

Date: June 22, 2007
To: Commissioners, NCCUSL
From: Standby Committee, Uniform Representation of Children in Abuse, Neglect, and Custody Proceedings Act
Re: Proposed Revisions to URCANCPA

Amendments to the Uniform Representation of Children in Abuse, Neglect, and Custody Proceedings Act as approved in 2006 are being proposed as the result of objections to certain portions of the Act by the Litigation Section of the American Bar Association.

NCCUSL withdrew URCANCPA from consideration by the ABA House of Delegates at the 2007 Midyear Meeting after the ABA Litigation Section Council, upon recommendation of the Children's Rights Litigation Committee of that section, voted to oppose the Act and significant differences of opinion emerged between the ABA Litigation Section and the ABA Family Law Section. Although the ABA Family Law Section was in support of the Act as approved, the ABA Litigation Section was opposed, with their opposition focused primarily on the abuse and neglect context and the Act's endorsement of a "best interests attorney." In an effort to reach agreement, NCCUSL scheduled a one-day "mediation" in Monterey, California, in late April 2007 between representatives of the Standby Committee and those two ABA Sections. The National CASA Association and the ABA Domestic Violence Commission also sent representatives to express their concerns. As a result of that intensive one-day session, a consensus was reached on a few matters, but disagreements remained between the ABA Sections on several core points. In a later conference call between NCCUSL leadership and representatives of the Standby Committee, a decision was made for the Standby Committee to propose revisions for consideration by the Conference at its 2007 Annual Meeting. As agreed in the conference call, the revisions were to incorporate the matters of consensus from the Monterey mediation and to provide alternatives, either by black letter or through a legislative note, to permit states to choose among the various approaches that continued to divide the participants at the mediation.

The Standby Committee believes that the proposed revisions are an improvement in the Act and will be more likely to garner approval by the ABA House of Delegates. This memo will highlight the changes included in the proposed revisions.

(1) The proposed revisions change the Act's terminology to "best interests legal representative" in the place of "best interests attorney." More substantively, the definition of the best interests legal representative is now an attorney who represents the best interests of the child and who is not in an attorney-client relationship with the child. The Litigation Section was particularly troubled by the ethical tensions inherent in the approved Act's characterization of the best interests attorney as being in a lawyer-client relationship without being bound by the child's directives. The term "legal representative" was agreed on at the Monterey mediation as a preferable term. At the same time, in what is now Section 12, almost all of the former duties of the best interests attorney are retained.

(2) Another terminology change is from “court-appointed advisor” to “best interests advocate”. This change was proposed by the representatives of the National CASA Organization and was based on their view that CASAs (Court Appointed Special Advocates) are advocates for children and not simply assistants to the court. Other consensus changes relate to revisions proposed by CASA relevant to the best interests advocate. These include non-substantive changes in Section 5(b) of both alternatives to add “the circumstances and needs of the child” and to broaden the final phrase to “any request for the appointment of a best interests advocate,” since requests may come from a variety of sources. Section 13(6) also is revised to make the offering of recommendations the advocate’s choice but still require compliance with Section 15 (availability for cross examination, etc.).

(3) Domestic violence advocates were concerned about a best interests advocate’s possible willingness to promote settlement in custody cases even where violence between divorcing parties might be present and might distort the negotiation process. Their concerns will be addressed in commentary to Section 6 and Section 13. They also raised the possibility of economic coercion in divorce cases, and that concern will be addressed in commentary to Section 19.

(4) Core matters of disagreement that remained after the Monterey meeting relate to whether a best interests legal representative should ever be appointed in an abuse or neglect proceeding and, if so, whether such an appointment should be limited to cases where the child lacks capacity to direct counsel. A second area of disagreement concerned how the duties of a child’s attorney should be defined when the child lacks capacity and when a child’s expressed objectives place the child at risk of harm.

The proposed revisions address these areas of disagreement by providing alternatives in black letter and through legislative notes. The Standby Committee concluded that the Conference should not abandon the basic approach of the Act as approved. Instead, two strong child’s attorney models of child representation are provided as options, one set out as an alternative in the black letter and one by legislative note.

Section 4 sets forth two alternatives. Alternative A under Section 4 is essentially the existing language of the Act which gives the court discretion to appoint either a child’s attorney or a best interests legal representative in abuse or neglect cases. Critics of the Act have pointed out that a court should take into account an attorney’s assessment of a child’s capacity, and for that reason a new subsection 4(c) of Alternative A has been added. Under that subsection, an attorney appointed in one role may determine that the other category of attorney is more appropriate. When the attorney communicates that information to the court, the court may redesignate the attorney in the appropriate role consistent with Section 9 or appoint a different individual. Significantly, a proposed new Section 9(d) permits the redesignation of a child’s attorney as a best interests attorney unless it would compromise the confidentiality of communications between the attorney and the child, in which case a different individual must be appointed.

Alternative B requires the appointment of a child's attorney for every child capable of directing legal representation. Infants and preverbal children are presumed incapable of directing legal representation; the initial appointment for all other children is to be a child's attorney. Alternative B, however, does recognize that some children will not be able to provide meaningful direction. When a child's attorney determines that the child is incapable of directing counsel (defined as "lacks ability to communicate or exercise reasoned judgment"), the Act requires the attorney to notify the court as soon as practicable. In that situation, the redesignation provision of Section 9(d) applies.

The legislative note accompanying Section 4 effectively presents a third alternative – the option proposed by the Children's Rights Committee. The note gives direction to states that wish to limit all lawyer appointments in abuse and neglect to child's attorneys and to bar appointment of best interests legal representatives in those proceedings. Additional legislative notes implementing that model are provided in Sections 5, 9, 10, 11, and 12.

Section 9, as indicated, contains revisions allowing redesignation where a child's attorney has determined that the child lacks capacity to direct counsel, unless the redesignation will compromise confidentiality. In other words, this redesignation is limited to cases where a child cannot direct counsel *and* no lawyer/client communications have occurred. It avoids the court's having to appoint a different individual when, for example, the lawyer meets with her 3-year-old client for the first time, observes the child, determines the child lacks capacity, and returns to the court. The redesignation would not be available if any confidential communications have occurred between the attorney and the child.

Section 11 in the approved Act, setting forth common duties of a child's attorney and a best interests attorney, has been deleted, in light of the revised concept of the best interests legal representative. New Section 11 (duties of child's attorney) retains the duties in the approved Act, including the existing directives for attorneys when the child lacks capacity or refuses to direct the lawyer on a particular issue and when the child's directives place the child at risk of harm. A new legislative note gives states the option of replicating the language of the relevant rule of professional conduct rather than adopting the implementing guidelines of the section as to children who lack capacity or whose directives create a risk of harm.

Proposed new Section 12 provides that a best interests legal representative is not in an attorney-client relationship with the child but in other respects retains the duties in the Act as approved in 2006, with that attorney's core duty being to "represent and advocate the best interests of the child based on the facts relevant to the proceeding and according to criteria established by law related to the purposes of the proceeding." All of the duties imposed on the best interests attorney by the approved Act continue to apply to the best interests legal representative except the duty to provide advice and counsel. In addition, the duty to keep the child informed of the status of the proceeding applies only when the child does not have a child's attorney. In other respects, however, the best interests legal representative has the same duties and responsibilities as the approved Act imposed upon the best interests attorney. The

confidentiality provision is reworded but retains the basic use/disclosure distinction.

A change in Section 17, addressing the child's right of action, extends limited immunity to the best interests legal representative (i.e. removes the brackets), since this newly defined representative is no longer in an attorney-client relationship with the child.