



**Governor's Advisory Council for Exceptional Citizens (GACEC)**  
**516 West Lookerman St., Dover, DE 19904**  
**302-739-4553 (voice) 302-739-6126 (fax) <http://www.gacec.delaware.gov>**

**MEMORANDUM**

**DATE:** April 23, 2014

**TO:** The Honorable Members of the Delaware General Assembly

**FROM:** Terri Hancharick, Chairperson  
GACEC

**RE:** **House Bill No. 251 (Guardianship of Child)**

The Governor's Advisory Council for Exceptional Citizens (GACEC) has reviewed House Bill No. 251 which would revise the processing of matters related to child guardianship in Family Court. In general, the revisions are logical and are helpful in clarifying standards and procedures. However, there is seemingly one inaccuracy in the bill, *i.e.*, in line 85 the term "terminated" should be "rescinded". Moreover, the sponsors may wish to consider modifying the standard of proof in multiple sections based on the following rationale:

House Bill No. 251 adopts a "preponderance of the evidence" standard in some contexts (lines 41, 57, and 81) and a "clear and convincing evidence" standard in other contexts (lines 84 and 100). The "clear and convincing evidence" standard requires more proof to justify the involuntary transfer of guardianship authority from a parent to a petitioner.

At a minimum, it would be preferable to adopt a "clear and convincing evidence" standard in lines 41 and 81. As a result, "clear and convincing evidence" would be required to justify both an initial removal of guardianship authority from a parent and to justify rejection of a parental petition seeking return/rescission of guardianship.

This approach is supported by the following.

First, adoption of a clear and convincing evidence standard is noticeably more aligned with the philosophy supported in the Delaware Supreme Court's Tourison decision cited in the synopsis. In Tourison, the Court explicitly adopted a clear and convincing evidence benchmark which "respects a parent's fundamental right to care for his or her children by making it extremely difficult for a third party to overcome a fit parent's petition to rescind a guardianship." At 7. In drafting a conforming statutory framework, any benefit of the doubt should be accorded to making it "extremely difficult" to overcome the parent's application for rescission. The Court's manifest emphasis on deference to fundamental parental rights likewise supports adoption of a clear and convincing standard for initial petitions.

Second, it is an unfortunate truth that parents with disabilities are disproportionately separated from their children in various forms of child welfare proceedings. See University of Minnesota, Policy Research Brief: The Inclusion of Disability as Grounds for Termination of Parental Rights in State Codes (2006), available at <http://ici2.umn.edu/products/prb/172/default.html>. See also National Council on Disability, Rocking the Cradle: Ensuring the Rights of Parents with Disabilities and Their Children (2012), endnote 256, available at [National Council on Disability: Publications & Policy Briefs: 2012 Publications: Rocking the Cradle: Ensuring the Rights of Parents with Disabilities and Their Children](#). Both publications note that the rationale for the disproportionate removal of children is often based on stereotypes and misconceptions about diagnosed disabilities. Adoption of a clear and convincing evidence standard, while not a stand-alone solution to this problem, would focus attention on evidentiary proof as compared to stereotypes and inferences.

Third, in 1981, the Family Court was given “concurrent authority to appoint guardians of the person over minors under 18 years of age with the Court of Chancery.” See synopsis to attached engrossed Senate Bill No. 247 (Attachment “A”). The relevant authorization [Title 10 Del.C. §925(16)] was placed in the “general jurisdiction” statute [§925] rather than the “exclusive jurisdiction” statute [§921]. Later enactment of Title 13 Del.C. §2303(a) is consistent with the conferral of general, but not exclusive, Family Court jurisdiction over actions related to guardianship of minors. Chancery Court continues to have jurisdiction over guardianship of minors. See Title 12 Del.C. §3901(a)(1) and §3902. In 2012, Vice Chancellor Noble issued a well-reasoned decision holding that a “clear and convincing evidence standard” must be used in cases involving petitions for termination/rescission of guardianship. For facilitated reference, a copy of the redacted opinion is included as Attachment “B”. The Court relied, in part, on precedents involving parental rights:

Most states recognize the consequences that result from the appointment of a guardian and have responded by imposing, through statute, a clear and convincing evidentiary standard. ... The United States Supreme Court has taught that, for a wide range of government actions limiting personal choice, the proper standard is clear and convincing. These personal interests include parental rights, civil commitment, deportation, and denaturalization. ... Thus, the OPG must demonstrate by clear and convincing evidence that Ms. B continues to need a guardian of the person.

At 5-6. The end result is that it would be jurisprudentially inconsistent to recommend legislation creating a different standard of proof in Family Court cases involving rescission of guardianship than the standard already adopted by the Court of Chancery. Moreover, the Chancery Court’s reasoning also extends to initial petitions for guardianship. Citing an American Bar Association (ABA) compilation, the Court observed that “(m)ost states recognize the consequences that result from the appointment of a guardian and have responded by imposing, through statute, a clear and convincing evidentiary standard.” At 4. In fact, the most recent ABA compilation reveals that almost every state which has adopted a benchmark by statute has adopted a clear and convincing evidence standard applicable to petitions for guardianship. See Attachment “C” available at [http://www.americanbar.org/content/dam/aba/administrative/law\\_aging/2013\\_04\\_CHARTConduct.pdf-15k-2013-05-01](http://www.americanbar.org/content/dam/aba/administrative/law_aging/2013_04_CHARTConduct.pdf-15k-2013-05-01).

Thank you for your time and consideration of our observations. Please feel free to contact me or Wendy Strauss should you have questions.

Attachments