianship under this chapter within 30 days following the conclusion of the proceedings, or if no hearing is necessary, within 30 days of the petition and social report, if applicable, being filed.

§ 2327. Confidentiality of proceedings.

All proceedings under this chapter shall be held before the Court privately, but for reasons appearing sufficient to the Court, the hearing in any particular case may be public.

§ 2328. Appeals.

The petitioner, if the petition is not granted, or any person or organization who does not prevail in a petition for guardianship under this chapter, may, at any time within 30 days after the entry of an order by the Court, take an appeal therefrom to the Supreme Court.

Subchapter III – Guardian of the Child

§ 2330. Grounds for guardianship of the child.

(a) Prior to granting an order for guardianship under this chapter, the Court shall find for each parent the following:

- 158 (1) The parent voluntarily consents to the guardianship; or
- 159 (2) After a hearing on the merits, by clear and convincing evidence:
- 160 a. the child is dependent and/or neglected; and
- 161 b. it is in the best interests of the child for the guardianship to be granted.
- 162 (b) If the child is 14 years of age or older, the Court shall find that the child consents to the
- 163 guardianship.
- 164 (c) If the Court determines that the elements of subsection (a) of this section have been met, the Court
- 165 shall also determine by a preponderance of evidence, the nature and extent, if any, of any contact,
- 166 sharing of information and/or visitation between the parent and the child. In making such a
- 167 determination, the Court shall apply the best interests of the child standard.

168 § 2331. Duties and rights of parents.

- 169 (a) While a guardianship is in effect, the parent shall have the following rights:
- 170 (1) Visitation, contact and information, to the extent delineated in the guardianship order issued by
- 171 the Court. A parent may petition the Court for specific enforcement of provisions of the order
- 172 relating to contact, visitation, or information; and
- 173 (2) Inheritance by and from the child.
- 174 (b) The parent shall have the primary responsibility to support the child financially.
- 175 (c) In the event the income and assets of the parent qualify the child for governmental benefits, the
- 176 benefits may be conferred upon the child with payment to be made to the guardian. The provision
- 177 of necessities by the guardian shall not disqualify the child for any benefit or entitlement.
- 178 (d) If the child has been in the custody of the Department immediately prior to the creation of a
- 179 guardianship, the Department shall have no further duty of support or care for the child after
- 180 establishment of the guardianship unless the Department agrees in writing to that support.

181 § 2332. Termination or modification of guardianship order.

- 182 (a) Termination: Except as otherwise specified in this Chapter, guardianship of a child terminates:
- 183 (1) upon the child's death;
- 184 (2) upon the guardian's death;
- 185 (3) upon adoption of the child;

(4) when the child reaches the age of majority; or

(5) as otherwise ordered by the Court.

(b) Modification: Except as otherwise specified in this Chapter, modification of a guardianship may be made as follows:

(1) An order concerning contact, visitation or sharing of information may be modified at any time if it is in the best interests of the child;

(2) An order of guardianship may be modified at any time if the child is no longer dependent or neglected, and it is in the best interests of the child to modify the order.

§ 2333. Subsidies.

(a) The Department, in its discretion, may award subsidy monies to guardians of the person of a child where the Court finds:

(1) the grounds for guardianship have been met as set forth in this chapter; and

(2) the child was in the custody of the Department and/or the Division for a period of at least one year.

(b) The amount and duration of the subsidy shall be in the sole discretion of the Department.

Subchapter IV – Powers and Duties of a Guardian

§ 2340. Powers and duties of the guardian of the child.

(a) The Court shall grant to the guardian of the child such powers, rights and duties, which are necessary to protect, manage, and care for the child.

(b) The guardian of the child may exercise the same powers, rights and duties respecting the care, maintenance and treatment of the child as a parent would, except that the guardian of the child is not liable to third persons for acts of the child solely by reason of the guardianship relationship.

(c) Except as modified by the order of guardianship and without qualifying the foregoing, a guardian of the person has the following powers and duties:

(1) The guardian is entitled to custody of the child and may establish the child's place of abode within or without this State.

(2) The guardian shall provide the child with:

a. a physically and emotionally healthy and safe living environment, and daily care;

- b. education; and
- c. all necessary and appropriate medical treatment, including but not limited to medical, dental and psychiatric examinations, treatment and/or surgery.
- (3) The guardian shall make decisions regarding:
- a. education;
- b. travel;
- c. all necessary and appropriate medical treatment, including but not limited to medical, dental and psychiatric examinations, treatment and/or surgery;
- d. the child's right to marry or enlist in the armed forces;
- e. representation of the child in legal actions; and
- f. any other matter that involves the child's welfare and upbringing.
- (4) The guardian shall:
- a. be responsible to the Court and the child for the health, education and welfare of the child;
- b. comply will all terms of any Court order to provide the child's parents with visitation, contact or information.
- (d) The Court, in its discretion, may expressly limit the duties and powers of the guardian as set forth in this Chapter.
- (e) No bond shall be required from any guardian appointed under this Chapter.

Subchapter V – Permanent Guardianships for Children

§ 2350. Intent.

Permanent Guardianship models the requirements of 'legal guardianship' under the Adoption and Safe Families Act of 1997, Public Law 105-89, § 101(b), 42 U.S.C., § 675(7). Permanent guardianship is intended to create a relationship between a child and caretaker which is permanent and self-sustaining, and which creates a permanent family for the child without complete severance of the biological bond.

§ 2351. Eligibility to serve as permanent guardian.

A blood relative or a foster parent(s) of the child may petition for permanent guardianship.

§ 2352. Contents of petition for permanent guardianship.

A petition for permanent guardianship shall contain all of the information required by § 2322 of this Chapter as well as the following information:

- (a) the grounds for the granting of an order of permanent guardianship; and
- (b) a statement outlining prior efforts to place the child for adoption, if applicable.

§ 2353. Standard for permanent guardianship.

(a) The Court shall grant a permanent guardianship if it finds by clear and convincing evidence that:

- (1) one of the statutory grounds for termination of parental rights as set forth in § 1103(a) of this Title has been met;
- (2) adoption of the child is not possible or appropriate;
- (3) permanent guardianship is in the best interests of the child;
- (4) the proposed permanent guardian:
 - a. is emotionally, mentally, physically and financially suitable to become the permanent guardian;
 - b. is a blood relative or a foster parent(s);
 - c. has expressly committed to remain the permanent guardian and assume the rights and responsibilities for the child for the duration of the child's minority; and
 - d. has demonstrated an understanding of the financial implications of becoming a permanent guardian;
- (5) if the child is age 14 or over, the child consents to the guardianship; and
- (6) if the proposed permanent guardian is a foster parent(s):
 - a. the child is at least 12 years of age; or
 - b. the proposed permanent guardian is the permanent guardian of one of the child's siblings; or
 - c. the child receives substantial governmental benefits for a serious physical and/or mental disability, which would no longer be available to the child if parental rights were terminated and/or if the child was adopted.

(b) If the Court determines that the elements of subsection (a) of this section have been met, the Court shall then also determine by a preponderance of evidence, 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.

(c) The parent or parents may voluntarily consent to the permanent guardianship provided the elements of subsection (a) of this section are met.

§ 2354. Social report.

A social report covering the factors enumerated in § 2353 of this Title shall be prepared by a licensed child-placing agency retained by the petitioner and provided to the Court no later than one week prior to trial.

§ 2355. Permanent guardianship hearing procedures and notice requirements.

The provisions of § 1107 of this Title shall apply to hearings on permanent guardianship petitions, with references to termination of parental rights being replaced by reference to permanent guardianship where appropriate.

§ 2356. Order granting permanent guardianship.

(a) The Court shall issue an order regarding permanent guardianship within 30 days of: (1) the final day of trial or (2) the filing of the petition and social report in cases based upon the consent of all parties.

(b) If the Court grants permanent guardianship, it shall include in that order provisions regarding visitation by the child with his or her parents, contact by the child with his or her parents, and the sharing of information to be provided to the parents about the child, all based upon the child's best interests.

(c) The order granting permanent guardianship may prohibit visitation, contact, or information if such prohibition is in the child's best interests.

(d) The order granting permanent guardianship may incorporate an agreement reached by the parties.

§ 2357. Powers and duties of the permanent guardian.

A permanent guardian shall have the same powers and duties as set forth in § 2340 of this Chapter.

§ 2358. Duties and rights of parents.

(a) While a permanent guardianship is in effect, the parent shall have the following rights:

(1) Visitation, contact and information, to the extent delineated in the permanent guardianship order issued by the Court. A parent may petition the Court for specific enforcement of

297 provisions of the order granting permanent guardianship relating to contact, visitation, or
 298 information;

299 (2) Inheritance by and from the child; and

300 (3) Right to consent to termination of parental rights and/or adoption of the child.

301 (b) The parent shall have the primary responsibility to support the child financially.

302 (c) In the event the income and assets of the parent qualify the child for governmental benefits, the
 303 benefits may be conferred upon the child with payment to be made to the permanent guardian. The
 304 provision of necessities by the permanent guardian shall not disqualify the child for any benefit or
 305 entitlement.

306 (d) If the child has been in the custody of the Department immediately prior to the entry of an order for
 307 a permanent guardianship, the Department shall have no further duty of support or care for the child
 308 after establishment of the permanent guardianship unless the Department agrees in writing to that
 309 support. However, if the permanent guardianship is terminated, and the Department held custody
 310 immediately prior to the entry of the order, custody shall revert to the Department.

311 § 2359. Termination or modification of permanent guardianship order.

312 (a) A parent may not petition the Court to modify or terminate a permanent guardianship once granted
 313 under this chapter.

314 (b) The Court shall modify or terminate a permanent guardianship only upon a finding:

315 (1) that there has been a substantial change in material circumstances; and

316 (2) that modification or termination is in the best interests of the child.

317 (c) Where the permanent guardianship is terminated by the Court, custody of the child shall not
 318 automatically revert to the parent. At any subsequent hearing, the parent shall be considered with
 319 no greater priority than any other person or agency, and the Court shall apply the best interests of
 320 the child factors in entering an order on behalf of the child.

321 (d) Upon a showing by affidavit of immediate harm to a child, the Court may temporarily:

322 (1) stay a permanent guardianship order on an *ex parte* basis pending a hearing, and grant
 323 temporary custody of the child to the Department or petitioner; and/or

324 (2) stay the visitation, contact, or information provisions of a permanent guardianship order on an
325 *ex parte* basis pending a hearing.”.

326 Section 2. If any provisions of this Act or the application thereof to any person or circumstances is held invalid,
327 the invalidity shall not affect other provisions or applications of the Act which can be given effect without the invalid
328 provision or application, and to this end the provisions of this Act are severable.

SYNOPSIS

This Bill is intended to provide a statutory framework to the jurisdictional authority and resulting practice in Family Court of granting guardianships with respect to children. It sets out the procedural mechanisms for filing a petition, and the rights and duties of guardians and parents once an order is entered. It also addresses the termination and modification of guardianships in the Family Court.

The second portion of the Bill, Subchapter V, creates permanent guardianships in Delaware. Under the Adoption and Safe Families Act of 1997, states were encouraged to provide a legal mechanism which provided children who were likely to be in foster care long-term or children who were living with relatives, a legal alternative for permanency where adoption was not possible or appropriate. Delaware has reviewed statutes in numerous other jurisdictions as well as federal and state treatises and authorities to create an alternative permanency arrangement for children who cannot live with their biological parents. The Bill requires grounds similar to termination of parental rights but preserves the biological link between parent and child. It also recognizes that once a permanent guardianship is granted, it cannot be undone absent a few exceptional circumstances.