

STATE OF NEW YORK

4838

2007-2008 Regular Sessions

IN SENATE

April 23, 2007

Introduced by Sens. KRUGER, DeFRANCISCO -- (at request of the Office of Children and Family Services) -- read twice and ordered printed, and when printed to be committed to the Committee on Social Services, Children and Families

AN ACT to amend the family court act, the domestic relations law and the surrogate's court procedure act, in relation to the legal powers of custodians and guardians of children

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

1 Section 1. Subdivisions (a) and (b) of section 651 of the family court
2 act, subdivision (a) as amended by chapter 85 of the laws of 1996 and
3 subdivision (b) as amended by chapter 657 of the laws of 2003, are
4 amended, subdivision (d) is relettered subdivision (e) and a new subdivi-
5 sion (d) is added to read as follows:

6 (a) When referred from the supreme court or county court to the family
7 court, the family court has jurisdiction to determine, in accordance
8 with subdivision one of section two hundred forty of the domestic
9 relations law and subdivision (d) of this section and with the same
10 powers possessed by the supreme court in addition to its own powers,
11 habeas corpus proceedings and proceedings brought by petition and order
12 to show cause, for the determination of the custody or visitation of
13 minors.

14 (b) When initiated in the family court, the family court has jurisdic-
15 tion to determine, in accordance with subdivision one of section two
16 hundred forty of the domestic relations law and subdivision (d) of this
17 section and with the same powers possessed by the supreme court in addi-
18 tion to its own powers, habeas corpus proceedings and proceedings
19 brought by petition and order to show cause, for the determination of
20 the custody or visitation of minors, including applications by a grand-
21 parent or grandparents for visitation or custody rights pursuant to
22 section seventy-two or two hundred forty of the domestic relations law.

EXPLANATION--Matter in italics (underscored) is new; matter in brackets
[-] is old law to be omitted.

LBD09815-01-7

1 (d) With respect to applications for custody rights or guardianship
2 initiated in supreme court, county court or family court regarding
3 custody or guardianship of the person of a minor or infant pursuant to
4 this part, the domestic relations law, or the surrogate's court proce-
5 dure act, the right to legal custody or guardianship of the person of a
6 minor or infant shall mean the right and responsibility to make deci-
7 sions, including issuing any necessary consents, regarding the child's
8 protection, education, care and control, health and medical needs, and
9 the physical custody of the person of the child, unless such right is
10 otherwise provided or limited by the court.

11 § 2. Section 661 of the family court act, as amended by chapter 232 of
12 the laws of 1988, is amended to read as follows:

13 § 661. Jurisdiction. ~~[The]~~ When initiated in the family court, such
14 court has like jurisdiction and authority to determine as ~~[is now~~
15 ~~conferred on]~~ county and surrogates courts ~~[as concerns]~~ in proceedings
16 regarding the guardianship of the person of a minor and permanent guar-
17 dianship of a child. ~~[The]~~ Such jurisdiction shall apply as follows:

18 (a) Guardianship of the person of a minor. When making a determination
19 regarding the guardianship of the person of a minor, the provisions of
20 subdivision (d) of section six hundred fifty-one of this article as well
21 as the provisions of the surrogate's court procedure act shall apply to
22 the extent they are applicable to guardianship of the person of a minor
23 and do not conflict with the specific provisions of this act.

24 (b) Permanent guardianship of a child. Where the guardianship and
25 custody of a child have been committed to an authorized agency pursuant
26 to section six hundred fourteen of this article, or section three
27 hundred eighty-three-c, section three hundred eighty-four or section
28 three hundred eighty-four-b of the social services law, or where both
29 parents of a child whose consent to the adoption of the child would have
30 been required pursuant to section one hundred eleven of the domestic
31 relations law or who were entitled to notice of an adoption proceeding
32 pursuant to section one hundred eleven-a of the domestic relations law
33 are dead, the court may appoint a permanent guardian of a child if the
34 court finds that such appointment is in the best interests of the child.
35 The provisions of the surrogate's court procedure act shall apply to the
36 extent that they are applicable to a proceeding for appointment of a
37 permanent guardian of a child and do not conflict with the specific
38 provisions of this act. Such permanent guardian of a child shall have
39 the right and responsibility to make decisions, including issuing any
40 necessary consents, regarding the child's protection, education, care
41 and control, health and medical needs, and the physical custody of the
42 person of the child, and may consent to the adoption of the child.

43 § 3. Paragraph (a) of subdivision 1 of section 240 of the domestic
44 relations law, as amended by chapter 624 of the laws of 2002, is amended
45 to read as follows:

46 (a) In any action or proceeding brought (1) to annul a marriage or to
47 declare the nullity of a void marriage, or (2) for a separation, or (3)
48 for a divorce, or (4) to obtain, by a writ of habeas corpus or by peti-
49 tion and order to show cause, the custody of or right to visitation with
50 any child of a marriage, the court shall require verification of the
51 status of any child of the marriage with respect to such child's custody
52 and support, including any prior orders, and shall enter orders for
53 custody and support as, in the court's discretion, justice requires,
54 having regard to the circumstances of the case and of the respective
55 parties and to the best interests of the child and subject to the
56 provisions of ~~[subdivision]~~ subdivisions one-c and one-d of this

1 section. Where either party to an action concerning custody of or a
2 right to visitation with a child alleges in a sworn petition or
3 complaint or sworn answer, cross-petition, counterclaim or other sworn
4 responsive pleading that the other party has committed an act of domes-
5 tic violence against the party making the allegation or a family or
6 household member of either party, as such family or household member is
7 defined in article eight of the family court act, and such allegations
8 are proven by a preponderance of the evidence, the court must consider
9 the effect of such domestic violence upon the best interests of the
10 child, together with such other facts and circumstances as the court
11 deems relevant in making a direction pursuant to this section. An order
12 directing the payment of child support shall contain the social security
13 numbers of the named parties. In all cases there shall be no prima facie
14 right to the custody of the child in either parent. Such direction shall
15 make provision for child support out of the property of either or both
16 parents. The court shall make its award for child support pursuant to
17 subdivision one-b of this section. Such direction may provide for
18 reasonable visitation rights to the maternal and/or paternal grandpar-
19 ents of any child of the parties. Such direction as it applies to rights
20 of visitation with a child remanded or placed in the care of a person,
21 official, agency or institution pursuant to article ten of the family
22 court act, or pursuant to an instrument approved under section three
23 hundred fifty-eight-a of the social services law, shall be enforceable
24 pursuant to part eight of article ten of the family court act and
25 sections three hundred fifty-eight-a and three hundred eighty-four-a of
26 the social services law and other applicable provisions of law against
27 any person having care and custody, or temporary care and custody, of
28 the child. Notwithstanding any other provision of law, any written
29 application or motion to the court for the establishment, modification
30 or enforcement of a child support obligation for persons not in receipt
31 of public assistance and care must contain either a request for child
32 support enforcement services which would authorize the collection of the
33 support obligation by the immediate issuance of an income execution for
34 support enforcement as provided for by this chapter, completed in the
35 manner specified in section one hundred eleven-g of the social services
36 law; or a statement that the applicant has applied for or is in receipt
37 of such services; or a statement that the applicant knows of the avail-
38 ability of such services, has declined them at this time and where
39 support enforcement services pursuant to section one hundred eleven-g of
40 the social services law have been declined that the applicant under-
41 stands that an income deduction order may be issued pursuant to subdivi-
42 sion (c) of section fifty-two hundred forty-two of the civil practice
43 law and rules without other child support enforcement services and that
44 payment of an administrative fee may be required. The court shall
45 provide a copy of any such request for child support enforcement
46 services to the support collection unit of the appropriate social
47 services district any time it directs payments to be made to such
48 support collection unit. Additionally, the copy of any such request
49 shall be accompanied by the name, address and social security number of
50 the parties; the date and place of the parties' marriage; the name and
51 date of birth of the child or children; and the name and address of the
52 employers and income payors of the party from whom child support is
53 sought or from the party ordered to pay child support to the other
54 party. Such direction may require the payment of a sum or sums of money
55 either directly to the custodial parent or to third persons for goods or
56 services furnished for such child, or for both payments to the custodial

1 parent and to such third persons; provided, however, that unless the
 2 party seeking or receiving child support has applied for or is receiving
 3 such services, the court shall not direct such payments to be made to
 4 the support collection unit, as established in section one hundred
 5 eleven-h of the social services law. Every order directing the payment
 6 of support shall require that if either parent currently, or at any time
 7 in the future, has health insurance benefits available that may be
 8 extended or obtained to cover the child, such parent is required to
 9 exercise the option of additional coverage in favor of such child and
 10 execute and deliver to such person any forms, notices, documents or
 11 instruments necessary to assure timely payment of any health insurance
 12 claims for such child.

13 § 4. Section 240 of the domestic relations law is amended by adding a
 14 new subdivision 1-d to read as follows:

15 1-d. With respect to applications for custody rights or guardianship
 16 initiated in supreme court, county court or family court regarding a
 17 child pursuant to this section, the family court act or the surrogate's
 18 court procedure act, the right to legal custody or guardianship of the
 19 person of a minor or infant shall mean the right and responsibility to
 20 make decisions, including issuing any necessary consents, regarding the
 21 child's protection, education, care and control, health and medical
 22 needs, and the physical custody of the person of the child, unless
 23 otherwise provided or limited by the court.

24 § 5. Section 1701 of the surrogate's court procedure act, as amended
 25 by chapter 167 of the laws of 1976, is amended to read as follows:

26 § 1701. Power of court

27 The court has power over the property of an infant and is authorized
 28 and empowered to appoint a guardian of the person or of the property or
 29 of both of an infant or a permanent guardian of the child, whether or
 30 not the parent or parents of the infant or child are living.

31 § 6. Section 1702 of the surrogate's court procedure act, subdivision
 32 1 as amended by chapter 286 of the laws of 1973, is amended to read as
 33 follows:

34 § 1702. Jurisdiction

35 1. Where an infant has no guardian the court may appoint a guardian of
 36 his person or property, or of both, in the following cases:

37 [~~1-~~] (a) Where the infant is domiciled in that county or has sojourned
 38 therein immediately preceding the application.

39 [~~2-~~] (b) Where the infant is a non-domiciliary of the state but has
 40 property situate in that county.

41 2. Where an infant or child has no guardian, the court may appoint a
 42 permanent guardian for the child where the infant is domiciled in that
 43 county or the authorized agency, as defined in subdivision ten of
 44 section three hundred seventy-one of the social services law, has its
 45 principal office in that county.

46 § 7. Section 1703 of the surrogate's court procedure act, as amended
 47 by chapter 514 of the laws of 1993, is amended to read as follows:

48 § 1703. Petition for appointment; by whom made

49 A petition for the appointment of a guardian of the person or proper-
 50 ty, or both, of an infant may be made by any person [~~in~~] on behalf of
 51 the infant or if the infant be over the age of [~~14~~] fourteen years, it
 52 may be made by the infant. A petition for appointment as a guardian of
 53 the property of an infant may also be made by the public administrator
 54 of the county in which the infant resides where no one else is available
 55 to serve as guardian. The court may grant such a petition of the public
 56 administrator upon its certification that all other efforts to appoint a

1 guardian have been exhausted. A petition for appointment as a permanent
2 guardian of an infant or child may be brought by any person on behalf of
3 the infant or child.

4 § 8. Subdivisions 2 and 3 of section 1704 of the surrogate's court
5 procedure act, subdivision 3 as amended by chapter 666 of the laws of
6 1976, are amended and a new subdivision 8 is added to read as follows:

7 2. The names of the father and the mother whose consent to the
8 adoption of a child would have been required pursuant to section one
9 hundred eleven of the domestic relations law or who was entitled to
10 notice of an adoption proceeding pursuant to section one hundred
11 eleven-a of the domestic relations law, and whether or not they are
12 living or have had their parental rights terminated pursuant to section
13 three hundred eighty-three-c, section three hundred eighty-four or
14 section three hundred eighty-four-b of the social services law or
15 section six hundred thirty-one of the family court act, and if living,
16 their domiciles, the name and address of the person with whom the infant
17 resides and the names and addresses of the nearest distributees of full
18 age who are domiciliaries, if both father and mother are dead.

19 3. Whether the infant has had at any time a guardian appointed by will
20 or deed or an acting guardian in socage or [~~a guardian of the person~~
21 ~~appointed~~] guardianship and custody committed pursuant to [~~section 384~~
22 ~~section three hundred eighty-three-c, three hundred eighty-four~~ or
23 [~~section 384-b~~] three hundred eighty-four-b of the social services law
24 or section six hundred thirty-one of the family court act.

25 8. In addition, the petition for appointment of a permanent guardian
26 of an infant or child shall include:

27 (a) an assessment to be performed by the local social services
28 district, which shall contain:

29 (i) the full name and address of the person seeking to become the
30 guardian;

31 (ii) the ability of the guardian to assume permanent care of the
32 child;

33 (iii) the child's property and assets, if known;

34 (iv) the wishes of the child, if appropriate;

35 (v) a recitation of the history of the child with child protective or
36 preventive services;

37 (vi) the results of the criminal history record check with the divi-
38 sion of criminal justice services of the guardian and any person eigh-
39 teen years of age or older residing in the guardian's household
40 conducted by the office of children and family services pursuant to
41 subdivision two of section three hundred seventy-eight-a of the social
42 services law;

43 (vii) the results of a search of the statewide central register of
44 child abuse and maltreatment records regarding the guardian and any
45 person eighteen years of age or older residing in the guardian's house-
46 hold whether such person has been the subject of an indicated report
47 conducted pursuant to subparagraph (e) of paragraph (A) of subdivision
48 four of section four hundred twenty-two of the social services law; and

49 (viii) the results of all inspections and assessments of the guardi-
50 an's home and the child's progress while placed in the home, if any;

51 (b) a certified copy of the order or orders terminating the parental
52 rights of the child's parents or approving the surrender of the child or
53 the death certificates of the child's parents, as applicable;

54 (c) the recommendation of the authorized agency involved, if any; and

1 (d) the suitability, ability and commitment of the permanent guardian
2 to assume full legal responsibility for the child and raise the child to
3 adulthood.

4 § 9. Subdivision 1 of section 1706 of the surrogate's court procedure
5 act, as amended by chapter 518 of the laws of 2006, is amended to read
6 as follows:

7 1. Where process is not issued or upon the return of process, the
8 court shall ascertain the age of the infant, the amount of his or her
9 personal property, the gross amount of the rents and profits of his or
10 her real estate during his or her minority and the sufficiency of the
11 security offered by the proposed guardian. With respect to applications
12 for custody rights or guardianship initiated in supreme court, county
13 court or family court regarding custody or guardianship of the person of
14 a minor or infant pursuant to this article, the family court act or the
15 domestic relations law, the right to legal custody or guardianship of
16 the person of a minor or infant shall mean the right and responsibility
17 to make decisions, including issuing any necessary consents, regarding
18 the child's protection, education, care and control, health and medical
19 needs, and the physical custody of the person of the child, unless
20 otherwise provided or limited by the court. With respect to applications
21 for appointment as a permanent guardian of a child, the permanent guard-
22 ian shall have the right and responsibility to make decisions, including
23 issuing any necessary consents, regarding the child's protection, educa-
24 tion, care and control, health and medical needs, and the physical
25 custody of the person of the child, and may consent to the adoption of
26 the child. If the infant is over the age of [~~14~~] fourteen years the
27 court shall ascertain his or her preference for a suitable guardian.
28 Notwithstanding any other section of law, where the infant is over the
29 age of eighteen, the infant shall consent to the appointment of a suit-
30 able guardian.

31 § 10. Section 1707 of the surrogate's court procedure act, subdivision
32 1 as amended by chapter 477 of the laws of 2000 and subdivision 2 as
33 amended by chapter 518 of the laws of 2006, is amended to read as
34 follows:

35 § 1707. Decree appointing guardian; term of office

36 1. If the court be satisfied that the interests of the infant will be
37 promoted by the appointment of a guardian or by the issuance of tempo-
38 rary letters of guardianship of his or her person or of his or her prop-
39 erty, or of both, it must make a decree accordingly. If the court deter-
40 mines that appointment of a permanent guardian is in the best interests
41 of the infant or child, the court shall issue a decree appointing such
42 guardian. The same person may be appointed guardian of both the person
43 and the property of the infant or the guardianship of the person and of
44 the property may be committed to different persons. The court may
45 appoint a person other than the parent of the infant or the person nomi-
46 nated by the petitioner. When the court is informed that the infant, a
47 person nominated to be a guardian of such infant, the petitioner, or any
48 individual eighteen years of age or over who resides in the home of the
49 proposed guardian is a subject of or another person named in an indi-
50 cated report, as such terms are defined in section four hundred twelve
51 of the social services law, filed with the statewide register of child
52 abuse and maltreatment pursuant to title six of article six of the
53 social services law or is or has been the subject of or the respondent
54 in or a party to a child protective proceeding commenced under article
55 ten of the family court act which resulted in an order finding that the
56 child is an abused or neglected child the court shall obtain such

1 records regarding such report or proceeding as it deems appropriate and
 2 shall give the information contained therein due consideration in its
 3 determination.

4 2. The term of office of a guardian of the person or property so
 5 appointed expires when the infant attains majority, unless the infant
 6 consents to the continuation of or appointment of a guardian after his
 7 or her eighteenth birthday, in which case such term of office expires on
 8 his or her twenty-first birthday, or after such other shorter period as
 9 the court establishes upon good cause shown; except that the term of
 10 office of a guardian of the person of an infant expires upon the
 11 infant's marriage prior to attaining majority. The appointment of a
 12 permanent guardian of a child shall expire when the infant or child
 13 reaches the age of eighteen years, unless the infant or child consents
 14 to the continuation of a guardian after his or her eighteenth birthday,
 15 in which case such term of office expires on his or her twenty-first
 16 birthday, or unless vacated by the court prior to the infant or child's
 17 eighteenth or twenty-first birthday if the court finds that based upon
 18 clear and convincing evidence the guardian failed to or is unable,
 19 unavailable or unwilling to provide proper care and custody of the
 20 infant or child, or that the guardianship is no longer in the best
 21 interests of the infant or child.

22 § 11. This act shall take effect on the ninetieth day after it shall
 23 have become a law.

MEMORANDUM

AN ACT to amend the family court act, the domestic relations
 law and the surrogate's court procedure act, in relation to the
 legal powers of custodians and guardians of children

Purpose:

This bill would enact a definition of permanent guardianship and clarify the powers of custodians and guardians, including the ability and obligation to enroll a child in school, consent to medical care, and sign voluntary placement agreements.

Summary of Provisions:

Section 1 of the bill amends Family Court Act (FCA) §651 to add cross-references to a new subdivision (d) defining legal custody of a child with respect to applications for custody initiated in Supreme, County or Family Court or guardianship of the person of a minor pursuant to Article 6 of the FCA or the Surrogate's Court Procedure Act (SCPA). The existing subdivision (d) is relettered subdivision (e). Legal custody is defined as the right and responsibility to make decisions, including issuing any necessary consents, regarding the child's protection, education, care and control, health and medical needs, and the physical custody of the person of the child, unless otherwise provided or limited by the court.

Section 2 of the bill amends FCA §661 relating to the court's jurisdiction over guardianship of the person of a minor and to cross reference new §651(d) of the FCA. This section also provides for the appointment of a permanent guardian in certain instances where guardianship and custody of

the child have been committed to an authorized agency or both parents of the child are deceased.

Section 3 of the bill amends §240(1)(a) of the Domestic Relations Law (DRL) relating to custody and child support, to cross reference new subdivision 1-d of such section.

Section 4 of the bill adds a new §240(1-d) of the DRL pertaining to applications for custody rights initiated in Supreme, County or Family Court or guardianship of the person of a minor under the FCA or SCPA. Legal custody is defined as the right and responsibility to make decisions, including issuing any necessary consents, regarding the child's protection, education, care and control, health and medical needs, and the physical custody of the person of the child, unless otherwise provided or limited by the court.

Section 5 of the bill amends SCPA §1701 to authorize that court to appoint a permanent guardian for an infant.

Section 6 of the bill amends SCPA §1702 to grant jurisdiction to the court to appoint a permanent guardian over an infant who is domiciled or the authorized agency has its principal office in that county.

Section 7 of the bill amends SCPA §1703 to permit a petition for appointment as a permanent guardian of an infant to be brought by any person on behalf of the infant.

Section 8 of the bill amends SCPA §1704 to set forth the requirements for a petition for the appointment of a permanent guardian for an infant.

Section 9 of the bill amends SCPA §1706 pertaining to the procedures for appointment of a guardian of the person of a minor. Guardianship of the person of a minor is defined the same as custody under the DRL and FCA, as the right and responsibility to make decisions, including issuing any necessary consents, regarding the child's protection, education, care and control, health and medical needs, and the physical custody of the person of the child, unless otherwise provided or limited by the court.

Section 10 of the proposal amends SCPA §1707 to authorize the court to enter a decree appointing a permanent guardian for an infant where the court determines that permanent guardianship is in the infant child's best interest. A decree of permanent guardianship would expire upon the infant's 18th birthday, unless the infant consent to continuation of the guardianship until his or her 21st birthday, or unless previously vacated by the court in certain limited circumstances.

Section 11 of the bill provides for an effective date of 90 days after enactment.

Existing Law:

FCA §651 sets forth the jurisdiction of the Family Court over habeas corpus proceedings and petitions for custody and visitation of minors. The Family Court may act in accordance with §240(1) of the DRL and has the same powers as the Supreme Court with respect to habeas corpus proceedings and proceedings brought by petition or order to show cause.

FCA §661 provides that the Family Court has the same jurisdiction and authority as the

County and Surrogate's Court with respect to guardianship of the person of a minor.

DRL §240 governs matters of custody and child support stemming from an action to dissolve a marriage.

SCPA §1701 empowers the Surrogate's Court to appoint a guardian of the person and/or the property of an infant.

SCPA §1702 sets forth the Surrogate's Court's jurisdiction to appoint a guardian for an infant whose person or property is located in that county.

SCPA §1703 provides who may petition the Surrogate's Court for appointment as the guardian of the person and/or property of an infant.

SCPA §1704 sets forth the elements that must be included in a petition to the Surrogate's Court for appointment as the guardian of the person and/or property of an infant.

SCPA §1706 governs the procedures in the Surrogate's Court for the appointment of a guardian of the person and/or property of a minor.

SCPA §1707 governs the terms of a decree issued by the Surrogate's Court appointing a guardian of the person and/or property of an infant.

Legislative History:

Portions of this proposal were included in OCFS #4R-05, which was introduced as S.5195 of 2005 and passed in the Senate in 2005 and 2006. Provisions of this proposal were a part of OCFS #6R which was introduced as S.8324 of 2006 and passed in the Senate.

Statement in support:

The proposed legislation will clarify and harmonize provisions regarding custody and guardianship of minors under the FCA, DRL and the SCPA. The proposed legislation is intended to have no effect on the meaning of "care and custody" under SSL §384-a regarding a child placed in foster care under pursuant to a voluntary placement agreement. The rights and responsibilities of a custodian or a guardian are not defined in current law. The lack of definition and seeming overlap between the meaning and effect of an application to be appointed a custodian or guardian of a child has caused confusion to parties, schools, health and medical services providers alike.

Health insurance providers, school districts and medical providers have differing requirements regarding whether a non-parent must have custody or guardianship of a child to provide a child with health insurance, enroll a child in school or provide medical care and treatment. A person who applied for custody may learn that he or she has asked for the wrong legal authority and be forced to commence another proceeding, with an attendant delay to the detriment of the child.

Two articles in the New York Law Journal highlight the confusion across the state regarding

determining whether to proceed with an application for custody or guardianship. See Segal, P. and Kaough, M., *Weighing Guardianship of a Child versus Custody*, 2/25/2002 N.Y.L.J 1, (col.1); Edlitz, S., *Guardianship and Custody: Is There a Distinction?*, 3/31/2000 N.Y.L.J 1, (col.1).

Case law interpreting applications for guardianship of the person of a child has held that such guardianship “implies the custody and control of the person of an infant”. *In re Yardum*, 228 A.D. 854 (2d Dept., 1930); see also, *Matter of Linton*, 12/18/98 N.Y.L.J 38 (col.3); Practice Commentary to *McKinney’s Consolidated Laws of New York*, SCPA §1707. Guardianship had historically been a concept associated with probate upon the death of the parents of a child.

However, the current statute does not preclude its application where the parents of a child are still living. Indeed, contested applications for guardianship of the person of a child have required proof of extraordinary circumstances as required by *Bennett v. Jeffreys* 40 N.Y.2d 543 (1976) in custody proceedings to establish standing for the proceeding to be brought by the applicant for guardianship against the parent. See *In re Tiffany Nicole L.*, 287 A.D.2d 717 (2d Dept., 2001). Once standing is established in a guardianship proceeding, a determination of the best interests of the child must be made, similar to a custody determination. See *In re Justina S.*, 180 A.D.2d 641 (2d Dept., 1992). Based upon the courts’ interpretation, there is no substantive difference between the rights and responsibilities of a custodian or guardian of the person of a child.

Codifying consistent legal rights and responsibilities for custody and guardianship of the person of a minor will eliminate the confusion, without making any substantive change in law under the FCA, DRL and SCPA. This change, however, is not intended to modify the meaning of care and custody as used in the SSL.

The proposal would also permit the appointment of a permanent guardian of a child in certain limited instances. When a child’s parental rights are terminated pursuant to SSL §384-b, FCA §634 or through a surrender, and the child is freed for adoption, the voluntary agency receives custody and guardianship of the child, which includes the right to consent to the adoption of the child. Current permanency goals for a child freed for adoption include placement with a fit and willing relative under FCA §651 and referral for guardianship of the child under the SCPA or FCA for guardianship of the person of the child. Under current law, neither custody granted to a non-parent under the FCA nor guardianship of the person of child under the FCA or SCPA include the right to consent to the adoption of the child. Thus, these permanency goals are inappropriate for a child freed for adoption because the transfer of legal rights regarding the child would be “incomplete”.

New official court forms promulgated in response to Chapter 3 of the Laws of 2005 highlight this conundrum by designating these goals as inapplicable for a freed child. However, the permanency goals of adoption or another planned permanent living arrangement with a significant connection to an adult willing to be a permanency resource for the child are not sufficient to apply to all the situations that commonly arise for these children. Where a child is living with a relative who is uncomfortable adopting the child, another legal relationship must be allowed to permit the relative to adequately care for the child, including having the legal authority to enroll the child in school or consent to medical care. The proposal would allow a permanent guardian to be appointed in the limited situations where the child is already freed or both parents are dead. The permanent guardianship would be in effect until the child reaches age 18, unless the court finds by clear and

convincing evidence that the guardian failed to or is unable, unavailable or unwilling to provide proper care and custody for the child or it is in the child's best interests to vacate the appointment. The permanent guardian would have all the legal rights and responsibilities of a custodian or guardian of the person of the child, and in addition, would be permitted to consent to the adoption of the child.

Budget Implications:

None.

Effective Date:

This act shall take effect on the ninetieth day after it shall have become a law.