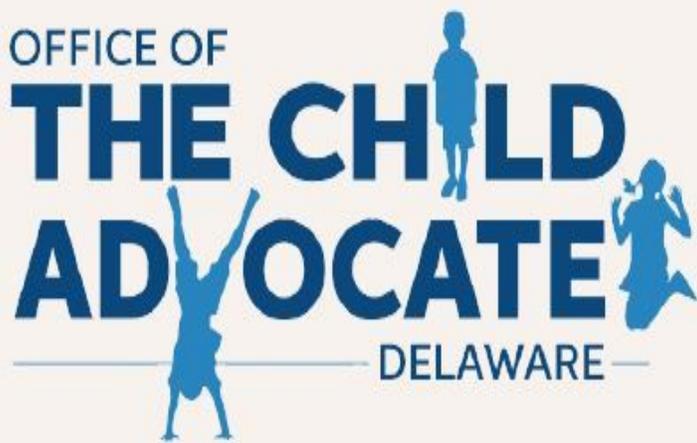


Advocacy | Education | Collaboration | Evaluation

# OCA ATTORNEY TRAINING MANUAL

2023



- Provides a voice for children to achieve permanency and justice, and to improve laws and policies that affect children and their families.
- Fosters a communicative, multidisciplinary team that builds trust and respect amongst members with a shared goal of improving outcomes for children and families.
- Ensures accountability by examining child welfare data, laws, and policies.
- Develops quality training to increase professional expertise and public awareness. Facilitates access to resources and opportunities for youth.

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# Chapter One

## OFFICE OF THE CHILD ADVOCATE

### Overview and History

The Office of the Child Advocate (OCA) was created in 1999 in response to numerous child deaths in Delaware resulting from child abuse. These cases pointed to deficiencies in the child protection system that could only be remedied through the collaborative efforts of Delaware's many child welfare agencies. The General Assembly determined that an office to oversee these efforts, staff the Child Protection Accountability Commission (CPAC), and provide legal representation on behalf of Delaware's dependent, neglected, and abused children was necessary.

Pursuant to 29 Del. C. § 9005A, OCA is mandated to coordinate a program of legal representation for children which includes the Court Appointed Special Advocate Program (CASA); to periodically review all relevant child welfare policies and procedures with a

view toward improving the lives of children; to recommend changes in procedures for investigating and overseeing the welfare of children; to assist the Office of the Investigation Coordinator (IC) in accomplishing its goals; to assist CPAC in investigating and reviewing deaths and near deaths of abused and neglected children; to develop and provide training to child welfare system professionals; and to staff CPAC.

Under Delaware law, all children in Department of Services to Children, Youth and their Families (DSCYF) custody shall be appointed an attorney to represent their best interests. The Court may also appoint a CASA to work in conjunction with the attorney. See 13 Del. C. § 2504(f). OCA is the agency responsible for recruiting, training, and appointing attorneys and CASAs to represent the over 500 children in state custody in Delaware.



## OCA Staff and Volunteers

OCA has grown tremendously over the years. Currently OCA has 6 full-time attorneys: 4 Deputy Child Advocates, the Child Advocate and the Chief of Legal Services. OCA has a number of other full-time employees including an Office Manager, Chief Policy Advisor, Investigation Coordinator (IC), IC Case Review Specialists, CASA Program Director, 10 CASA Coordinators and a CASA Training Director. In addition OCA has a casual seasonal Family Crisis Therapist (social worker), 7 contract Child Attorneys, and a number of other staff that support programs through data analysis and other administrative duties.

OCA has a volunteer attorney pool of approximately 200 lawyers. These volunteer attorneys are partners and associates alike, and practice in all fields, including corporate litigation, patents, intellectual property, real estate, in-house corporate counsel, criminal, medical malpractice and personal injury. Several retired and inactive attorneys also volunteer, some of which are stay-at-home parents. Volunteer attorneys represent approximately 25% of the children in DSCYF custody.

OCA also has a pool of approximately 230 CASA volunteers who, in conjunction with a Child Attorney, represent about 60% of the children in DSCYF custody. These volunteers are carefully screened, thoroughly trained, and supervised by a CASA Program Coordinator to work together with a Child Attorney to represent the best interests of these children and advocate for a safe, permanent, nurturing home for each child. The purpose of the CASA Program is to provide independent and quality advocacy for abused and neglected children who are the subject of court proceedings. The Delaware CASA Program is a member in good standing of the National CASA Association and operates in accordance with established national standards and state law. 29 Del.C. Ch. 90A.

For more information on OCA's work, staff, and volunteers, please visit OCA's website and review OCA's annual reports.

<https://courts.delaware.gov/childadvocate/>

# Chapter Two

## COMPONENTS OF DELAWARE'S CHILD WELFARE SYSTEM

### Department of Services for Children, Youth & heir Families

The Department of Services for Children, Youth and their Families (DSCYF or the Children's Department) was created in 1980, and is enabled statutorily by 29 Del. C. Ch.90. The Department is within the executive branch of government, and is comprised of four divisions: the Division of Family Services, the Division of Prevention & Behavioral Health Services, the Division of Youth Rehabilitative Services, and the Division of Management and Support Services.

The duties of the first three divisions are outlined below. The duties and powers of DSCYF when it holds custody of a child are set forth in 13 Del. C. Ch. 25.

To learn more about the Children's Department visit its website at: <https://kids.delaware.gov/>



## Division of Family Services

The Division of Family Services (DFS) is the lead agency charged with caring for Delaware's abused, neglected and dependent children. At any given time, there are between 500-600 children in the legal custody of DSCYF being served by DFS. Thousands more children and families receive services from DFS while their families remain intact.

The DFS main office is located at 1825 Faulkland Road in Wilmington. Branches are spread throughout the state. New Castle County has sites at the New Castle County Police Station on Route 13 (hotline), and off Christiana Road in New Castle. Kent County has its offices in the Silver Lake Professional Plaza in Dover. Sussex County has locations in Georgetown, Milford, Seaford, and Frankford.

Each county has several units that include investigation, treatment services, permanency, foster care, and adolescents. Some offices also have units that specialize in services for substance-exposed infants or children who are victims of serious physical abuse or sexual abuse.

**The Mission of the Division of Family Services is to promote the safety and well-being of children and their families through prevention, protection, and permanency.**

## Division of Prevention & Behavioral Health Services

The Division of Prevention & Behavioral Health Services (PBH) provides voluntary mental health and substance abuse treatment services to children less than 18 years of age. These services are available to those children without health insurance, as well as to those children who have Medicaid, but who need more than 30 units of outpatient counseling services per year. Children with private insurance with benefits that have been exhausted also qualify for services.

PBH manages these services through licensed mental health professionals who coordinate and contract with community providers. PBH also operates one residential treatment center within the State. In addition, PBH is responsible for providing prevention and early intervention services. Approximately 20%-25% of children in DSCYF custody also receive services from PBH.

## Division of Youth Rehabilitative Services

The Division of Youth Rehabilitative Services (YRS) provides probation and rehabilitation services to youth who have been adjudicated delinquent by the Family Court and ordered by the court system to receive rehabilitative services. These services range from secure care to community services. YRS operates secure care facilities in New Castle and Kent counties.

Approximately 10-15% of children in DSCYF custody are also receiving services through YRS. These youth are often referred to as "Dual Status Youth." When a youth in DSCYF custody receives criminal charges, a multidisciplinary team meeting called a Dual Status Youth (DSY) meeting is convened to wrap services around the youth, and family if involved, to prevent the youth from becoming more deeply involved in either the child welfare or juvenile justice systems.



## Department of Justice

The Delaware Department of Justice (DOJ) has both criminal and civil divisions. The Deputy Attorneys General (DAG) in the civil division provide legal representation to most state agencies.

The Department of Justice has created a Family Division which houses both civil and criminal matters that affect families. This includes the DAGs who represent DSCYF. Currently, there are nine DAGs statewide who represent the Division of Family Services (5-New Castle, 3-Kent, 2-Sussex). In addition, there is one DAG assigned as General Counsel to DSCYF. DFS is represented by a DAG in every court proceeding. Where PBH or YRS are also involved with a child in DSCYF custody, the DAG is responsible for representing all three Divisions in Court.



## Family Court

Delaware's Family Court is a constitutional court that has original exclusive jurisdiction over abused, neglected, and dependent children. The Court's criminal and civil jurisdiction is set forth in 10 Del. C. §§ 921 and 922. Definitions that govern Family Court proceedings can be found at 10 Del. C. § 901.

The Family Court assigns one judge to a case from the day a child enters DSCYF custody. That judge remains with the case until permanency is achieved, either by reunification with the family, termination of parental rights and adoption, or some other permanent plan. There are currently ten judges in New Castle County, three judges in Kent County, and three judges in Sussex County that handle these cases. In New Castle County, initial hearings (Preliminary Protective Hearings) are typically held every Wednesday morning. In Kent and Sussex Counties, each Judge typically reserves one day per week on his or her calendar to handle DFS matters.

To learn more about the Family Court or to access Court forms, please visit its website at:

<https://courts.delaware.gov/family/>

# The Parent's Attorney

In Delaware, there is no absolute constitutional right for parents to have legal representation from the day their children are removed from their custody. The United States Supreme Court has held that there is no absolute constitutional right to representation in termination of parental rights proceedings, but that the decision whether to appoint counsel would be left to the trial court to determine on a case-by-case basis. Lassiter v. Dept. of Social Svcs., 452 U.S. 18 (1981). The Delaware Supreme Court has followed that holding in Matter of Carolyn S.S., Del. Supr., 498 A.2d 1095 (1984), and extended that holding to all DSCYF custody proceedings in Watson v. DFS, No. 18, 2002 (Del. 2002).

However, the Delaware Supreme Court has been clear that in applying *Lassiter*, most indigent parents whose children have been placed in DSCYF custody will be entitled to counsel. Furthermore, the Family Court Rules require the appointment of counsel for indigent parents in DSCYF custody proceedings. See Family Court Civil Rules 205 and 206. As a practical matter, all indigent parents involved in DSCYF custody proceedings receive court-appointed counsel. Family Court contracts with private attorneys to represent parents in these proceedings. Currently, 10 attorneys are contracted statewide – 6 in New Castle, 2 in Kent and 2 in Sussex.

# Chapter Three

## HOW DFS PROCESSES A CASE

### Child Abuse Hotline Report

When a referral alleging abuse, neglect, or dependency is made, it is received by the DFS hotline. The hotline phone number is 1-800-292-9582. Based on the content of the report, the hotline worker determines if the referral will be accepted for investigation or not using a standardized assessment tool. If the referral is accepted, the hotline generates a form in DSCYF's computerized case management system (FOCUS) titled "Hotline Family Abuse Report" and transfers the case to the investigation unit.

### Investigation

Once a case is accepted, a DFS investigation worker is immediately assigned to determine whether or not the allegations can be substantiated. The allegations in the hotline report determine how quickly DFS needs to respond. Situations deemed Priority 1 require an investigative response within 24 hours. Priority 2 referrals

require a response within 3 days, and Priority 3 referrals within 10 days. If an urgent referral is received after-hours, a hotline investigator will do the initial contacts and transfer the case to an investigation worker once regular business hours resume.

The investigation worker must complete the investigation within 45 days. During the investigation, DFS may determine that the family needs services, that a safety plan needs to be implemented to ensure the child's well-being, or that the child needs to be removed from the home and placed in DSCYF custody. If the allegations prove to be unfounded, DFS may choose to close the case or refer the family for services.

Upon completion of the investigation, the worker generates a report titled "Risk Assessment" which outlines the risk factors and an analysis of the allegations. A second report titled "Assessment Supervisor Risk Disposition" is generated by the supervisor and acknowledges a review of the initial report and approval of its findings.

# Emergency DSCYF Custody

If an investigation determines that emergency custody of a child is required during regular business hours, DFS will file the emergency petition and wait for notice from the Family Court that the request has been approved or denied.

If emergency custody is required after-hours, DFS will contact the on-call Family Court judge for ex parte custody. A dependency/neglect petition for custody is required to be filed for after-hours cases by noon the next business day.

If emergency custody is granted to DSCYF, the Court will issue an ex-parte custody order.

## The Family Court of the State of Delaware

In and For  New Castle County  Kent County  Sussex County

### EX PARTE CUSTODY ORDER ON DIVISION OF FAMILY SERVICES FILINGS

DIVISION OF FAMILY SERVICES/  
DEPARTMENT OF SERVICES FOR  
CHILDREN, YOUTH AND THEIR  
FAMILIES,

Petitioner

v.

Respondents

File Number
Petition Number

On \_\_\_\_\_, \_\_\_\_\_, \_\_\_\_\_, the Department of Services for Children, Youth and Their Families, through its Division of Family Services (DSCYF/DFS)

Submitted a written sworn affidavit alleging dependency, neglect and/or abuse; or

Presented sworn testimony, through a verbal order request, alleging dependency, neglect, and/or abuse.

DSCYF/DFS has requested emergency ex parte custody of:

_____	, born _____	;
_____	, born _____	;
_____	, born _____	;
_____	, born _____	;
_____	, born _____	;
_____	, born _____	;

After review of the affidavit/oral testimony, the Court finds:

- Emergency conditions exist sufficient to find the existence of probable cause that the child(ren) continue to be in actual physical, mental or emotional danger or there is a substantial risk thereof, based on the following:

## The Family Court of the State of Delaware

In and For  New Castle County  Kent County  Sussex County

### DEPENDENCY/NEGLECT PETITION FOR CUSTODY

Petitioner	Respondent 1	
DFS/Worker Name	Name	File Number
<input type="checkbox"/> 92 Christina Road New Castle, DE 19720	D.O.B. Phone Number	Petition Number
<input type="checkbox"/> 821 Silver Lake Blvd Dover, DE 19904	Street Address (Including Apt)	
<input type="checkbox"/> Georgetown Service Center 546 South Bedford Street Georgetown, DE 19946	P.O. Box Number	
Attorney Name	City/State/ZIP Code	
	Attorney Name	
	Interpreter Needed? <input type="checkbox"/> Yes <input type="checkbox"/> No	
	Language: _____	

Respondent 2	Respondent 3
Name	Name
D.O.B. Phone Number	D.O.B. Phone Number
Street Address (Including Apt)	Street Address (Including Apt)
P.O. Box Number	P.O. Box Number
City/State/ZIP Code	City/State/ZIP Code
Attorney Name	Attorney Name
Interpreter Needed? <input type="checkbox"/> Yes <input type="checkbox"/> No	Interpreter Needed? <input type="checkbox"/> Yes <input type="checkbox"/> No
Language: _____	Language: _____

IN THE INTEREST OF (include last name):			
Name	D.O.B.	Name	D.O.B.
Name	D.O.B.	Name	D.O.B.
Name	D.O.B.	Name	D.O.B.
Name	D.O.B.	Name	D.O.B.

## Treatment

Once an investigation is completed, unless the case is closed, the case is usually transferred to a DFS treatment worker. The treatment worker is responsible for providing services to the family as well as any special services for the child. The services for the family are outlined in a case plan or family service plan. Children in DSCYF custody also get a child plan outlining the services they will receive while in care.

When DSCYF obtains custody of a child, the child is usually placed with suitable family members or in a foster home. Foster homes licensed through DFS will have a foster home coordinator who manages the needs of the foster family. DFS also contracts with private agencies that license foster homes. If a child is placed in a private agency foster home, a foster care worker from that agency will be assigned to the child and foster family in addition to the DFS treatment worker. The agency foster care worker will generally work with DFS to ensure the child receives the services outlined in the child plan.

## DSCYF Custody - Reunification Services

While the case is assigned to a treatment worker with a goal of reunification, the worker is obligated to coordinate services for each parent and child designed to allow the child to safely return to the care of the parent. Services for parents may include substance abuse treatment, domestic violence counseling, mental health treatment, parenting classes, parent aides, anger management, individual therapy, family therapy, employment assistance, housing assistance, and meaningful visitation with the child. Services for the child may include medical care, dental care, mental health treatment, educational services, sibling visitation, and recreational activities. It is important that the Child Attorney has input into the service plans and independently monitors the services for compliance, progress and demonstrated behavioral changes by the parents. During the case, DFS has an obligation to inform the Child Attorney of changes in placement, medical circumstances, and educational setting prior to those changes occurring pursuant to 13 Del. C. § 2521.

## DSCYF Custody - Permanency Services

If the plan for a child is changed from reunification to termination of parental rights or another permanent plan (such as permanent guardianship), the case is transferred to a permanency worker. The permanency worker is charged with providing the child with the services he or she needs, and for pursuing possible permanent homes for the child. Once the Court approves a plan change, DFS is no longer obligated to provide reunification services to the family. In the Matter of Derek W. Burns, a Minor Child, Del. Supr., 519 A.2d 639, 644 (1986). Once the child is placed in a permanent home, the worker must ensure the necessary home studies, subsidies and support services are in place for the family.

Youth age 16 or older may have a plan of another permanent planned living arrangement (APPLA), and will be assigned an APPLA permanency worker. A status of APPLA is an acknowledgment that there is no other appropriate permanency plan at that time, and that the youth will likely age out of foster care. The APPLA worker ensures services are in place to prepare the child for exiting foster care at age 18. However, the APPLA worker is required to continue pursuing possible permanency options for the youth. See 13 Del. C. § 2514(2).

## DSCYF Custody - Independent Living Services

All youth age 16 and older in DSCYF custody are entitled to receive independent living (IL) services which are designed to help them lead productive, successful lives once they exit the foster care system. The DFS treatment or permanency worker should make a referral on or before the youth's 16th birthday so the youth can receive services through one of DFS' contracted independent living services agencies. Youth are assigned an IL worker who will meet regularly with the youth to prepare them for adulthood. The IL worker and the IL agency are important contacts and resources to ensure that youth are learning about daily living skills, employment skills and opportunities, financial planning, access to education and training, family planning and pregnancy prevention, transportation and driving resources, and other critical supports. Some IL providers also offer transitional housing for youth who age out of foster care, although these resources are limited. IL services are available until age 23 to youth who age out of foster care or exit foster care at age 16 or 17 to guardianship, permanent guardianship or adoption.

# Chapter Four

## HOW A DSCYF CUSTODY CASE MOVES THROUGH THE COURT



### Ex Parte Custody

If DSCYF obtains custody of a child at a time other than business hours, ex parte custody is granted by an on-call judicial officer. A petition reflecting the allegations must be filed with the Family Court by noon the next business day. The contents of the petition are governed by 13 Del. C. Ch. 25. If custody is requested during regular business hours, the Court may enter an ex parte order if requested, or it may deny the ex parte and schedule the case for a Preliminary Protective Hearing (formerly known as a probable cause hearing).

The applicable Family Court Rules can be found at <https://courts.delaware.gov/forms/download.aspx?id=39308>

The DSCYF custody statute can be found at 13 Del. C. Ch. 25.

### Preliminary Protective Hearing

The first hearing on the petition before the Family Court is known as a Preliminary Protective Hearing (PPH). See Family Court Civil Rule 212. A PPH must be held within 10 days of the dependency/neglect petition being filed. At that hearing, DFS must establish that probable cause exists to believe that a child continues to be in actual physical, mental or emotional danger or there is a substantial imminent risk thereof OR that the child is abused, neglected or dependent. Hearsay evidence is admissible.

## Preliminary Protective Hearing (Cont'd)

A parent may stipulate to probable cause at this hearing and request an Adjudicatory Hearing for a determination of dependency, neglect, or abuse.

If the Court finds probable cause and determines that custody of the child should continue with DFS, the Court will provide the PPH order to the parties with notice of the date and time for the Adjudicatory Hearing. The Court may also order that certain services be put in place for the family, order that the parents complete certain tasks before the next hearing, order paternity testing, require visitation with parents and/or siblings, or ask for a prompt exploration of relatives. Where an alleged father has been identified, paternity testing should be routinely requested at this hearing. The Child Attorney should also ensure the child is enrolled in school and is attending.

## Adjudicatory Hearing

An Adjudicatory Hearing should be scheduled within 30 days of the Preliminary Protective Hearing. Family Court Civil Rule 213 governs this procedure. DFS must show by a preponderance of the evidence that a child is dependent, neglected or abused as those terms are defined in 10 Del. C. § 901, and that it is in the child's best interests for custody to be with DFS. Hearsay evidence is not admissible.

A parent may stipulate to dependency, neglect, or abuse at this hearing. If a parent stipulates, a basis for the stipulation must be provided (such as insufficient housing, substance abuse issues, parent/child conflict, etc.). Despite the basis for the stipulation, the parent will be told that additional elements will likely be address on the parent's case plan.

Again, the Court may order the parties to do a variety of tasks or engage in services. Visitation between the child and his or her family will also be addressed using a best interests of the child standard. 13 Del. C. § 2512(c).

## Dispositional Hearing

The next Court review is a Dispositional Hearing. See Rule 214. At this hearing, the Court determines if the appropriate services for the family have been implemented and approves the case plans for the family and the child. This hearing should take place within 30 days of the Adjudicatory Hearing; however, in some instances it may be combined with the Adjudicatory Hearing if all parties have developed and agreed on an appropriate case plan and goal. The minimal requirements for a case plan are found at Family Court Civil Rule 220. The Child Attorney should carefully review the proposed case plan prior to the Dispositional Hearing and determine if all areas of concern are appropriately addressed. Should DFS not be agreeable to an attorney's involvement in developing the case plan, issues of disagreement should be handled at the Dispositional Hearing.

## Review Hearings

Review hearings generally take place every 3 months. At the review, the assigned Judge will inquire of all parties whether progress is being made on the case plan(s) or what is preventing progress on same. The Judge will also want to hear how the child is doing, and what services are being provided to meet the child's needs.

## Internal DFS Permanency Planning Committee (PPC)

Once a child has been in care for nine months, DFS policy requires that the child's permanent plan be reviewed (if it has not been reviewed earlier). A committee comprised of DSCYF administrators and supervisors reviews each case. A DFS Deputy Attorney General should be present for all reviews. Input is received from CASAs or Child Attorneys regarding recommendations for the child, and then they will be asked to leave the meeting. At the conclusion of the meeting, the Committee decides what the permanent plan for the child should be. If the recommendation is to change the plan from reunification to something else, DFS must seek court approval. See "Permanency Hearing" for additional information.

# Permanency Hearing

Once a child has been in the custody of DSCYF for a period of 12 months, the Family Court must hold a Permanency Hearing to determine what the permanency plan for the child should be. See Rule 216. Possible permanency plans are reunification, TPR and adoption, guardianship, permanent guardianship, or APPLA. A child can also have more than one of these plans concurrently (except APPLA, which requires a finding that no other permanency plan is possible or appropriate).

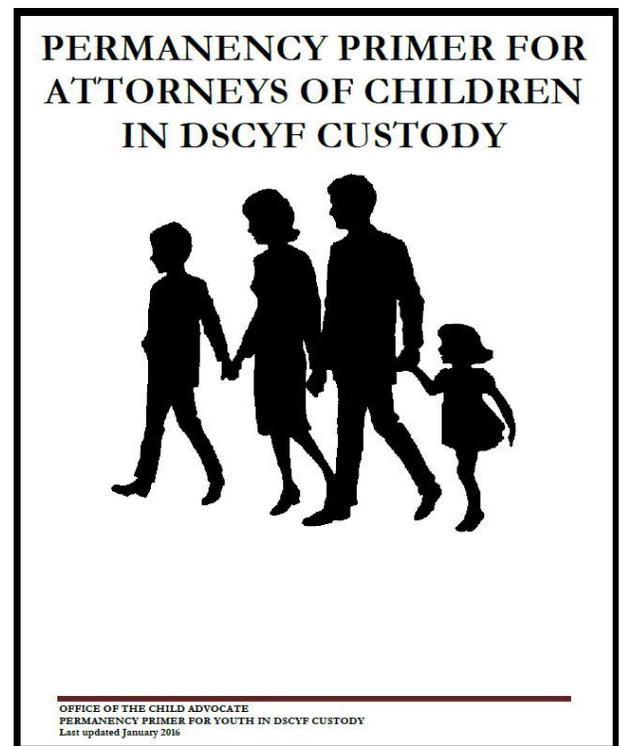
Generally, following PPC review, DFS will file a motion to establish the permanency plan recommended by PPC. The Court will then make the determination at the Permanency Hearing.

If termination of parental rights is determined to be the permanency plan then a petition must be filed with the Family Court within 15 months of the child entering custody. If the plan is continued efforts at reunification, the parent usually gets 3-6 additional months to complete their case plan.

After a permanency plan is established, the Court will continue to hold Review Hearings at least every 6 months until the permanency plan is achieved.

In certain cases, DFS may ask the Court to change the permanency plan before 12 months, particularly in cases where DFS requests to be relieved from providing reunification services to a parent due to aggravating circumstances. See 13 Del. C. § 1103(d).

A permanency primer that further explains different permanency options is available by contacting OCA.



# Termination of Parental Rights

If a termination of parental rights petition is filed, DFS must prove by clear and convincing evidence one of the enumerated grounds set forth in 13 Del. C. § 1103. In addition to a TPR ground, DFS must also prove by clear and convincing evidence that termination is in the child's best interests.

A TPR primer is available by contacting OCA.

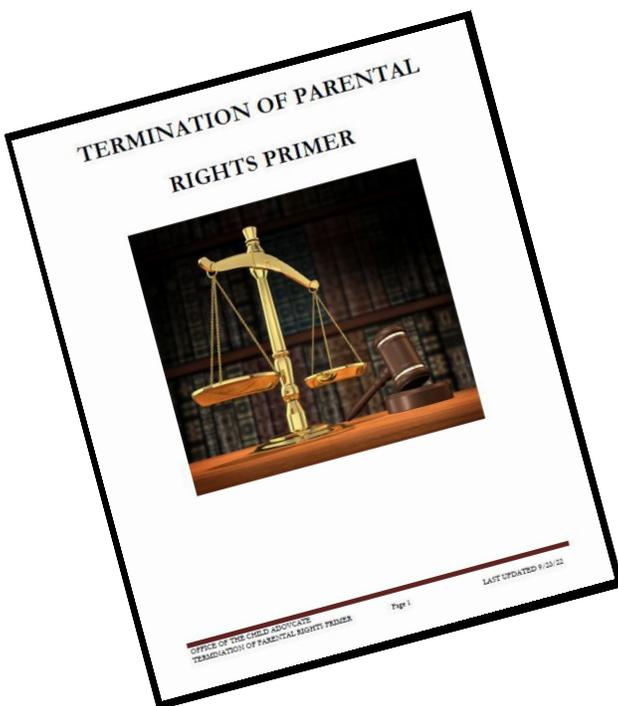
# Adoption

Once a TPR has been granted, and all appeals have been exhausted without success, an adoption petition may be filed. Many times children are adopted by their foster parents. In such cases, an adoptive home study of the foster parents is usually completed by an outside agency. This process can take up to 6 months; however, it can begin before a TPR petition is even filed, thereby shortening the timeframe for permanency.

If the child is not in a foster home that wishes to adopt, the child will get an additional worker called a Child Specific Recruitment (CSR) worker. It is the job of the CSR worker to use all available avenues to find an adoptive family for the child.

Once one or more adoptive families are identified and the home studies are completed, DFS presents the home studies to PPC for approval of an adoptive family for the child. After a family is approved for adoption, subsidy paperwork and the adoption petition are prepared. The petition is filed with Family Court, and is usually assigned to the Judge who granted the TPR. If the adoptive parents so desire, an adoption hearing will be scheduled.

Please contact OCA for guidance throughout the adoption process.



## OTHER COURT PROCEEDINGS

### Visitation

At any time during a case, a petition for visitation may be filed by a parent or relative. 13 Del. C. Ch. 25 governs visitation.

### Motions to Rescind Custody

When DFS believes that one or both parents are now able to provide necessary care for their child or children, they typically file a motion to rescind custody. A parent may also file a Motion to Rescind Custody. All parties, including the Child Attorney, should be noticed on the motion and should answer it. See 13 Del. C. § 2513(c) for the legal standard.

## Guardianship/Permanent Guardianship

Delaware Code Title 13, Ch. 23 addresses guardianship and permanent guardianship. Guardianship is a temporary arrangement for a child wherein the guardian is custodian of the child, but also may make decisions regarding medical needs, education, etc. However, at any time a parent can petition the Family Court for return of the child if the parent can demonstrate that the child will no longer be dependent, neglected, or abused in the parent's care. Despite this, the Delaware Supreme Court has determined that regular guardianship constitutes permanency for a child. CASA v. DSCYF, et al., No. 59, 2003 (Del. 2003).

Permanent guardianship is, as it sounds, more permanent than regular guardianship, in that a parent cannot petition the Court to rescind an order of permanent guardianship.

## Appeals

If a party appeals a Family Court order, the Child Attorney should participate fully in the appeal on behalf of the child. Please contact OCA immediately if an appeal is filed in your case. A Supreme Court Appeal Primer is available, as well as assistance from OCA staff. No appellate briefs should be filed without OCA's review and approval.

# Chapter Five

## DUTIES AND RIGHTS OF THE CHILD ATTORNEY

The rights and duties of the Child Attorney are set out in 29 Del. C. § 9007A(c). The Child Attorney's duty is to the child, and the scope of representation is the child's best interest. Specifically, these duties include conducting an independent investigation of the circumstances of the case, presenting evidence to the court to support the Child Attorney's position, participating in all negotiations, discovery, hearings and appeals related to the case, and receiving on-going training on topics involving child welfare law.

The Child Attorney also has the right to be provided notice of every court proceeding and receive copies of every pleading, access to all records maintained by DSCYF pertaining to the child and the child's family, and to receive reasonable notice from DFS of changes in placement, school or any other change or circumstance affecting the child client

For information about advanced training on child welfare topics, please visit OCA's website:

<https://courts.delaware.gov/childadvocate/attorneys/ForAttorneys.aspx>

# Best Interests

In representing the best interests of the child, the Child Attorney needs to consider the best interest factors set forth in 13 Del. C. § 722(a).

Any recommendations to the Court should specifically include factual evidence regarding the best interest factors:

1. The wishes of the parents;
2. The wishes of the child;
3. The interactions and relationships between the child and his parents, grandparents, siblings, significant others, or foster parents;
4. The child's adjustment to his or her home, school and community;
5. The mental and physical health of all individuals involved;
6. Past and present compliance by the parent with the parent's rights and responsibilities to the child under 13 Del. C. § 701;
7. Evidence of domestic violence as provided for in 13 Del. C. Ch. 7A;
8. The criminal history of any party or any other resident of the household including whether the criminal history contains pleas of guilty or no contest or a conviction of a criminal offense.

## 13 Del. C. § 722



## Establishing Relationships

In order to gather the necessary evidence to answer the above questions, the Child Attorney should begin by meeting with the child. Several publications on interviewing children are available. The Handbook on Questioning Children by Anne Graffam Walker is most helpful and is available at the OCA office. The Child's Attorney by Ann Haralambie is also an excellent resource for determining what steps to take in making a best interests determination, although 13 Del. C. § 722 does set out a general framework of inquiry. For a discussion of ethical issues regarding the Child Attorney's relationship with the child, please see Chapter 6.

If criminal charges are pending where the child is the victim, the Child Attorney should refrain from interviewing the child regarding those circumstances. The Child Attorney should request that a forensic interview be completed by the Children's Advocacy Center (CAC) if one has not already been completed. See the CAC website for more information. <http://www.cacofde.org>

The Child Attorney should establish a relationship with the child client through regular visits and contact. No matter how young a child is, if time is spent with the child, the child will likely be able to communicate his or her wishes to the Child Attorney.

The Child Attorney should also establish relationships with foster parents, school teachers, daycare providers, relatives, counselors, doctors, and any other relevant person in the child's life. The Child Attorney should collaborate with the DFS social worker and other professionals involved with the child. Each one of these contacts may lead to further contacts such as friends, pastors, prior foster parents, an educational surrogate parent or distant relatives.

In addition to speaking with providers, the Child Attorney should visit the home where the child resides as well as the school or daycare the child attends. The Child Attorney should also observe visits between the child and parents.

If a CASA is assigned to work alongside the Child Attorney, the CASA will likely make most of the contacts discussed herein; however, the Child Attorney should still meet with the child after appointment and periodically thereafter, and should talk to any person in the child's life the attorney intends to call as a witness.

# Records

## DSCYF Records

At the beginning of the case, the Child Attorney should review the family's DSCYF records and then continue to do so on a regular basis. OCA will initially obtain the DSCYF file for you. However, the Child Attorney should notify OCA when updated DSCYF records are needed.

## Child's Records

The Child Attorney should obtain the child's pediatric and birth records, if relevant, as well as any hospital or mental health records. The Child Attorney should also obtain the child's school records and make regular contact with school personnel. The Child Attorney should request updated records on an ongoing basis as necessary. All of these records may be obtained by sending a letter to the provider with a copy of the Court Order of Appointment. Sample letter requests are available from OCA upon request.

## Parents' Records

The Child Attorney should review the parents' criminal histories in the beginning of a case and on an ongoing basis. OCA will provide these to you upon your appointment or upon request. The Child Attorney should obtain any records related to services in which the parent has engaged. Drug, alcohol, and mental health providers will require a consent signed by the parent or a specific court order, which meets the requirements of 42 USC §290DD-2 and 42 CFR §§2.61-2.64, to release the records. A general consent form for drug, alcohol and mental health providers to release a parent's records to the Child Attorney is available from OCA, although some providers may require the parent to sign the provider's own consent instead. It is best practice to have the parent sign a consent in the presence of their attorney, or to let the parent's attorney know you will be asking the parent to sign a consent. OCA can also provide a sample motion for release of these records.

# Advocacy

While the Child Attorney is not responsible for coordinating services for the parents, to the extent that the prompt involvement in services will benefit the child client, the Child Attorney should have input and advocate for necessary services to be included in the parent's case plan. For example, if there are allegations of domestic violence, it benefits the child for the parents to promptly engage in anger management and/or domestic violence counseling.

In addition, the Child Attorney should be advocating for whatever his or her child client needs, whether it be counseling, visitation with siblings, after school activities, new shoes, etc. The Child Attorney must also be advised of any changes in placement, and must take an active role to ensure that changes in school, living arrangements, daycare or visitation is in the child's best interests.

13 Del. C. § 2521 requires DFS to provide reasonable notice to the Child Attorney prior to any changes in placement, educational settings, or medical circumstances. The Child Attorney should be included in decisions regarding same, and should take whatever action is necessary to protect the best interests of that child.

**Remember that the Child Attorney is this child's voice.**

**Without an advocate, unilateral decisions will be made about this child that may or may not be best for him or her.**

# Child Attorney's Recommendations to the Court

Once the Child Attorney has gathered the necessary evidence, the Child Attorney is in a position to make recommendations to the Court, and should do so at every Court proceeding. The next chapter provides additional guidance on how to accomplish this given that there are some inherent conflicts between attorney and Child Attorney roles.

Under the statute, 9007A(c)(14) requires the Child Attorney to not only make the child's wishes known to the Court, but also to alert the Court if the child's expressed wishes differ from the Child Attorney's position on best interests. Depending on the age of the child, the Court may appoint another attorney to represent the child's expressed wishes. This decision is largely governed by the Supreme Court decision In re Samantha Frazer, Del. Supr., 721 A.2d 920 (1998). Therefore, this type of attorney is known as a Frazer attorney.

If your ultimate recommendations to the Court will be different than the expressed wishes of the child, you have an obligation to alert the Court of the conflict. The Court will then make a determination as to what your proper role will be, and whether additional representation is necessary. If this situation occurs, please contact OCA to discuss it prior to requesting that the Court appoint an additional attorney for the child.

Child Attorneys will receive a checklist that sets out possible inquiries, interviews, and records that should be obtained during representation. Sample letters for record requests can be provided as well. It is the obligation of the Child Attorney, on behalf of the child, to take a proactive approach in these matters, and to ensure that the Court is getting the information it needs to make a decision that is truly in the best interest of the child.

# Chapter Six

## ETHICAL DILEMMAS FACED BY A CHILD ATTORNEY

As stated in the previous chapter, when representing a child through OCA, the statute clearly indicates that a Child Attorney's duty is to the child. In defining the representation of the child, the statute further indicates that the scope of representation is the child's best interests. Finally, the Child Attorney shall have confidentiality with the child client unless disclosure is necessary to protect his or her best interests. 29 Del. C. § 9007A(c).

What the first two sentences mean is that the child is the client, albeit perhaps one under a disability. Rule 1.14. The child should be treated as a client according to the rules of professional responsibility. When defining the scope of representation, the attorney should be guided by the child's best interests. Rule 1.2 addresses scope of representation.

When initially receiving an OCA case, the Child Attorney must make sure to explain the scope of representation in terms the child can understand. The attorney should explain that while the scope includes the child's wishes, there are also other things that must be considered.

See 13 Del. C. § 722 for guidance and refer to the Nuts and Bolts training as to how to discuss this with a child client.

And always remember, if the best interests recommendation made to the Court conflicts with the child client's expressed wishes, there is a potential conflict which may require two lawyers to represent the child. If you believe such a conflict exists, please call OCA immediately to discuss how to ensure the child's rights are protected.

The third sentence indicates that there is confidentiality between the attorney and child client. However, an escape clause is provided which states "unless disclosure is necessary to protect the child's best interests." Rule 1.6 supports this by allowing disclosure "to comply with other law or court order." OCA is also mentioned in the comments following Rule 1.6. Confidentiality should be kept with the child client when at all possible. Only rare circumstances require a disclosure -- primarily where there is no other way to protect your client's safety.

## **Volunteer Attorney Training Manual**

For additional information please contact:

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