

DRAFT

FOR DISCUSSION ONLY

UNIFORM REPRESENTATION OF CHILDREN IN
ABUSE AND NEGLECT AND CUSTODY
PROCEEDINGS ACT

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

For Drafting Committee Meeting ~~October 7-9~~ February 3-5, 2005⁶

WITH PREFATORY NOTE AND COMMENTS

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NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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**UNIFORM REPRESENTATION OF CHILDREN IN ABUSE AND NEGLECT AND
CUSTODY PROCEEDINGS ACT**

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UNIFORM REPRESENTATION OF CHILDREN IN ABUSE AND NEGLECT AND CUSTODY PROCEEDINGS ACT

Prefatory Note

~~The~~ The legal representation of children is a rapidly developing professional field, one that has received increased attention in the United States and elsewhere in the last several decades.¹ It has become a recognized area of practice, and child welfare law has been designated by the American Bar Association as a legal specialty.² Nevertheless, the role of lawyers representing children in court proceedings directly affecting their interests ~~has been the welfare, such as abuse and neglect or custody proceedings, remains a subject of intense debate within the last decade.~~ Disagreements focus on such fundamental questions as whether appointment of counsel should be mandatory, how a lawyer should determine a child's capacity to direct the legal representation, what a lawyer should do for a child who lacks that capacity, and whether a lawyer may both represent a child as the child's lawyer and participate as guardian ad litem for the child.³

¹See Marvin Ventrell, *The Practice of Law for Children*, 66 MONT. L. REV. 1 (2005); Barbara Ann Atwood, *Representing Children: The Ongoing Search for Clear and Workable Standards*, 19 J. AM. ACAD. MATRIM. LAW. 801 (2005). The United Nations Convention on the Rights of the Child, available at 28 I.L.M. 1448 (1989), with its protection of the child's right of participation under Article 12, has fueled interest in the role of children's representatives in many of the nations that have ratified the Convention.

²The American Bar Association authorized the National Association of Counsel for Children (NACC) to award legal specialty certification in child welfare law in 2004.

³For ~~a thoughtful explorations of all~~ exploration of these issues, see JEAN KOH PETERS, REPRESENTING CHILDREN IN CHILD PROTECTIVE PROCEEDINGS: ETHICAL AND PRACTICAL DIMENSIONS (2d ed. 2001). In Professor Peters's view, an attorney should develop a relationship with a child over time and interpret the child's wishes in the context of the child's individualized circumstances. Another comprehensive analysis of the legal and ethical issues involved in representing children is ANN M. HARALAMBIE, THE CHILD'S ATTORNEY (1993). Haralambie proposes that children's attorneys should advocate the child's wishes unless they are potentially harmful to the child but should request appointment of a guardian ad litem where the child's wishes are deemed ~~unreasonable~~ dangerous. She also ~~notes~~ emphasizes that ethical dilemmas can be minimized or eliminated if children's attorneys spend significant time advising their clients. If children's positions are deemed unreasonable, Haralambie urges lawyers to explain to the situation to the children why their positions are unreasonable and counsel them about alternatives. See also Katherine Hunt Federle, *The Ethics of Empowerment: Rethinking the Role of Lawyers in Interviewing and Counseling the Child Client*, 64 FORDHAM L. REV. 1655 (1996)(exploring ways in which lawyers can redefine their role *vis a vis* the child client); Catherine Ross, *From Vulnerability to Voice*, 64 FORDHAM L. REV. 1579 (1996)(advocating

Several competing proposals have emerged that address the important question^{topic} of representation of children in abuse and neglect or custody proceedings. In 1995, the American Academy of Matrimonial Lawyers adopted a set of standards under which lawyers are to advocate the wishes of the “unimpaired” child but can act only as a conduit of information for the “impaired” child.⁴ In the same year, the Family Law Section of the American Bar Association proposed a contrasting set of Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases (“Abuse and Neglect Standards”),⁵ taking a different approach to the question of children’s competence to direct representation. Under those standards, which were adopted by the ABA in 1996, a lawyer should advocate the child’s articulated preference, but if a child will not or does not express a preference, the lawyer should advocate the child’s legal interests determined by objective criteria. The ABA Abuse and Neglect Standards take the position that a child’s disability from as a result of immaturity is incremental and issue-specific. The National Association of Counsel for Children issued its own revised version of the ABA Standards in which it endorsed most of the ABA guidelines but proposed an exception to traditional representation where the child’s wishes may be seriously injurious to the child. Emphasizing the counseling function of the child’s lawyer, the NACC emphasizes that the child’s lawyer does not owe “robotic allegiance” to each of the child’s directives.⁶

A conference on the representation of children was held at Fordham Law School in 1996⁵

mandatory appointment of independent counsel for children in high conflict divorces); Martin Guggenheim, *A Paradigm for Determining the Role of Counsel for Children*, 64 FORDHAM L. REV. 1399 (1996)(advocating that a child’s lawyer should focus on enforcing the child’s legal rights rather than on carrying out the child’s expressed objectives). For an insightful examination of the child’s limited capacity to direct counsel, see Emily Buss, *Confronting Developmental Barriers to the Empowerment of Child Clients*, 84 CORNELL L. REV. 895 (1999).

⁴American Academy of Matrimonial Lawyers *Standards for Attorneys and Guardians Ad Litem in Custody or Visitation Proceedings*, 13 J. AM. ACAD. MATRIM. LAW 1 (1995). For a critique of the AAML approach, see Ann M. Haralambie & Deborah L. Glaser, *Practical and Theoretical Problems with the AAML Standards for Representing “Impaired” Children*, 13 J. AM. ACAD. MATRIM. LAW. 57 (1995).

⁵American Bar Association, *Proposed Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases*, 29 FAM. L. Q. 375 (1995) (Abuse and Neglect Standards).

⁶Marvin Ventrell, *Legal Representation of Children in Dependency Court: Toward a Better Model—The ABA (NACC Revised) Standards of Practice*, NACC Children’s Law Manual Series (1999). The NACC has also developed a list of overarching duties of all children’s lawyers, regardless of the precise role of the lawyer. See *NACC Recommendations for Representation of Children in Abuse and Neglect Cases* (2001).

entitled Ethical Issues in the Legal Representation of Children. This conference examined the principles set out in the then-proposed standards promulgated by the ABA and ~~proposed~~recommended various refinements.⁷ The American Law Institute added its views with the publication of the Principles of the Law of Family Dissolution.⁸ The ALI recommends that courts be given broad discretion in private custody disputes to appoint either a guardian with investigatory or advocacy capacity or a lawyer for the child if the child is competent to direct the terms of the representation.⁹ Most recently, the ABA returned to the same questions in the context of child custody proceedings and in 2003 adopted Standards of Practice for Lawyers Representing Children in Custody Cases (ABA Custody Standards).¹⁰

State laws vary dramatically on the appointment of representatives for children, with some models emphasizing the unique vulnerability of children and children's need for adult protection and guardianship to determine their interests, while other models affirm a child's right to have his or her wishes presented by a zealous advocate.¹¹ In the abuse and neglect context, the federal Child Abuse Prevention and Treatment Act (CAPTA) requires the appointment of a guardian ad litem for a child, but the role and identity of that representative are largely undefined.¹² In

⁷*Recommendations of the Conference on Ethical issues in the Legal Representation of Children*, 64 FORDHAM L. REV. 1301 (1996)(Fordham Recommendations)(attorney must follow child's expressed preferences and attempt to discern wishes in context in developmentally appropriate way if child is incapable of expressing viewpoint).

⁸American Law Institute, *Principles of the Law of Family Dissolution: Analysis and Recommendations* (2002).

⁹*Id.* at § 2.13.

¹⁰American Bar Association, *Standards of Practice for Lawyers Representing Children in Custody Cases*, 37 FAM. L. Q. 129 (2003).

¹¹See Marvin Ventrell, *Legal Representation of Children in Dependency Court: Toward a Better Model – The ABA (NACC Revised) Standards of Practice* (1999)(reporting that attorney/GAL and traditional attorney are models that have dominated representation of children).

¹²See 42 U.S.C. § 5106a(b)(2)(A)(xiii) (2000), which requires states to have “provisions and procedures in every case involving an abused or neglected child which results in a judicial proceeding, a guardian ad litem, who has received training appropriate to the role, and who may be an attorney or a court appointed special advocate who has received training appropriate to that role (or both), shall be appointed to represent the child in such proceedings–(I) to obtain first-hand, a clear understanding of the situation and needs of the child; and (II) to make

response to CAPTA, almost all states now require some form of child representation in abuse and neglect proceedings, but the role of the representative ranges from lay guardians to legal counsel.¹³ Many states routinely appoint lawyers to function as guardians ad litem, without careful delineation of the distinctions between the ethical responsibilities of a lawyer to the client and the professional obligations of the lay guardian ad litem as a best interests witness for the court. In the custody context outside of child protective proceedings, states have even fewer guidelines about the appointment of representatives for children. Typically, state law simply authorizes the appointment of counsel or guardian ad litem as a matter of judicial discretion.¹⁴

In light of the disagreements among the various professional organizations committed to child advocacy and the marked variation in approaches across the United States, the National Conference of Commissioners on Uniform State Laws concluded that this important area could benefit from a uniform law. The Conference concluded that a uniform act would enhance the quality and professionalism of children’s representatives in the areas of abuse and neglect and custody and ultimately would benefitprotect the interests of children nationwide.

The proposed Act seeks to improve the representation of children in proceedings directly affecting their interestscustody by clearly defining the roles and responsibilities of children’s representatives and by providing guidelines to courts in appointing representatives. The Act not only integrates the two sets of standards promulgated by the ABA – the Abuse and Neglect Standards and the Custody Standards – but it also addresses the role of a non-lawyer representative, denominated a “court-appointed advisor” under the Act in order to avoid the confusion generated by the term “guardian ad litem.” The new term, however, applies only in the proceedings governed by this Act and is not intended to alter the practice of appointing guardians ad litem in other contexts. By its inclusive nature, the Act provides standards that differentiate among the various representatives while indicating where certain core duties are shared by all categories of children’s representatives. These objectives are implemented through the definitions set out in Section 2, the standards for the appointment of counsel and court-appointed advisors in Sections 4-6, the qualifications of counsel and court-appointed advisors in Sections 7 and 8, the provisions governing orders of appointment in Sections 9 and 10, and the description of powers, responsibilities, and immunity in Sections 11-18. Fees and expenses are addressed in Sections 19 and 20.

recommendations to the court concerning the best interests of the child.”

¹³See Howard A. Davidson, *Child Protection Policy and Practice at Century’s End*, 33 Fam. L. Q. 765, 768-69 (1999).

¹⁴Section 310 of the Uniform Marriage and Divorce Act, for example, provides for the discretionary appointment of counsel for a child. Revealing the blurring of professional lines, the Comment explains that “[t]he attorney is not a guardian ad litem for the child, but an advocate whose roles is to represent the child’s interests.”

_____ An important premise underlying the Act is that an attorney should be appointed for every child who is the subject of an abuse or neglect proceeding.¹⁵ In abuse and neglect cases, as defined in the Act, court orders effectively determine a child's future, including whether the child will remain in his or her home, the nature and duration of any placement outside the home, the child's contact with parents and other relatives, and the child's access to social services. The requirement of appointed counsel rests on the recognition that children's interests in these proceedings are of fundamental importance. The ABA has long advocated the mandatory appointment of attorneys for children in abuse and neglect proceedings in addition to the appointment of guardians ad litem, and more than half the states require the appointment of an attorney/guardian whether or not a guardian ad litem has been appointed. Although the role of counsel may vary depending on the developmental level of the child and other factors, legal representation for children can ensure that court orders are based on an accurate, informed, and sensitive assessment of the child's circumstances.-

The Act not only integrates the two sets of standards promulgated by the ABA—the Abuse and Neglect Standards and the Custody Standards—but it also addresses the role of the non-lawyer representative, denominated a “court advisor” under the Act. By its inclusive nature, the Act provides standards that differentiate among the various representatives while indicating where certain core duties are shared by all categories of children’s representatives. These objectives are implemented through the definitions set out in Section 2, standards for the mandate for appointment of an attorney for every child in an abuse or neglect proceeding is consistent with trends across the United States. Currently, more than half the states require the appointment of an attorney/guardian ad litem, and about three-fourths of the states regularly appoint attorneys for children as a matter of practice whether or not required by state law.¹⁶ Moreover, at least one federal district court has held that appointment of counsel and court advisors in Sections 4-8, the qualifications of counsel and court advisors in Sections 9 and 10, and the description of powers, responsibilities, and immunity in Sections 11-18. Fees and expenses are addressed in Sections 19 and 20. for every child in the state foster care system is required as a matter of procedural due process.¹⁷ Although the mandate of this Act may impose additional financial costs on those states

¹⁵Recognizing the need for legal representation for children in abuse and neglect proceedings, a federal district court held that appointment of counsel was required as a matter of procedural due process under the Georgia Constitution. See Kenny A. ex rel. Winn v. Perdue, 356 F. Supp. 2d 1353 (N.D. Ga. 2005). Moreover, federal law has long authorized the discretionary appointment of counsel for Indian children subject to the Indian Child Welfare Act. See 25 U.S.C. § 1912(b).

¹⁶See Survey of State Laws on Representation of Children in Abuse and Neglect Cases, Appendix A.

¹⁷See Kenny A. ex rel. Winn v. Perdue, 356 F. Supp. 2d 1353 (N.D. Ga. 2005) (every child in foster care entitled to appointed counsel as matter of procedural due process under Georgia state constitution.). Significantly, the Georgia constitutional provision tracks the federal

that do not currently provide for legal representation for children in abuse and neglect cases, the drafters of the Act believe that the profound benefit to children and overall society of an improved child welfare system outweighs those monetary costs.

The Act provides for two categories of lawyers for children—the child’s attorney and the best interests attorney—but ~~attorney—and~~ does not endorse the ~~dual role~~ hybrid category of attorney/guardian ad litem.¹⁸ The child’s attorney is in a traditional attorney-client relationship with the child and is

therefore under traditional ethical limitations governing that relationship.¹⁹ Under the Act, the child’s attorney remains a client-directed representative and should function within that role rather than advocating for what the lawyer believes to be in the child’s best interests. The Act authorizes, however, a limited exercise of “substituted judgment” by the child’s attorney. ~~Under~~ Section 12, when the child is incapable of reasoned judgment and meaningful communication as to a particular issue. ~~In that limited circumstance,~~ the child’s attorney may take a position that is in the child’s best interests so long as the position is not in conflict with the child’s expressed objectives. The child’s attorney may also request appointment of a ~~court~~ court-appointed advisor or, where permitted, a best interests attorney.²⁰ Similarly ~~In contrast,~~ if a child’s expressed goals would put the child at risk of substantial harm, the child’s attorney should ~~must request a court-~~ appointed advisor for the child or withdraw from representation and request the appointment of a ~~court advisor or, where permitted, a best interests attorney. By appointing a court advisor~~ Thus, ~~the court can seek~~ Act provides mechanisms to ensure that evidence of potential harm to the child

Due Process Clause, and the court relied on interpretations of the federal Constitution in its analysis.

¹⁸The Act rejects the ~~dual role~~ hybrid category because it has given rise to a blurring of professional roles where, for example, the same individual functions both as an attorney for the child and a witness in the proceeding. *See* Rule 3.7, A.B.A. Model Rules of Professional Conduct (2002) (generally prohibiting attorney from acting as advocate and witness in same proceeding). In addition, problems have arisen with the dual role approach because of ethical constraints that are inherent in the attorney/client relationship, including in particular the confidentiality of client communications. For a court’s recognition of the tensions inherent in the hybrid attorney/guardian ad litem, see *Clark v. Alexander*, 953 P.2d 145 (Wyo. 1998).

¹⁹Model Rule 1.14 of the ABA Model Rules of Professional Conduct provides useful guidance in representing a client with diminished capacity. A helpful exploration of ethical issues facing a child’s attorney can be found in Jennifer L. Renne, *Legal Ethics in Child Welfare Cases* (ABA 2004).

²⁰~~In the design of the Act, states may choose to prohibit the appointment of a best interests attorney for a child who already has a child’s attorney. See Sections 12 and 13 and Commentary.~~

will be disclosed. Nevertheless, the child's attorney may continue to present the child's expressed goals to the court unless the child's position is prohibited by law or lacking in factual foundation. Under the Act, the child's attorney remains a client-directed representative. The design of the Act is to keep the child's attorney within the appointed role and not to permit a more subjective pursuit of the child's best interests.

— In contrast, the ~~brought~~ to the attention of the court.

The best interests attorney under the Act, while remaining in~~on~~ the professional role of an attorney~~other hand~~, has the substantive responsibility of assisting the court in determining the child's best interests. Thus, under Section 13 while still remaining in the professional role of an attorney. Under Section 13, the best interests attorney is expected to advocate for a resolution of the proceeding that is consistent with the child's best interests "according to criteria established by law." In other words, the best interests attorney should adhere to established legal standards rather than subjective bias. Unlike the child's attorney, the best interests attorney is not bound by the client's expressed objectives and but should consider those objectives in determining what to advocate. Moreover, the best interests attorney may use (but not disclose) client's~~the child's~~ confidences where necessary to protect the child's interests in the proceeding.

— Finally, under~~At the same time, the best interests attorney is a lawyer for the child and remains under the general duties of representation spelled out in Section 11, including the presentation of the child's expressed objectives to the court if the child so desires. Under the Act, the ethical precepts governing a lawyer-client relationship apply to the best interests attorney's relationship with the child unless the Act provides an express exception.~~

Finally, according to the Act, the ~~court~~court-appointed advisor is a representative of the child whose role is to assist the court in determining the child's best interests. The ~~court~~court-appointed advisor's responsibilities include investigation of the case and, where appropriate, making a recommendation to the court. See Section 14. As such, the Act makes clear that the ~~court~~court-appointed advisor may not perform acts that would be restricted to a licensed attorney, even if the person ~~appointed to be court~~functioning as court-appointed advisor holds a license to practice law. The Act also endorses the widespread use of Court Appointed Special Advocates (CASAs) to fulfill the role of ~~court~~court-appointed advisor.²¹

Because of the fundamental importance of the interests at stake in child welfare cases,

²¹The Court Appointed Special Advocate is a lay volunteer who advocates as a non-lawyer on behalf of a child in child abuse and neglect proceedings. CASAs generally are screened and trained at the local level but all CASA programs that are affiliated with the National Court Appointed Special Advocate Association must comply with the standards issued by that organization. See www.nationalcasa.org. In addition, many states have established their own standards to ensure that the volunteers representing children are competent and possess relevant training and experience.

Section 4 requires the appointment of either a child’s attorney or a best interests attorney for children in abuse and neglect proceedings. Under CAPTA, on the other hand, states must appoint a “guardian ad litem” for children in abuse and neglect proceedings as a condition of receiving federal CAPTA funding, and the statute expressly permits the guardian to be a lawyer.²² Although the CAPTA provision for guardian ad litem may be broad enough to encompass either a best interests attorney or a child’s attorney, this Act provides two alternative approaches. See Section 5 and Comment. If Under the first alternative in Section 5, states may require the appointment of a court-appointed advisor only if the attorney appointed for a child in an abuse or neglect proceeding does not have a best interests attorney, Section 5, Alternative A, requires the additional appointment of a court advisor to meet the CAPTA requirement. In contrast, under Section 5, At the second alternative B, the appointment of a ~~court~~court-appointed advisor is discretionary when either a child’s attorney or a best interests attorney has been appointed in an abuse and neglect proceeding.

In custody proceedings, the Act leaves to judicial discretion the question of appointing a child’s representative. Although there ~~may be~~are significant benefits to ~~having~~appointing a representative for a child under certain circumstances, courts should consider the child’s interests, the court’s needs, and the parties’ resources before making an appointment. Section 6 provides a list of factors to assist the court in deciding whether to appoint a representative at all and, if a representative is to be appointed, which category of representative is appropriate.

While the Act sets out basic guidelines for the appointment and role of attorneys and ~~court~~court-appointed advisors, states can provide more detailed guidelines through separate standards of practice. Standards in effect in many states address ethical concerns, specific training and experience requirements, and other professional issues facing children’s representatives that are beyond the scope of this Act.

²²See 42 U.S.C. § 5106a(b)(2)(A)(xiii), quoted *supra* at note 9.

**UNIFORM REPRESENTATION OF CHILDREN IN ABUSE AND NEGLECT AND
CUSTODY DISPUTES PROCEEDINGS ACT**

SECTION 1. SHORT TITLE. This [act] may be cited as the Uniform Representation of Children in Abuse and Neglect and Custody Disputes Proceedings Act.

SECTION 2. DEFINITIONS. In this [act]:

(1) “Abuse and neglect proceeding” means a court proceeding under [cite state statute] for protection of a child from abuse or neglect or a court proceeding under [cite state statute] in which termination of parental rights is at issue.

(2) “Best interests attorney” means an attorney appointed by the court to provide ~~independent legal services~~ representation for a child to protect a child’s best interests without being bound by the child’s directives or objectives.

(3) “Child’s attorney” means an attorney appointed by the court to provide legal representation for a child.

(4) “~~Court~~“Court-appointed advisor” means a ~~person~~individual appointed to assist the court in determining the best interests of a child.

(5) “Custody proceeding” means a court proceeding in which legal or physical custody of a child, access to, or visitation or parenting time, access, or visitation with a child is at issue, including a proceeding relating to divorce, separation, determination of parentage, adoption, private guardianship, and or protection from domestic violence. The term does not include a proceeding initiated against a child because of the conduct of the child.

(6) “Developmental level” means the ability to understand and communicate,

1 taking into account such factors as ~~the child's~~ age, mental capacity, level of education, cultural
2 background, and degree of language acquisition.

3 **Comment**

4 The definitions in the Act reflect the range of court-appointed representatives for children
5 that are encompassed by the ABA Custody Standards: child's attorney, best interests attorney, and
6 guardian ad litem, except that the Act uses the new term "court""court-appointed advisor" in order
7 to avoid the widespread disagreement and confusion about the meaning of "guardian ad litem."
8 Under the Act, a "child's attorney" is a client-directed lawyer in a traditional attorney-client
9 relationship with the child, while a "best interests attorney" provides legal services to a child but
10 is not bound by the child's directives. ~~A best interests attorney may only serve under the authority~~
11 ~~of a court appointment, while in some jurisdictions a privately retained attorney may function as~~
12 ~~the child's attorney without a court appointment. This Act, however, governs only court-~~
13 ~~appointed representatives for children.~~

14
15 The "court""court-appointed advisor" assists the court in determining the best interests of a
16 child and will therefore perform many of the functions formerly attributable to guardians ad litem,
17 but the Act makes clear that courtcourt-appointed advisors are not to function as attorneys.
18 Instead, a courtcourt-appointed advisor will independently investigate the child's circumstances
19 and may sometimes testify in the case about the child's best interests. See Section 14. Similarly,
20 because the role of attorney, whether child's attorney or best interests attorney, is functionally and
21 ethically inconsistent with that of a guardian ad litem, the Act does not endorse the ~~du~~hybrid
22 role of attorney/guardian ad litem employed in numerous states.

23
24 ~~As a condition of receiving federal child welfare funding, states must appoint a "guardian~~
25 ~~ad litem" in every judicial proceeding involving an abused or neglected child. See Child Abuse~~
26 ~~Prevention and Treatment Act, 42 U.S.C. § 5106a(b)(2)(A)(xiii) (2000). The federal Act does not~~
27 ~~define the role of the guardian ad litem beyond stating that the guardian, who may be an attorney~~
28 ~~or court appointed special advocate, shall "(I) obtain first-hand, a clear understanding of the~~
29 ~~situation and needs of the child; and (II) make recommendations to the court concerning the best~~
30 ~~interests of the child." Id. The "Best interests attorney" is a term of art that was introduced by the~~
31 ~~ABA in developing the Custody Standards and signifies a representative who advocates the~~
32 ~~child's interests rather than the child's expressed goals. In many respects, however, the best~~
33 ~~interests attorney by definition should satisfy CAPTA's requirement, since that attorney's role is~~
34 ~~to provide legal services to protect a child's best interests. A child's attorney may also satisfy~~
35 ~~CAPTA, depending on a state's interpretation of federal law. Even a child-directed lawyer~~
36 ~~functioning in the role of a child's attorney will ultimately facilitate the court's resolution in the~~
37 ~~child's best interests, and performs the same duties of representation that are performed by the~~
38 ~~child's attorney may, in situations justifying substituted judgment under Section 12, advocate a~~
39 ~~position the lawyer believes is in the child's interests. Also, the attorney must take remedial~~
40 ~~action if the child's objectives will subject the child to a risk of serious harm. See Section 12.~~

1 ~~Section 5 addresses the potential impact of the CAPTA requirement. See Section 11.~~

2
3 The Act applies to all court-appointed attorneys and court-appointed advisors for children
4 in abuse and neglect proceedings for the appointment of court advisors and custody proceedings.
5 In states where privately-retained counsel may represent children without a formal appointment,
6 this Act's applicability to those lawyers should be determined under local law. In any event, a
7 lawyer who is initially privately retained may thereafter seek an appointment. Once such a formal
8 appointment occurs, the Act clearly applies. It should be noted that a representative may be court-
9 appointed without receiving compensation from the court or other government sources.

10
11 Under the definitions of this Act, abuse and neglect proceedings include child protection
12 proceedings ordinarily brought in juvenile court, such as dependency actions and foster care
13 placements, as well as actions to terminate parental rights. A custody proceeding, in contrast,
14 includes private custody disputes, adoptions, private guardianships, and other proceedings in
15 which the child's legal or physical custody is at issue. This Act does not apply to proceedings
16 initiated by the state because of the child's conduct, such as proceedings brought to adjudicate the
17 child as delinquent or proceedings charging the child with status offenses.

18
19 In some circumstances, credible and serious allegations of abuse or neglect will surface in
20 a custody proceeding. If the court determines that the case should go forward as an abuse and
21 neglect proceeding (generally entailing a transfer to juvenile court), then this Act's terms
22 regarding abuse and neglect proceedings—including proceedings—including, in particular, the
23 mandatory appointment of counsel for the child—will govern. In some states a custody
24 case can be referred to juvenile court for investigative purposes. Such a referral would not
25 transform the proceeding into an abuse and neglect proceeding until unless a dependency petition
26 is filed.

27 **SECTION 3. APPLICATION RELATIONSHIP TO OTHER LAW.**

28 ~~_____ (a) This [act] does not apply to a child's privately retained attorney or other~~
29 ~~representative who has not been appointed by the court in the abuse and neglect or custody~~
30 ~~proceeding.~~

31 ~~_____ (b) This [act] does not diminish affect children's rights, standing, or party status~~
32 ~~under law other than this [act].~~

33 ~~_____ (c) Neither the child nor the child's representative, whether or not appointed by~~
34 ~~court, may waive the child's right to representation under this [act].~~

1 **Comment**

2 ~~The Act does not govern privately-retained counsel for children since in some jurisdictions~~
3 ~~a child or parent remains free to independently hire a lawyer to represent the child. While it is~~
4 ~~hoped that privately-retained counsel will adhere voluntarily to the standards in the Act, the Act~~
5 ~~by its own force applies only to court-appointed lawyers and court advisors. Nevertheless, a~~
6 ~~lawyer who is initially privately retained may thereafter seek an appointment. Once such a formal~~
7 ~~appointment occurs, the Act applies. Similarly, if a child in an abuse and neglect or custody~~
8 ~~proceeding already has a lay representative through appointment from another court, that~~
9 ~~representative is not bound by this Act until he or she is appointed for purposes of the instant~~
10 ~~proceeding. It should be noted that a representative may be court-appointed without receiving~~
11 ~~compensation from the court or other government sources.~~

12 ~~The or create party status or standing not provided under law other than this [act].~~

13 **Comment**

14 ~~This Act is not intended to ~~diminish~~affect children's rights recognized under other ~~federal~~~~
15 ~~or state laws. For example, the Indian Child Welfare Act authorizes courts to appoint counsel for~~
16 ~~Indian children in proceedings governed by the ICWA when such appointment is in the best~~
17 ~~interests of the child. See 25 U.S.C. § 1912(b) (2000). While the ICWA gives courts discretion to~~
18 ~~appoint counsel in Indian child welfare proceedings, this Act would supplement that provision by~~
19 ~~requiring appointment of counsel as a matter of state law in all abuse and neglect proceedings. At~~
20 ~~the same time, the ICWA provides jurisdictional rules and placement preferences for the foster~~
21 ~~and adoptive placement of Indian children. See 25 U.S.C. §§ 1911-1915. The federal statutory~~
22 ~~standards would necessarily govern the attorney's representation of an Indian child under the~~
23 ~~ICWA.~~

24
25 ~~Similarly, this Act does not diminish state laws that afford children standing or the right to~~
26 ~~broader participation in abuse and neglect or custody cases than provided under the Act. The Act~~
27 ~~establishes guidelines for the appointment of representatives for children, without regard to a~~
28 ~~state's position on whether the child should be recognized as a separate party to a custody~~
29 ~~proceeding. State laws regarding the standing of third parties to initiate custody actions are also~~
30 ~~not affected by this Act.~~

1 ~~—Likewise, state or federal laws. State law may impose specialized rules for particular~~
2 ~~proceedings, such as guardianships or adoptions. In many states, for example, a child of a certain~~
3 ~~age has a statutory right to veto a proposed adoption. See, e.g., Ariz. Rev. Stat. § 8-106 (2004)~~
4 ~~(consent of child twelve years of age or older required for adoption); West’s Ann. Cal. Fam. Code~~
5 ~~§ 8602 (2004) (same). Several states provide a right to counsel for children in contested adoption~~
6 ~~proceedings. See, e.g., Okla. Stat. Ann. § 7505-1.2 (2004). Where such specialized rules are in~~
7 ~~effect, they control the more general provisions of this Act.~~

8
9 Similarly, this Act does not affect state laws that afford children standing or the right to
10 broader participation in abuse and neglect or custody cases than provided under the Act. The Act
11 establishes guidelines for the appointment of representatives for children, without regard to a
12 state’s position on whether the child should be recognized as a separate party to the proceeding.
13 State laws regarding the standing of third parties to initiate abuse and neglect or custody actions
14 also are not affected by this Act. Conversely, the Act does not provide standing where it does not
15 otherwise exist under state law.

16
17
18 Text Moved Here: 8

19 State law varies on children’s procedural status in abuse and neglect and custody
20 proceedings. In several states, children are viewed as parties to abuse and neglect proceedings and
21 have the right to participate through their representatives in all stages of the proceedings. See, e.g.,
22 Minn. Stat. Ann § 260C.163(2) (child who is subject to petition for protection has right to
23 participate in all proceedings); In re Williams, 805 N.E.2d 1110 (Ohio 2004)(child is party to
24 parental rights termination action and has right to legal counsel). In a few other states, children are
25 non-parties whose rights of participation are more limited. In re R.S., 647 N.Y. Supp. 2d 361 (NY
26 Fam. Ct. 1996)(child is not party to child protective proceeding and therefore cannot be deposed
27 as party); In re Anthony, 675 N.Y. supp. 2d 759 (NY Fam. Ct. 1998)(child is not party to
28 termination of parental rights proceeding and therefore cannot seek relief from judgment). In
29 child custody disputes, children typically are not viewed as parties and are not permitted to
30 become parties through intervention. See, e.g., Auclair v. Auclair, 730 A.2d 1260 (Md. App.
31 1999); J.A.R. v. Superior Court, 877 P.2d 1323 (Ariz. App. 1994); In re Marriage of Hartley, 886
32 P.2d 665 (Col. 1994). ~~On the other hand, in a few states, however, at least one state,~~ a child who is
33 the subject of a custody dispute is viewed as an indispensable party to the proceeding. See, e.g., In
34 re J.W.F. v. Schoolcraft, 763 P.2d 1217 (Utah App. 1988). ~~The bracketed phrases in subsection~~
35 ~~(a) permit states to select At the option that best comports with the state’s views same time, even~~
36 ~~where children are not viewed as parties they often have many of the child’s rights of~~
37 ~~participation. Similarly, in those states where there is full participation by children’s attorneys in~~
38 ~~alternative forms of dispute resolution, the bracketed phrase under subsection (9) should be~~
39 ~~omitted parties as a practical matter.~~

40 End Of Moved Text

41
42 In addition, this Act may supplement rights already provided by federal law. As a
43 condition of receiving federal child welfare funding, for example, states must appoint a “guardian

ad litem” in every judicial proceeding involving an abused or neglected child. See Child Abuse Prevention and Treatment Act, 42 U.S.C. § 5106a(b)(2)(A)(xiii) (2000). The federal Act does not define the role of the guardian ad litem beyond stating that the guardian, who may be an attorney or court appointed special advocate, shall “(I) obtain first-hand, a clear understanding of the situation and needs of the child; and (II) make recommendations to the court concerning the best interests of the child.” Id. This Act goes further by requiring the appointment of either a child’s attorney or a best interests attorney for every child involved in an abuse and neglect proceeding. Similarly, the Indian Child Welfare Act authorizes courts to appoint counsel for Indian children in proceedings governed by the ICWA when such appointment is in the best interests of the child. See 25 U.S.C. § 1912(b) (2000). While the ICWA gives courts discretion to appoint counsel in Indian child welfare proceedings, this Act requires appointment of a child’s attorney or best interests attorney if an Indian child is the subject of an abuse and neglect proceeding in state court.

SECTION 4. MANDATORY APPOINTMENT OF CHILD’S ATTORNEY OR BEST INTERESTS ATTORNEY IN ABUSE AND NEGLECT PROCEEDING.

(a) ~~Subject to Section 12(e), in~~ [In] an abuse and neglect proceeding, the court shall appoint either a child’s attorney or a best interests attorney. The appointment must be made as soon as practicable to ensure adequate representation of the child and in any event before the first court hearing that substantially affects the interests of the child. ~~If the court does not designate the role of the attorney in the initial appointment, the court shall do so by order of appointment no later than the first hearing, based on information provided by the appointed attorney and any other source available to the court.~~

~~(b) In determining whether to appoint a~~

(b) The court shall appoint a [child’s attorney or a] [best interests attorney, the court shall consider] unless the child’s circumstances and the court’s needs for information and assistance in the particular proceeding make the appointment of a [best interests attorney] [child’s attorney] appropriate. The court shall consider such factors as the child’s age and developmental level, any desire for an attorney expressed by the child, whether the child has expressed objectives

1 in the proceeding, and the value of an independent advocate for the child’s best interests.

2 _____(c) The court may appoint one attorney to represent siblings if there is no conflict
3 of interest, even if the attorney serves in different capacities with respect to two or more siblings.
4 If a conflict arises, the attorney shall take any action required by [this state’s rules of professional
5 conduct].

6 (d) Neither the child nor the child’s representative, whether or not appointed by
7 the court, may waive representation of the child under this Section or Section 5.

8 LEGISLATIVE NOTE: States that do not wish to mandate the appointment of a child’s attorney
9 or best interests attorney in every abuse and neglect proceeding may revise Section 4 to add
10 “court-appointed advisor” to the appointment alternatives under subsection (a). So revised, the
11 section would require the appointment of a representative for the child in all abuse and neglect
12 proceedings but would leave the choice of representative to the discretion of the court.
13 Conforming amendments to the remainder of Section 4 and to Section 5 would be necessary.

14 **Comment**

15 This section requires the appointment of an attorney for every child who is the subject of
16 an abuse and neglect proceeding because of the fundamental importance of the interests at stake.
17 Although the nature of the attorney’s role may vary from case to case, the child’s right to legal
18 representation is a function of basic procedural justice. Under subsection (d), that right is not
19 subject to waiver by the child or anyone acting on behalf of the child.

20
21 The Act leaves the choice between a best interests attorney or a child’s attorney to
22 legislative direction as well as judicial discretion. It should be noted that a custody proceeding
23 may become an abuse and neglect proceeding because of substantial allegations of abuse or
24 neglect, as explained in the Comment to Section 2. In that event, this section’s mandatory
25 appointment of counsel for the child would apply.

26
27 ~~The nature of the~~The presumptive nature of the initial appointment – whether child’s
28 attorney or best interests attorney – ~~should reflect the court’s~~will be a policy choice for the state
29 legislature. Because of the practical difficulty of providing an individualized
30 assessmentdetermination of the role of the attorney at the outset of every abuse and neglect
31 proceeding, the bracketed categories in subsection (b) provide courts with a presumptive starting
32 point. Nevertheless, courts sometimes will possess sufficient information to determine that the
33 presumptive role is inappropriate for a particular child. In that event, the court may designate a
34 different role for the attorney in light of the child’s interests and developmental

level circumstances and the court's needs in the particular proceeding. Ordinarily, a child's attorney ~~should~~ would be appointed appropriate for an older child capable of exercising considered judgment and directing a lawyer, while a best interests attorney would be appropriate for a preverbal or very young child incapable of expressing a considered choice about issues that are relevant to the proceeding. ~~In determining whether a child is capable of considered judgment,~~ the court should focus on the child's decision-making process rather than the child's choices themselves. ~~The selection of the type of attorney, however, depends on the reasons for the appointment and the needs of the child and is not simply a function of the child's chronological age. The court should~~ court's determination should be informed by insights drawn from the abundant literature on children's psychological, cognitive, and emotional development. Section 9(c) addresses the authority of a court to change the nature of an attorney's appointment from best interests attorney to child's attorney based on new information not available at the time of the original appointment.

This section permits the appointment of a single lawyer for two or more siblings, even if that lawyer is acting as child's attorney for one sibling and best interests attorney for another. A lawyer for multiple siblings may have a better understanding of the children's family context than would a lawyer for only one sibling. Thus, the presence of a *potential* conflict of interest should not preclude the representation of multiple siblings. On the other hand, if an *actual* conflict of interest arises, common representation would be inappropriate. If the representation of one child is materially limited by the lawyer's responsibilities to another child (where, for example, one child seeks to establish parental unfitness and another opposes the production of such evidence), the attorney must take remedial steps and may be forced to withdraw from some or all representation. *See* Rule 1.7, ABA Model Rules of Professional Conduct (2002). Key concerns are whether pursuing one client's objectives will prevent the lawyer from pursuing another client's objectives, and whether confidentiality will be compromised. *See* Jennifer L. Renne, *Legal Ethics in Child Welfare Cases* 47-60 (ABA 2004).

Ideally, a child will have the same lawyer throughout the pendency of the abuse and neglect proceeding. Continuity in representation is particularly important in building trust in the child, and the lawyer's representation will be more informed if the same lawyer has been on the case from its inception. Nevertheless, a lawyer appointed to represent a child in an abuse and neglect proceeding may need to withdraw from representation due to conflicts or other reasons. If the court grants permission to withdraw, the court should appoint a new lawyer as soon as feasible to continue the representation.

It should be noted that a custody proceeding may become an abuse and neglect proceeding because of substantial allegations of abuse or neglect, as explained in the Comment to Section 2. In that event, this section's mandatory appointment of counsel for the child would apply.

SECTION 5. APPOINTMENT OF ~~COURT~~COURT-APPOINTED ADVISOR IN ABUSE AND NEGLECT PROCEEDING.

1 ~~ALTERNATIVE~~ Alternative A

2 _____(a) In an abuse and neglect proceeding:

3 (1) if the court ~~does not appoint~~ appoints a child's attorney rather than a
4 best interests attorney pursuant to Section 4, the court shall appoint a ~~court~~ court-appointed advisor
5 before the first court hearing that substantially affects the interests of the child; or

6 (2) if the court appoints a best interests attorney, the court may appoint a
7 ~~court~~ court-appointed advisor if the court determines that a ~~court~~ court-appointed advisor is
8 necessary to assist the court in determining the best interests of the child.

9 Alternative B

10 (a) In an abuse and neglect proceeding, whether the attorney appointed pursuant to
11 Section 4 is a child's attorney or a best interests attorney, the court may appoint a court-appointed
12 advisor if the court determines that a court-appointed advisor is necessary to assist the court in
13 determining the child's best interests.

14 End of Alternatives

15 (b) In determining whether a ~~court~~ court-appointed advisor is necessary under
16 subsection [(a)(2)] [(a)], the court shall consider such factors as the court's need for information
17 regarding the child's circumstances, the value of a ~~court~~ court-appointed advisor's expertise, and
18 any request by the best interests attorney for the appointment of a ~~court~~ court-appointed advisor.

19 (c) The court shall make an appointment under subsection [(a)(2)] [(a)] as soon as
20 practicable. ~~An appointment under subsection (a)(1) must be made before the first court hearing~~
21 ~~that substantially affects the interests of the child.~~

22 ~~ALTERNATIVE B~~

~~Whether the attorney appointed pursuant to Section 4 is a child's attorney or a best interests attorney, the court may appoint a court advisor if the court determines that a court advisor is necessary to assist the court in determining the child's best interests. In determining whether to make an appointment, the court shall consider such factors as the court's need for information regarding the child's circumstances, the value of a court advisor's expertise, and any request by the child's attorney or the best interests attorney for the appointment of a court advisor.~~

Comment

~~This section is consistent with requirements of current federal law regarding~~permits states to decide whether to require a court-appointed advisor under certain circumstances. Because some states may want to ensure that a best interests advocate will always be participating in the proceeding, Alternative A requires a court-appointed advisor whenever the court has not appointed a best interests lawyer for the child. Alternative B, in contrast, treats the appointment of guardians ad litem a court-appointed advisor as a matter of judicial discretion to be determined on a case-by-case basis.

~~The options within this section may also have implications for a state's compliance with federal law. As a condition of receiving federal child welfare funding, states must appoint a guardian~~"guardian ad litem" in every judicial proceeding involving an abused or neglected child. Child Abuse Prevention and Treatment Act, 42 U.S.C. § 5106a(b)(2)(A)(xiii) (2000). See Comment to Section 23. While some states view either a best interests attorney or a child's attorney may satisfy as fulfilling CAPTA's guardian ad litem requirement, this section gives other states the option of interpreting may interpret CAPTA more narrowly. For those states that read interpret CAPTA to always mandate a best interests advocate, Alternative A requires that a court advisor be appointed~~court-appointed advisor unless the child court has already appointed a best interests attorney. Thus, if a best interests attorney has not been appointed, Alternative A of this section directs the court to appoint a court advisor.~~

~~Alternative B, on the other hand, would be appropriate for those states that read view CAPTA's requirement to be as fully satisfied by the appointment of either a child's attorney or a best interests attorney.~~

~~The best interests attorney by definition should satisfy CAPTA's requirement, since that attorney's role is to provide legal services to protect a child's best interests. A child's attorney may also satisfy CAPTA, depending on a state's interpretation of federal law. Even a client-~~

1 ~~directed~~child-directed lawyer functioning in the role of a child's attorney will ultimately facilitate
2 the court's resolution in the child's best interests. Also, the child's attorney may, in situations
3 justifying substituted judgment under Section 12, advocate a position the lawyer believes is in the
4 child's interests. Moreover, the attorney must take remedial action if the child's objectives will
5 subject the child to a risk of substantial harm. See Section 12. For ~~that~~these reasons, under
6 ~~Alternative B~~the second bracketed option, the appointment of a ~~court~~court-appointed advisor is
7 discretionary when either a child's attorney or a best interests attorney has been appointed in an
8 abuse and neglect proceeding. ~~For~~In support of this more flexible interpretation of the CAPTA
9 guardian ad litem requirement, see U.S. Department of HHS Children's Bureau, *Adoption 2002:*
10 *The President's Initiative on Adoption and Permanence for Children*, Commentary to Guideline
11 15A.

14 SECTION 6. DISCRETIONARY APPOINTMENT IN CUSTODY PROCEEDING.

15 (a) ~~Subject to Section 12(c), in~~ In a custody proceeding, the court sua sponte or
16 on motion may appoint either a child's attorney or a best interests attorney. Whether or not the
17 court appoints an attorney, the court may appoint a ~~court~~court-appointed advisor. An appointment
18 may be made at any stage of the proceeding and must designate the role of the appointee.

19 (b) ~~Subject to subsection (c), the court shall make an appointment under this~~
20 ~~section if it determines that~~In determining whether an appointment is appropriate ~~in light of the~~
21 ~~nature and adequacy of the evidence to be presented by the parties, the court's need for additional~~
22 ~~information relevant to the best interests of the child, and, if so, which category of representative~~
23 should be appointed, the court shall consider the child's developmental level; any desire for a
24 representative expressed by the child and whether the child has expressed objectives in the
25 proceeding; the value of an independent advocate for the child's best interests; the need to
26 minimize harm to the child from the processes of family separation and litigation; ~~the cost~~
27 ~~to~~nature and adequacy of the evidence presented by the parties and their ability to pay; ~~the court's~~
28 need for additional information; and the financial burden on the parties and the cost of available

alternatives for resolving the issues in the proceeding.

~~(c) In determining whether~~ The court may consider any other factor showing a particularized need for an appointment is appropriate, the court shall consider:

~~(1) any views or concerns expressed by the child, including any request by the child for appointment of a representative;~~

~~(2) the likelihood that the child will be called as a witness or be examined by the court in chambers;~~

~~(3) any need for extraordinary remedies, such as supervised visitation;~~

~~(4, including:~~

(1) ~~the presence of a high level of acrimony between the parties or a party and the child;~~

~~(5) the likelihood of relocation that could substantially reduce the child's time with a parent or sibling;~~

~~(6) any past or present substance abuse by the child, a party, or a household member;~~

~~(7) any dispute as to paternity;~~

(8) ~~any interference, or threatened interference, with custody or parenting time, including abduction of the child or risk of abduction;~~

~~(9) any past or present domestic violence;~~

~~(10) any past or present physical, sexual, or emotional abuse of the child or neglect of the child;~~

~~(11) any special physical, educational, or mental health needs of the child~~

1 ~~that require investigation or advocacy;~~

2 ~~(123) any inappropriate adult influence on or manipulation of the child;~~

3 ~~[and]~~

4 ~~[(13) a(4) any need for extraordinary remedies, such as supervised~~
5 ~~visitation;~~

6 ~~(5) the likelihood of relocation that could substantially reduce the child's~~
7 ~~time with a parent or sibling;~~

8 ~~(6) the likelihood that the child will be called as a witness or be examined~~
9 ~~by the court in chambers;~~

10 ~~(7) any past or present substance abuse by the child, a party, or a household~~
11 ~~member;~~

12 ~~(8) any special physical, educational, or mental health needs of the child~~
13 ~~that require investigation or advocacy;~~

14 ~~(9) any dispute as to paternity;~~

15 ~~(10) any past or present domestic violence involving the child, a party, or a~~
16 ~~household member; and~~

17 ~~(11) credible allegations of past or present abuse or neglect of the child [or~~
18 ~~referral of the proceeding to the juvenile court for investigation of allegations of abuse or neglect;~~
19 ~~and]~~

20 ~~(14) any other factor relevant to the child's best interests.~~

21 ~~(d) If the court decides to make an appointment under this section, the court shall~~
22 ~~consider the child's circumstances and the court's needs in the particular proceeding in~~

1 ~~determining whether to appoint a child's attorney, best interests attorney, or court advisor. The~~
2 ~~court shall consider such factors as the child's developmental level, the value of an independent~~
3 ~~advocate for the child's best interests, any desire for an attorney expressed by the child, the child's~~
4 ~~special needs, the legal complexity of any disputed issue affecting the child, and the benefit to the~~
5 ~~court of an appointee's special expertise.].~~

6 **Comment**

7 This section leaves the appointment of an attorney or ~~court~~court-appointed advisor for
8 children in custody cases to judicial discretion, but courts should recognize the significant benefit
9 in having a representative for a child in certain situations. If a court anticipates that the
10 evidentiary presentation by the parties will be incomplete, distorted, or otherwise inadequate, the
11 appointment of a representative for the child can be particularly helpful. ~~The factors listed in~~
12 ~~subsection (c) may raise special concerns warranting the appointment of a representative for the~~
13 ~~child and should guide the court's discretion. In some circumstances, such as where there are~~
14 ~~credible allegations of domestic violence or child abuse, the appointment of a separate~~
15 ~~representative for the child may be essential for the court's determination of the evidentiary issues~~
16 ~~in the case. Similarly, in custody proceedings where parentage is at issue, the appointment of~~
17 ~~counsel for the child may be extremely helpful to the court.~~

18
19 ———Moreover, one of the key values of a child's representative is to advocate for evidentiary
20 procedures and methods of dispute resolution that are the least harmful to the child. A child's
21 representative, for example, can assist the court in deciding whether to interview a child in
22 chambers or to involve the child as a participant in mediation between the parents. The goal of
23 child representation is not only to help the court arrive at an outcome that best serves the child's
24 interests but also to protect children from collateral damage from litigation:

25
26 ———At the same time, courts must recognize that the appointment of a lawyer or court advisor
27 ~~for the child in a custody case may be unnecessary and might introduce a potentially intrusive and~~
28 ~~expensive advocate. The court should take into account the cost of an appointment and the~~
29 ~~parties' ability to pay, since public funds for children's representatives in custody proceedings are~~
30 ~~rarely available. Section 20 provides guidelines for assessing fees against the parties for~~
31 ~~children's representatives in custody proceedings.~~

32
33 ———In deciding

34
35 The first paragraph of subsection (b) identifies general considerations that courts should
36 consider in determining whether to appoint a child's attorney, best interests attorney, or court
37 advisor, the court should consider the child's interestsrepresentative and, if a representative is

1 necessary, to decide on the category of representative. The child's circumstances, including his or
2 her developmental level, and the court's needs in the custody determination should inform the
3 court's decision. The numbered items under subsection (b) are factors that may raise special
4 concerns warranting the appointment of a representative for the child in a particular proceeding.
5 Subsection (c) recognizes that the and should guide the court's discretion. In some circumstances,
6 such as where there are credible allegations of domestic violence, child abuse, or substance abuse,
7 the appointment of a separate representative for the child may be essential for the court's
8 determination of the evidentiary issues in the case. Similarly, in custody proceedings where
9 parentage is at issue or where extraordinary remedies are in dispute, the appointment of counsel
10 for the child may be extremely helpful to the court.

11
12 The decision to appoint a particular category of representative will depend in large part on
13 the child's developmental level and the court's sense of how the child's interests can best be
14 protected. In some cases, a mental health professional as court-appointed advisor may be
15 particularly helpful, while in other cases involving older children with defined views, a child's
16 attorney may be appropriate.

17 **SECTION 7. CONTINUED REPRESENTATION.**

18 (a) In an abuse and neglect proceeding, unless otherwise provided by court order,
19 an appointment of a child's attorney, On the other hand, a preverbal child in the middle of a bitter
20 and protracted custody dispute may need representation through a best interests attorney, or court
21 advisor continues in effect until the proceeding is concluded.

22 (b) In a,
23

24 At the same time, courts must recognize that the appointment of a lawyer or court-
25 appointed advisor for the child in a custody case may be unnecessary and might introduce a
26 potentially intrusive and expensive advocate. This section directs courts to consider the financial
27 burden on parties and the availability of alternative methods of dispute resolution. Section 20
28 provides guidelines for assessing fees against the parties for children's representatives in custody
29 proceeding, an proceedings. Nevertheless, a court's decision whether or not to appoint a
30 representative for a child should not depend solely on the parties' ability to pay. Many family
31 courts have access to low cost or pro bono programs for children's representatives. Ideally, state
32 court systems will set aside funds for the appointment of a child's attorney, best interests attorney,
33 or court advisor continues in effect only for the term provided in the order of appointment or any
34 subsequent order.
35 children's

36 Text Was Moved From Here: 1

37
38 Underrepresentatives in this important realm.
39
40
41

42 Text Moved Here: 4

SECTION 97. QUALIFICATIONS OF CHILD’S ATTORNEY OR BEST

INTERESTS ATTORNEY. The court may appoint as a child’s attorney or best interests attorney only an individual who is qualified through training or experience in the type of proceeding in which the appointment is made, according to standards established by [federal law,] law of this state other than this [act][,] or judicial or other rule.

Comment

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~~section, the appointment~~

All court-appointed attorneys for children, whether in the role of a representative in a child's attorney or best interests attorney, must have adequate training or experience to discharge their duties with competence. States are encouraged to adopt state-wide standards of practice for all children's attorneys through court rule or rule promulgated by the state bar or other regulatory agency. Such standards of practice should include a description of required training in applicable statutory codes, case law and court procedures, including state law relevant to divorce, child custody, child support, adoption, paternity, child welfare, and other regulations of family life. Lawyers representing children should also be familiar with federal law pertaining to family regulation, such as the Child Abuse Prevention and Treatment Act, the Adoption and Safe Families Act, the Family Educational Rights and Privacy Act, and the Indian Child Welfare Act. In addition, children's lawyers should have knowledge of child development and child psychology, the dynamics of child abuse and neglect proceeding presumptively lasts until the proceeding is concluded. Although the court can provide otherwise, the appointment ordinarily will continue until the child is no longer under state protection. For example, if a child's dependency is dismissed and the child's case is closed, the proceeding can be deemed concluded. On the other hand, a child in long-term foster care may not have an active case file but the proceeding would not be "concluded" within the meaning of this section. Indeed, in the latter situation, the impact of domestic violence, the impact of separation and long-term consequences to a child of being in temporary care, and the central role of culture and ethnicity in family relations. They should be trained in communicating with children and should understand the impact of culture on styles of communication. Moreover, children's attorneys and best interests attorneys should become familiar with the ABA Abuse and Neglect Standards, the suggested amendments to those standards adopted by the National Association of Counsel for Children, and the ABA Custody Standards. Finally, the training of children's lawyers should be conducted on an ongoing basis. Mandatory periodic training requirements exist in many states to ensure that children's counsel continue to meet standards of competence over time.

1 Before making an appointment, courts should be satisfied that the attorney possesses the
2 relevant qualifications established by law or rule. Under Section 9, courts may designate child
3 advocacy organizations or governmental programs in the initial order of appointment when those
4 entities have ensured that their attorney members have appropriate training and experience.
5 Although such programs may be designated in the initial order of appointment on a temporary
6 basis, the program should identify the particular individual who will be the child's representative
7 can play an essential role in ensuring that periodic assessments of the child's placement and
8 services occur as required by law.

9
10 ~~The right of a child's attorney, best interests attorney, or court advisor to participate in any~~
11 ~~appeal or to bring an appeal on behalf of the child is determined by state law. State law varies on~~
12 ~~the question of standing to file an appeal or participate on appeal, just as it varies on whether~~
13 ~~children have formal party status in abuse and neglect and custody proceedings. In states where~~
14 ~~the child through a representative can participate fully on appeal, the representation of the child~~
15 ~~extends to any appellate proceeding. To the extent feasible, courts should ensure continuity of~~
16 ~~counsel on appeal. Theas soon as feasible.~~

17
18 In making an appointment under this Act, the court should ensure that the attorney's
19 caseload is not so burdensome as to undermine his or her ability to competently serve as the
20 child's representative should take actions that are consistent with the representative's role, taking
21 into consideration the potential impact on the child, the child's expressed objectives, the
22 likelihood of success on appeal, and the available resources for prosecuting the appeal.

23 24 **SECTION 8. ORDER OF APPOINTMENT.**

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26 ~~Text Was Moved From Here: 2~~

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28 ~~Text Was Moved From Here: 3~~

29 and to fulfill the duties identified in Sections 11-13. See ABA Abuse and Neglect Standards L-1
30 (providing duty of trial courts to control size of court-appointed caseloads). For effective
31 representation, a lawyer must be able to engage in certain essential tasks, including meeting with
32 his or her client, interviewing relevant witnesses, conducting investigation and discovery, and
33 reviewing records pertaining to the child. The National Association of Counsel for Children has
34 recommended that a child's lawyer represent no more than 100 clients at a time. See Testimony
35 of Marvin Ventrell, NACC Executive Director, *Kenny A. ex rel. Winn v. Perdue*, 356 F. Supp. 2d
36 1353 (N.D. Ga. 2005).

37 **SECTION 8. QUALIFICATIONS OF COURT-APPOINTED ADVISOR .**

38 (a) The court may appoint as court-appointed advisor for a child only an individual
39 who is qualified through training or experience in the type of proceeding in which the

1 appointment is made, according to standards established by [federal law,] law of this state other
2 than this [act][,] or judicial or other rule.

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5 (b) The court may appoint an attorney to serve as ~~court~~court-appointed advisor for
6 a child if the attorney meets the qualifications in subsection (a) and is specifically appointed to
7 serve solely in the role of ~~court~~court-appointed advisor. An attorney appointed as ~~court~~court-
8 appointed advisor may take only those actions that may be taken by a ~~court~~court-appointed
9 advisor who is not an attorney.

10 (c) The appointment of a ~~court~~court-appointed advisor does not create a
11 professional relationship between the advisor and the child unless such a relationship is expressly
12 established in the order of appointment.

13 **Comment**

14 End Of Moved Text

15 In appointing a court-appointed advisor for a child, the court must ensure that the
16 individual is qualified based on training, ability, and experience in child advocacy. As with the
17 training for attorneys for children, the court-appointed advisor training should be required on an
18 ongoing basis. Court-appointed advisors should have knowledge of child development and child
19 psychology, the dynamics of child abuse and neglect, the impact of domestic violence, the impact
20 of separation and the long-term consequences to a child of being in temporary care, and treatment
21 and rehabilitation systems. They should be trained in communication with children and should
22 understand the role of cultural identity in personality formation, family life, and social interaction.
23 Court-appointed advisors should also be familiar with applicable state and federal law.

24
25 As a practical matter, many courts rely on private or governmental programs for lists of
26 volunteer advocates, such as the Court Appointed Special Advocates (CASA), or a specific
27 volunteer list maintained by the court pursuant to other provisions of state law. Although such
28 programs may be designated in the initial order of appointment on a temporary basis pursuant to
29 Section 9, the program should identify the particular individual who will be the child's
30 representative as soon as feasible.

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This section makes clear that if the court appoints an attorney to function as ~~court~~court-
appointed advisor, that person is not to function as an attorney in the proceeding. CAPTA
expressly provides that the guardian ad litem may be an attorney or a court-appointed special
advocate, or both. *See* Comment to Section 5. Although federal law may permit an attorney
guardian ad litem to serve as an attorney, under this Act an attorney appointed as ~~court~~court-
appointed advisor is not appointed to serve as an attorney and should function only as a non-
lawyer.

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Social workers, counselors, and therapists are often appointed as guardians ad litem for
children because of their valuable expertise in mental health, child development, and family
dynamics. This section makes clear that the appointment of a ~~court~~court-appointed advisor does
not in itself create a therapist-patient relationship or other professional relationship between the
~~court~~court-appointed advisor and the child. Thus, unless the order of appointment expressly states
otherwise, a child's communications with a ~~court~~court-appointed advisor appointed under this Act
are not privileged.

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SECTION 9. ORDER OF APPOINTMENT.

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(a) ~~A~~Subject to subsection (b), an order of appointment designating must be in a
record, identify the role of individual who will act as the appointee child's representative under
Section 4, 5, or 6 ~~must be recorded,~~ and clearly set forth the terms of the appointment, including
the ~~reasons~~grounds for and duration of the appointment, rights of access as provided under
Section 15, and applicable terms of compensation.

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(b) The court may identify in the order of appointment a private organization or

governmental program that will provide the representative for the child. The organization or program shall designate an individual who will act as the child's representative and submit to the court the name of the individual as soon as feasible, at which time the court shall amend the order of appointment to identify the designated individual as the child's representative.

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(b~~c~~) If appropriate in light of changed circumstances or new information not available at the time of the original appointment, an attorney appointed as a best interests attorney may be reappointed as a child's attorney by a new order of appointment that complies with subsection (a). In deciding whether to make a reappointment, the court shall consider such factors as the child's developmental level, any desire for an attorney expressed by the child, any objectives in the proceedings expressed by the child, and the value of an independent advocate for the child's best interests.

Comment

End Of Moved Text

Orders of appointment for children's representatives have often failed to clearly communicate the expectations for the representative. Lack of clarity in a representative's role can lead to ineffective representation. Under this section, the order of appointment ~~should~~must be in writing and ~~should~~ identify the role of the appointed representative in plain language understandable to non-lawyers. The order should explain the reasons for the appointment and the ~~taskscope of to be performed as precisely as possible~~the representative's responsibilities, and it ~~should~~must state how long the appointment will last. Payment terms should also be expressly set out in the order. Clarity in the order will help all parties understand the role and authority of the appointed representative. Moreover, the court will be better equipped to exercise effective oversight if the appointed representative's powers and duties are clearly described in the order. For a Model Appointment Order, *see* Appendix A, ABA Standards of Practice for Lawyers Representing Children in Custody Cases.

This section permits a court to designate a private organization or governmental program

1 in making an appointment under the Act, since it may not always be possible for a court to include
2 the name of the representative at the outset of an abuse and neglect proceeding. If this occurs, the
3 designated organization or program must quickly identify the individual who will be taking on the
4 representation.

5
6 A lawyer may not serve both as a child's attorney and a best interests attorney for the same
7 child at the same time. Such a blurring of roles would give rise to the very problems that this Act
8 is designed to avoid. On the other hand, a lawyer's role may change over time. This section
9 recognizes that in some situations, an attorney initially appointed as a best interests attorney may
10 be more appropriately designated as a child's attorney if the child over time has developed the
11 capacity and desire to direct counsel. In that event, a lawyer should seek a reappointment in a new
12 order of appointment from the court. Significantly, this section requires court action and does not
13 permit a lawyer to unilaterally redesignate his or her role.

14
15 It should be noted that this section does not permit a child's attorney to be reappointed as a
16 best interests attorney. In light of ethical restrictions on a child's attorney under Section 12 and
17 the contrasting ability of a best interests attorney to use a child's confidential communications
18 under ~~s~~Section 13, a conversion of a child's attorney into a best interests attorney might
19 compromise the child's confidences.

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21 ~~Text Was Moved From Here: 4~~

22 SECTION 10. DURATION OF APPOINTMENT.

23 ~~All~~ (a) In an abuse and neglect proceeding, unless otherwise provided by a court order,
24 an appointment of a child's attorney, best interests attorney, or court-appointed advisor continues
25 in effect until the proceeding is concluded.

26 (b) In a custody proceeding, an appointment of a child's attorney, best interests
27 attorney, or court-appointed advisor continues in effect only for the term provided in the order of
28 appointment or any subsequent order.

29 [(c) The appointment of a child's attorney, best interests attorney, or court-
30 appointed advisor continues through any appeal that may be filed in the proceeding on behalf of
31 the child or other party.]

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Comment

It is important to have continuity in representation, both in terms of practical impact and in terms of the child's emotional perspective. A lawyer or ~~court~~court-appointed advisor who has been representing a child from the beginning of an abuse and neglect or custody proceeding ordinarily will have a fuller understanding of the issues in the case than will a representative who is appointed midstream. Moreover, a child's sense of trust and confidence in his or her representative will be enhanced if that representative is the same person over time. Of course, a court remains free at any point to terminate the appointment of a representative if the representative's performance is inadequate.

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~~court-appointed attorneys for children, whether in the role~~

~~Under this section, the appointment of child's attorney or best interests attorney, must have adequate training or experience to discharge their duties with competence. States are encouraged to adopt state-wide standards of practice for all children's attorneys through court rule or rule promulgated by the state bar regulatory agency or otherwise. Such standards of practice should include a description of required training a representative in applicable statutory codes, case law and court procedures, the dynamics of child abuse and neglect, domestic violence, child development and child psychology, treatment issues, communication with children, cultural awareness, and proceeding presumptively lasts until the impact of separation and long-term consequences to a child of being in temporary care. In addition, mandatory periodic training requirements exist in many states to ensure that children's counsel continue to meet standards of competence on an ongoing basis.~~

~~Before making an proceeding is concluded. Although the court can provide otherwise, the appointment, courts should be satisfied that ordinarily will continue until the attorney possesses the relevant qualifications established by law or rule. Courts may rely on agencies or child advocacy organizations for lists of available attorneys is no longer under state protection. For example, if a child's dependency proceeding is dismissed and the child's case is closed, the proceeding can be deemed concluded. On the other hand, a child in long-term foster care may not have an active case file but the proceeding would not be "concluded" with appropriate training and experience, but in the meaning of this section contemplates that. Indeed, in each case a particular lawyer will be appointed by name for each child. Children's attorneys and best interests attorneys should become familiar with the ABA Abuse and Neglect Standards, the suggested amendments to those standards adopted by the National Association of Counsel for Children latter situation, and the ABA Custody Standards. Also, in making an appointment under this Act, the court should ensure that the attorney's caseload is not so burdensome as to undermine his or her ability to competently serve as the child's representative and to fulfill the duties identified in Sections 11-13. See ABA Abuse and Neglect Standards L-1 (providing duty of trial courts to~~

control size of court-appointed caseloads). For effective representation, a lawyer must be able to engage in certain essential tasks, including meeting with his or her client, interviewing relevant witnesses, conducting investigation and discovery, and reviewing records pertaining to the child. The National Association of Counsel for Children has recommended that a child's lawyer represent no more than 100 clients at a time. See Testimony of Marvin Ventrell, NACC Executive Director, *Kenny A. ex rel. Winn v. Perdue*, 356 F. Supp. 2d 1353 (N.D. Ga. 2005).

SECTION 10. QUALIFICATIONS OF COURT ADVISOR.

(a) The court may appoint as court advisor for a child only a qualified individual or a non-profit or governmental organization of qualified individuals. To be qualified, an individual must have received training or have experience in the type of proceeding in which the appointment is made, according to standards established by [federal law,] law of this state other than this [act][,] or judicial or other rule.

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can play an essential role in ensuring that periodic assessments of the child's placement and services occur as required by law.

In appointingAn appointment in a court advisor custody case continues for a child, the term provided in the court may appoint an individual as court advisor based on that individual's training, ability, and experience in child advocacy. Alternatively, the court may identify a nonprofit organization or governmental program consisting of volunteer advocates, such as the Court Appointed Special Advocates (CASA), or a specific volunteer advocate from a list maintained by the court pursuant to other provisions of state law.

order of appointment

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As with, since the training for attorneys for children child's need for representation in that context will often be short-term and issue-specific. Nevertheless, subsequent reappointment of the same representative for a child may be appropriate where related custody proceedings arise in the future, such as a relocation dispute arising several years after an initial custody decree.

The right of a child's attorney, best interests attorney, the or court advisor training should be required on an ongoing basis. It should include instruction on the applicable state and federal law, the dynamics of child-appointed advisor to participate in any appeal or to bring an appeal on behalf of the child is determined by state law. State law varies on the question of standing to file an appeal or participate on appeal, just as it varies on whether children have formal party status in abuse and neglect, domestic violence, child development, treatment issues, communication with children, cultural awareness, the impact of separation, and the long-term consequences to a child of being in temporary care.

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1 _____
2 ~~LEGISLATIVE NOTE TO SECTIONS 11, 12, AND 13: In those~~ and custody proceedings.
3 ~~See, e.g., Ihinger v. Ihinger, 824 A.2d 601 (Vt. 2003)(children were not parties to parent's divorce~~
4 ~~and custody dispute and therefore lacked standing to appeal). In states where the duties of~~
5 ~~attorneys can only be prescribed by rules of court and not by legislation, the duties listed in~~
6 ~~Sections 11, 12, and 13 should be adopted by appropriate court rule.]~~

7
8 child through a representative can participate fully on appeal, the representation of the child
9 extends to any appellate proceeding. To the extent feasible, courts should ensure continuity of
10 counsel on appeal. The child's representative should take actions that are consistent with the
11 representative's role in deciding whether to file an appeal on behalf of the child or to participate in
12 an appeal brought by other parties.

13 **SECTION 11. DUTIES OF CHILD'S ATTORNEY AND BEST INTERESTS**
14 **ATTORNEY.**

15 (a) A child's attorney or best interests attorney shall participate in the conduct of
16 the litigation ~~[to the samefull extent as an attorney for any party][to the extent permitted under the~~
17 ~~law of this state other than this act].~~

18 ~~_____ (b) Within a reasonable time after appointment,~~necessary to represent the child.

19 (b) The duties of a child's attorney or best interests attorney shall include:

20 (1) ~~meet~~meeting with the child and ~~ascertain~~ascertaining, in a manner
21 appropriate to the child's developmental level, the child's needs, circumstances, and views;

22 (2) ~~meet and consult~~consulting with any ~~court advisor appointed for the~~
23 ~~child~~court-appointed advisor for the child and arranging for the court-appointed advisor to meet
24 with the child in the attorney's presence or, if the attorney agrees, outside the attorney's presence;

25 (3) ~~investigate~~investigating the facts relevant to the proceeding to the
26 extent the attorney considers appropriate, including interviewing persons with significant
27 knowledge of the child's history and condition and reviewing copies of relevant records;

(4) ~~obtain and review copies of relevant records relating to the child to the extent the attorney considers appropriate;~~

~~(5) determine, in a manner appropriate to the child's developmental level, the child's expressed objectives~~providing advice and counsel to the child;

(5) informing the child of the status of the proceeding and the opportunity to participate and, if appropriate, facilitating the child's participation in the proceeding;

(6) ~~present the child's~~reviewing and accepting or declining to accept any proposed stipulation for an order affecting the child and explaining to the court the basis for any opposition.

(7) presenting any expressed objectives of the child in the proceeding to the court, if the child so desires, by a method that is appropriate in light of the purpose of the proceeding and the impact on the child;

~~(7) inform the child of the status of the proceeding and the opportunity to participate and, if appropriate, facilitate the child's participation in the proceeding;~~

(8) ~~take~~taking any action that the attorney considers appropriate to expedite the proceedings and the resolution of contested issues; and

(9) when the attorney considers appropriate, ~~encourage~~encouraging settlement and the use of alternative forms of dispute resolution and ~~participate~~participating in such proceedings [to the extent permitted under the law of this state].]

LEGISLATIVE NOTE TO SECTIONS 11: In states where the duties of attorneys can be prescribed only by rule of court or administrative guideline and not by legislative act, the duties listed in Section 11 should be adopted by the appropriate measure.

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Comment

The general duties of an attorney, whether serving as the child's attorney or as best interests attorney, include developmentally appropriate communication with the child and interviews of all parties and persons likely to have significant knowledge of the child's circumstances. The attorney should investigate the case fully while still complying with ethical restrictions on contact with represented parties, and conversely the attorney should ensure that other parties respect the ethical restrictions arising from the fact that the child is represented in the proceeding. The attorney is in a pivotal position in negotiations and should attempt to resolve the case in the least adversarial manner possible. Both the child's attorney and the best interests attorney have the duty to advise and counsel the child and review proposed settlements on behalf of the child. Similarly, lawyers should be cognizant of children's sense of time and should expedite the proceedings to achieve a prompt resolution whenever feasible. For a detailed enumeration of the pretrial and trial responsibilities for children's counsel, attorneys should refer to Standards III (F) and (G) of the ABA Custody Standards.

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_____ In addition, courts must ensure that children and their attorneys receive notice and the opportunity to participate in all judicial proceedings affecting the child's welfare. The attorney, whether child's attorney or best interests attorney, should participate actively in all hearings and conferences on issues within the scope of the appointment. Moreover, the child's attorney and best interests attorney should, when appropriate, inform the child of hearings, settlement conferences, and other proceedings and enable the child to attend ~~when appropriate~~. The emotional and psychological value to a child of participating in a proceeding affecting his or her welfare may be of profound significance. In the abuse and neglect context, a recent study concluded that "[c]hildren, parents, and caregivers all benefit when they have the opportunity to actively participate in court proceedings, as does the quality of decisions when judges can see and hear from key parties." The Pew Commission on Children in Foster Care, *Fostering the Future: Safety, Permanence and Well-Being for Children in Foster Care* 42 (2004), available at www.pewfostercare.org. On the other hand, a child might receive little therapeutic benefit from observing an acrimonious custody dispute. Thus, this section recognizes the potential value of participation by the child and places a corresponding duty on both the child's attorney and best interests attorney in that regard.

A child's legal counsel, whether a child's attorney or best interests attorney, may become aware of needs of the child that go beyond the particular proceeding. In abuse and neglect proceedings in particular, a child may be eligible for specialized educational, medical, or mental health services under federal or state programs. To the extent that a lawyer learns of such needs, the lawyer should request permission from the court to pursue issues on behalf of the child, administratively or judicially, even if those issues do not specifically arise from the court appointment. See Standard D-12, ABA Abuse and Neglect Standards.

1

2 **SECTION 12. DUTIES UNIQUE TO CHILD’S ATTORNEY.**

3 [(a)] A child’s attorney owes to the child the duties imposed by the law of this
4 state in an attorney-client relationship.

5 [(b)] A child’s attorney shall:

6 ~~_____ (1) explain the nature of the attorney-client relationship to the child,~~
7 including the requirements of confidentiality;

8 ~~_____ (2) provide advice and counsel to the child;~~

9 ~~_____ (3) keep the child informed of the nature and status of the proceeding; and~~

10 ~~_____ (4) review and accept or decline to accept any proposed stipulation for an~~
11 ~~order affecting the child and explain to the court the basis for any opposition.~~

12 (c) Subject to subsections (d) and (e), once the child has formed an attorney-client
13 relationship with a child’s attorney, the attorney shall advocate any objectives of representation
14 expressed by the child unless they are prohibited by law or without factual foundation.

15 (d) If a child’s attorney determines that the child ~~[lacks the capacity to understand~~
16 ~~the nature of an attorney-client relationship or]~~ lacks the capacity or refuses to direct the attorney
17 with respect to a particular issue, the attorney shall:

18 (1) present to the court a position that the attorney determines will serve
19 the child’s best interests if the position is not inconsistent with the child’s expressed objectives;

20 (2) take no position as to the issue in question; or

21 (3) request appointment of a ~~court~~ court-appointed advisor ~~[or best interests~~
22 ~~attorney]~~.

(e) ~~If a child's attorney determines that, despite appropriate legal counseling, the child continues to express~~ objectives of representation that the child's attorney determines would ~~put~~expose the child ~~at~~to an unacceptable risk of ~~reasonably certain and~~ substantial harm, the attorney shall:

_____ (1) ~~if neither~~ request the appointment of a court-appointed advisor if a court-appointed advisor has not been appointed, or withdraw from representation and request the appointment of a best interests attorney nor a court advisor has been appointed, request appointment of [a. The child's attorney shall not disclose the reasons for requesting a court-appointed advisor or best interests attorney or] a court advisor without disclosing the reason for the request, unless disclosure is except as permitted by [this state's rules of professional conduct]; and

_____ (2) ~~continue to advocate the child's expressed objectives or request to withdraw from the representation.~~

LEGISLATIVE NOTE TO SECTION 12: In states where the duties of attorneys can be prescribed only by rule of court or administrative guideline and not by legislative act, the duties listed in the bracketed provisions should be adopted by the appropriate measure. In states that enact only subsection (a), the text of subsection (a) should immediately follow the heading of the section.

Comment

The child's attorney is in a traditional lawyer/client relationship with the child and, as such, is in a unique position to ensure that the child has a legal voice in the proceeding. The child's attorney should explain the meaning and consequences of the child's choices in terms the client can understand. As in other lawyer/client relationships, the lawyer may express his or her assessment of the case and advise the child of the best goals to pursue. On the other hand, the lawyer must remain aware that the child may be more vulnerable to manipulation than an adult client. The lawyer has a duty not to overbear the will of the client. As a client-directed lawyer, the lawyer may not advocate a position contrary to the child's expressed position except as permitted

1 by applicable ethical standards.

2
3 Consistent with ABA Model Rule 1.14, the child's attorney should determine whether the
4 child has sufficient maturity to understand and form an attorney-client relationship and whether
5 the child is capable of making reasoned judgments and engaging in meaningful communication.
6 A determination of incapacity may be incremental and issue-specific, thus enabling the child's
7 attorney to continue to function as a client-directed lawyer as to major questions in the
8 proceeding. When a child does lack capacity to formulate objectives of representation as to a
9 particular matter, this section permits the child's attorney to advocate the best interests of the child
10 as to that matter. In so doing, however, the child's attorney may not take a position that is
11 contrary to an expressed objective of the child in the proceeding. For cases of such incremental
12 lack of capacity, the child's attorney may also simply take no position on the matter in question.
13 Finally, the child's attorney may request the appointment of a court-appointed advisor or,
14 ~~where permitted, a best interests attorney. Some states may wish to prohibit the appointment of a~~
15 ~~best interests attorney, even on a temporary basis, when the child already has a child's attorney. If~~
16 ~~so, the bracketed phrase in subsections (d)(3) should be excluded.~~

17
18 This section reflects the approach of the ABA Abuse and Neglect Standards and the ABA
19 Custody Standards as to the dilemma that can arise when the child's expressed goals in the
20 proceeding may place the child at risk of harm. These guidelines are also consistent with
21 prevailing ethical standards. See Rules 1.14 and 1.6, ABA Model Rules of Professional Conduct
22 (2002). A child's attorney may not refuse to advocate the child's wishes simply because the
23 attorney disagrees with the child's view or believes the child's objectives will not further the
24 child's best interests. On the other hand, the child's attorney is not bound by the child's expressed
25 wishes if pursuing those wishes would put the child at unacceptable risk of substantial physical,
26 emotional, psychological or other harm and is not merely contrary to the lawyer's opinion of the
27 child's interests. ~~The requirement that the risk of harm be "reasonably certain" is intended to~~
28 ~~distinguish situations where the risk is remote and speculative.~~ In most cases, the ethical conflict
29 involved in asserting a position that would seriously endanger the child can be resolved through
30 the lawyer's counseling function. If it cannot be resolved, this section ~~permits~~directs the child's
31 attorney to either request the appointment of a court advisor or, ~~where permitted, a best interests~~
32 ~~attorney. Similar to the bracketed phrase in subsection (d)(3), subsection (e)(1) includes a~~
33 ~~bracketed phrase for~~court-appointed advisor or to withdraw and request the appointment of a best
34 interests attorney. ~~In any event, a~~

35
36 A child's attorney should not reveal the reason for the request unless such disclosure is
37 necessary to prevent harm to the child and is requesting a court-appointed advisor or withdrawing
38 except as permitted by the state's ethics rules on confidentiality. These guidelines for the Under
39 Model Rule 1.14, lawyers are impliedly authorized to reveal information about a client with
40 diminished capacity when taking protective action on behalf of the client, but only to the extent
41 reasonably necessary to protect the client's interests. Ethical rules also typically permit attorneys
42 to disclose confidential information where necessary to prevent reasonably certain death or bodily
43 harm. See Rule 1.6(b). Thus, if information about the risk of harm is not otherwise available, a

1 child's attorney are consistent with prevailing ethical standards. ~~See Rules 1.14 and 1.6(a), ABA~~
2 ~~Model Rules.~~

3
4 ~~Ordinarily, a court would not also appoint a~~ may reveal the reasons for requesting a court-
5 appointed advisor or best interests attorney for a child who already has a child's attorney.
6 Typically, a court advisor in order to protect the child from harm.

7
8 Often a court-appointed advisor can satisfactorily assist the court in determining the
9 child's best interests through appropriate investigation and reports can enable the court to
10 determine the child's best interests. Nevertheless, in exceptional cases involving a competent
11 child who persists in taking a position that poses a risk of serious harm, a court might conclude
12 that a best interests attorney should be appointed to ensure a full presentation of the facts to the
13 court. Alternatively, a court might submission of reports. In unusual cases, however, a court may
14 need to appoint a court court-appointed advisor as well as a lawyer to represent the court court-
15 appointed advisor into ensure a full presentation of the proceeding evidence.

16
17 Even where the child's expressed objectives may place the child at risk of substantial
18 harm, the child has a right to have his or her views made known to the court. Under ordinary
19 ethical standards and court rules, however, a lawyer may not advocate positions that are not well
20 grounded in fact and warranted by existing law or a nonfrivolous argument for modification of
21 existing law. See ABA Model Rule 3.1; Rule 11, Fed. R. Civ. Pro. Thus, the child's attorney
22 may not advocate the child's wishes if the child's position is prohibited by law or lacks any
23 factual foundation. ~~In extreme and rare situations w~~ Where the child persists in wanting the
24 attorney to advocate a position unsupportable under the law, the attorney may seek to withdraw
25 from the representation.

26
27 If a court grants permission to withdraw from representation in an abuse and neglect
28 proceeding, the court must ensure that the child continues to have legal representation in
29 compliance with Section 4. ~~If the child does not already have a best interests attorney, the court~~
30 ~~should appoint a lawyer for the child as soon as feasible after withdrawal. The~~ In general, the
31 court has discretion to appoint either a best interests attorney or child's attorney, and the court
32 should decide on the nature of the appointment in light of the child's wishes, the court's needs, the
33 circumstances of the prior attorney's withdrawal, and other factors in the case. If, for example, a
34 child's attorney has withdrawn under the circumstances described in the preceding paragraph, the
35 court presumably would appoint a best interests attorney. A request from an older child for a
36 child's attorney should be given special consideration by the court, since the child's voice may be
37 effectively silenced without such an appointment. In a custody proceeding, on the other hand, the
38 appointment of a lawyer is always discretionary. In the event of withdrawal of a child's attorney
39 in that context, the court retains discretion to decide whether to appoint another representative for
40 the child and to decide on the role of that representative.

41 SECTION 13. DUTIES UNIQUE TO BEST INTERESTS ATTORNEY.

1 ~~[(a)]~~ A best interests attorney shall advocate for a resolution of the proceeding
2 consistent with the best interests of the child based on the facts relevant to the proceeding and
3 according to criteria established by law related to the purposes of the proceeding.

4 ~~[(b)]~~ A best interests attorney, in a manner appropriate to the child's developmental
5 level, shall:

6 (1) explain the role of the best interests attorney to the child; and

7 (2) inform the child that, in providing assistance to the court, the attorney
8 may use information that the child gives to the attorney; ~~and~~

9 ~~_____ (3) unless the child has a [child's attorney or] privately retained attorney:~~

10 ~~_____ (A) keep the child informed of the nature and status of the~~
11 ~~proceeding;~~

12 ~~_____ (B) provide advice and counsel to the child; and~~

13 ~~_____ (C) review and accept or decline to accept any proposed stipulation~~
14 ~~for an order affecting the child and explain to the court the basis for any opposition.~~

15 ~~_____ :~~

16 _____ (c) A best interests attorney is not bound by the child's expressed objectives but
17 shall consider the child's objectives with due regard to the child's developmental level in
18 determining what to advocate. _____

19 (d) A best interests attorney may not disclose a ~~child's confidential~~
20 ~~communications with the attorney~~ or be compelled to disclose information relating to the
21 representation of the child except as permitted by [this state's rules of professional conduct ~~for~~
22 ~~attorneys~~] as if the child were in an attorney-client relationship with the attorney], but the attorney

1 may use such information, including communications received from the child's in confidences,
2 for the purpose of performing the duties of a best interests attorney without disclosing ~~the~~
3 ~~confidences.~~
4 that the child was the source of the information.]

5 LEGISLATIVE NOTE TO SECTION 13: In states where the duties of attorneys can be prescribed
6 only by rule of court or administrative guideline and not by legislative act, the duties listed in the
7 bracketed provisions should be adopted by the appropriate measure. In states that enact only
8 subsection (a), the text of subsection (a) should immediately follow the heading of the section.
9 A conforming amendment to a state's rules of professional conduct may be necessary to authorize
10 the performance of the duties of the best interests attorney as described in this Section.

11 **Comment**

13 The best interests attorney provides legal services for the purpose of protecting the child's
14 best interests. Although the best interest attorney is not client-directed, the attorney is
15 nevertheless providing legal representation to the child as a lawyer. Because the determination of
16 best interests is imprecise and highly contextual, the best interests attorney should follow
17 objective criteria and should not substitute his or her personal views of best interests. The
18 "criteria established by law relating to the purposes of the proceeding" will include standards
19 imposed by federal and state law for child protection in abuse and neglect proceedings, as well as
20 a state's substantive law governing child custody determinations. *See, e.g.,* Section 402 of the
21 Uniform Marriage and Divorce Act. Moreover, the attorney's legal representation should be
22 informed by an understanding of the child's individual circumstances and needs, including the
23 child's developmental level, unique family relationships, and cultural background.

24
25 ~~If the child has no other attorney representative, the best interests attorney's duties also~~
26 ~~include keeping the child informed about the proceedings, advising the child, and reviewing~~
27 ~~proposed stipulations. In rare circumstances, a child may have a privately retained counsel who~~
28 ~~has not been appointed by the court. In addition, where permitted by state law, a court may~~
29 ~~appoint a best interests attorney under Section 12 to assist it in determining the child's interests~~
30 ~~even where the child already has a child's attorney. In these unusual situations~~
31 Confidentiality of
32 attorney-client communications is fundamental to the traditional attorney-client relationship in
33 order to encourage openness by the client and to enable the attorney to render effective
34 representation. In general, the rule of confidentiality extends to unauthorized use as well as
35 disclosure of client information. See Model Rule 1.6 (barring disclosure of information relating to
36 representation); Model Rule 1.8(b) (barring use of information relating to representation to
37 disadvantage of client). Nevertheless, ethical rules permit disclosure of client information to the
38 extent necessary to protect a client's interests when a lawyer is taking protective action on behalf
of a client with diminished capacity. Model Rule 1.14(c). Under ordinary ethical guidelines, the

best interests attorney's responsibilities are necessarily limited by the fact that the child has other counsel. The bracketed phrase under subsection (b) attorney, like the child's attorney, may reveal the child's confidences if necessary to protect the child from harm under ordinary ethical guidelines. See Comment to Section 12. The best interests attorney, however, has greater latitude than the child's attorney in one key respect: to use information received from the child for purposes of the representation without revealing the source of the information. This section recognizes that some states may not permit the appointment of a limited inroad on the principle of confidentiality may be necessary to enable the best interests attorney for a child who already has a child's attorney to carry out the purposes of the representation.

Under this section, a child's communications with information received from the child is protected by ordinary rules of professional conduct except that use of such information, including confidential communications, is permitted to enable the best interests attorney are confidential except that use of the communications is permitted if necessary to protect a child's interests to perform his or her role. Although some states have permitted the hybrid lawyer/guardian ad litem to reveal the child's confidential communications to the court where necessary to promote the child's best interests, see Clark v. Alexander, 953 P.2d 145 (Wyo. 1998), this section provides a more limited exception to the principle of client confidentiality. Thus

Under the use exception, a best interests attorney may use a child's confidential communications for the purpose of the representation without disclosing them. The distinction between use and disclosure means, for example, that if a child tells the attorney that a parent uses illegal drugs abuses alcohol, the attorney may use that information to find and present an independent source of evidence of the parent's alcohol abuse. The attorney may present that separate evidence of the drug use to the court alcohol abuse but may not reveal that the initial source of information was the child. The best interests attorney should explain to the child that the child's communications may be used by the attorney in order to achieve the best resolution for the child in the proceeding.

The prohibition on disclosure is intended to provide a measure of confidentiality for the child's relationship with the best interests attorney. It may also diminish the child's feelings of responsibility or guilt for the presentation of negative evidence about his or her parents or caregivers. Although this section does modify the ethical obligations ordinarily inherent in the attorney-client relationship, it is designed to accommodate competing concerns: the child's need to trust his or her lawyer and to speak freely in confidence versus the court's need for a full presentation of evidence in order to reach a disposition in the child's best interests.

SECTION 14. DUTIES OF ~~COURT~~ COURT-APPOINTED ADVISOR. A

~~court~~ court-appointed advisor appointed for a child shall:

- (1) within a reasonable time after the appointment:

1 (A) meet with the child and ascertain, in a manner appropriate to the
2 child's developmental level, the child's needs, circumstances, and views;

3 (B) investigate the facts relevant to the proceeding to the extent the ~~court~~
4 advisor considers appropriate, including interviewing persons with significant knowledge of the
5 child's history and condition;

6 (C) obtain and review copies of relevant records relating to the child to the
7 extent the ~~court~~ advisor considers appropriate;

8 (D) meet and consult with the child's attorney or the best interests attorney,
9 if any, regarding the issues in the proceeding;

10 (2) determine, in a manner appropriate to the child's developmental level, the
11 child's expressed objectives in the proceeding;

12 (3) present the child's expressed objectives to the court, if the child so desires, by
13 report or other submission;

14 (4) consider the child's expressed objectives in the proceeding without being
15 bound by them;

16 (5) maintain the confidentiality of information relating to the proceeding except as
17 necessary to perform the duties of ~~court~~court-appointed advisor or as may be specifically provided
18 by law of this state other than this [act];

19 (6) if appropriate, present recommendations to the court regarding the child's best
20 interests and the bases of those recommendations;

21 (7) provide copies of any report or other document submitted to the court by the
22 advisor to any child's attorney or best interests attorney appointed for the child and to the parties;

(8) when the ~~court~~ advisor considers appropriate, encourage settlement and the use of any alternative forms of dispute resolution and participate in such proceedings [to the extent permitted under the law of this state]; and

(9) perform any specific task directed by the court not inconsistent with the role of ~~court~~court-appointed advisor.

Comment

This section describes the general function of the ~~court~~court-appointed advisor and makes clear that the ~~court~~court-appointed advisor should explain his or her role to the child in terms the child can understand. The ~~court~~court-appointed advisor has a duty to conduct an independent investigation in order to ascertain the facts of the case. In carrying out that duty, the ~~court~~court-appointed advisor must have access to the child and a reasonable opportunity to interview persons with relevant knowledge of the child, including the parties. If the child is represented by counsel, whether child's attorney or best interests attorney, the ~~court~~court-appointed advisor ~~should~~must notify counsel and permit counsel to be present during any interview. In addition, the ~~court~~court-appointed advisor's investigation ordinarily should include a review of relevant records. To ensure that the ~~court~~court-appointed advisor has the ability to carry out his or her responsibilities under this section, the order of appointment should expressly provide for such rights of access.

In abuse and neglect and custody proceedings, the ~~court~~court-appointed advisor's obligations to the court may include the duty to make recommendations concerning the child's best interests. State law varies as to whether mental health experts should or must make recommendations to the court on the ultimate disposition of the case. Disagreement also exists within the mental health profession about whether mental health professionals are qualified to offer opinions on the ultimate question of the child's best interests. Some commentators argue that the determination of a child's best interests is the prerogative of the court and not within the expertise of the mental health profession. *See generally* Gary B. Melton, et al., *Psychological Evaluations for the Courts: A Handbook for Mental Health Professionals* (Guilford Press 2d ed. 1997). In any event, the ~~court~~court-appointed advisor should be prepared to make such recommendations if requested by the court, always ensuring that the recommendation or opinion is based on the advisor's thorough and unbiased investigation of the case.

~~Court~~Court-appointed advisors, including CASA's, must observe all statutes and court rules concerning confidentiality and should not disclose information about the appointed case to non-parties other than the court and court-authorized personnel. Although attorney-client confidentiality rules do not govern the ~~court~~court-appointed advisor's communications with the child, the advisor should protect the child's privacy and should reveal the child's statements only when necessary to fulfill the advisor's duties to the court. For guidelines governing the duty of

1 confidentiality for guardians ad litem, see Minnesota Rule 908, General Responsibilities of
2 Guardians Ad Litem; Standard 7.0, Standards for Guardians Ad Litem in Missouri Juvenile and
3 Family Court Matters.

4
5 Many states have developed more detailed standards governing the duties of ~~court~~court-
6 appointed advisors, generally under the rubric of “guardian ad litem,” than those contained in this
7 Act. See, e.g., Judicial Council of Virginia, Standards to Govern the Appointment of Guardians
8 Ad Litem, at www.courts.state.va.us/1/cover.htm; There are also numerous sources governing
9 CASA programs and specifying the duties of CASA volunteers. See, e.g., Nat’l CASA
10 Association, Standards for National CASA Association Member Programs (2002), available at
11 www.nationalcasa.org; Office of Juvenile Justice and Delinquency Prevention, Court Appointed
12 Special Advocates: A Voice for Abused and Neglected Children in Court (1997).

13
14 **SECTION 15. ACCESS TO CHILD AND INFORMATION RELATING TO**
15 **CHILD.**

16 (a) Subject to subsection (c) ~~and any conditions imposed by the court that are~~
17 ~~required by law, rules of professional conduct, the child’s needs, or the circumstances of the~~
18 ~~proceeding~~, the court shall issue an order of access at the time of an order of appointment under
19 this [act], authorizing the child’s attorney, best interests attorney, or ~~court~~court-appointed advisor
20 to have immediate access to:

- 21 (1) the child; and
22 (2) any confidential information relating to the child as to which the child
23 may otherwise have a privilege of nondisclosure.

24 (b) The custodian of any relevant record relating to a child shall provide access to
25 a person authorized by order issued pursuant to subsection (a) to access the records.

26 (c) ~~A~~The court may impose conditions or limitations on an order of access which
27 are required by law, rules of professional conduct, the child’s needs, or the circumstances of the
28 proceeding, and a child’s record that is privileged or confidential under law other than this [act]

1 may be released to a person appointed under this [act] only in accordance with that law.

2 **Comment**

3 Persons appointed to represent children under this Act must have access to information
4 regarding the child in order to competently perform their assigned roles. Relevant files include
5 those concerning child protective services, developmental disabilities, juvenile delinquency,
6 mental health, and educational programs. Access should also be provided to records of a probate
7 or other court proceeding as well as records of any trust or account for which the child is a
8 beneficiary.

9
10 Under subsection (a), a court may impose conditions on access that are required by law,
11 ethical rules, the child's needs, or the circumstances of the case. A lawyer may need to use
12 subpoenas or other discovery tools to obtain relevant records, for example. Moreover, if a child's
13 parent is represented by counsel, a child's attorney or best interests attorney would need to comply
14 with applicable rules of professional conduct governing contact with represented parties.
15 Similarly, a child's attorney or best interests attorney may have the right to be present when the
16 child is interviewed by others. To the extent feasible, the order of appointment should explain the
17 relevant limitations on access in detail.

18
19 Subsection (c) also recognizes that federal or state law, such as the Family Educational
20 Rights and Privacy Act, 20 U.S.C. § 1232g (the "Buckley Amendment"), and the Health Insurance
21 Portability and Accountability Act of 1996, 42 U.S.C. § 201, may impose independent
22 requirements for access that a child's representative must observe. *See* 34 C.F.R. § 99.31-39
23 (requirements for access to educational records under Buckley Amendment); 45 C.F.R. § 164.512
24 (requirements for access to health records under HIPAA). In some circumstances, the order of
25 appointment will need to contain qualifying language to enable the appointed representative to
26 gain access to the protected records. _____

27 _____

28 **SECTION 16. PARTICIPATION IN PROCEEDING BY CHILD'S ATTORNEY, BEST**

29 **INTERESTS ATTORNEY, AND COURT-COURT-APPOINTED ADVISOR.**

30 (a) A child's attorney, best interests attorney, and court-courtcourt-appointed advisor for
31 a child are each entitled to:

32 (1) receive a copy of each pleading or other record filed with the court in
33 the proceeding;

1 (2) receive notice of and attend each hearing in the proceeding; and
2 (3) participate in any case staffing or case management conference
3 concerning the child in an abuse and neglect proceeding.

4 (b) A child's attorney, best interests attorney, and ~~court~~court-appointed advisor
5 may not engage in ex parte contact with the court except as authorized by law other than this [act].

6 (c) A ~~court~~court-appointed advisor may not take any action that may be taken only
7 by a licensed attorney, including making opening and closing statements, examining witnesses in
8 court, and engaging in discovery other than as a witness.

9 (d) The court, a child's attorney, or a best interests attorney may compel any
10 ~~court~~court-appointed advisor for a child to attend a trial or hearing relating to the child and to
11 testify as necessary for the proper disposition of the proceeding.

12 (e) The court shall ensure that any ~~court~~court-appointed advisor for a child has an
13 opportunity to testify or submit a report setting forth:

14 (1) the ~~court~~court-appointed advisor's recommendations regarding the best
15 interests of the child; and

16 (2) the bases for the ~~court~~court-appointed advisor's recommendations.

17 (f) In a [nonjury] proceeding, a party may call any ~~court~~court-appointed advisor
18 for the child as a witness for the purpose of cross-examination regarding the advisor's report
19 without the advisor's being listed as a witness by a party.

20 [(g) In a jury trial, disclosure to the jury of the contents of a ~~court~~court-appointed
21 advisor's report to the court is subject to this state's rules of evidence.]

22 **Comment**

1 This section makes clear that a child's attorney, a best interests attorney, and a ~~court~~court-
2 appointed advisor are each entitled to receive notice of all hearings and to receive copies of all
3 documents filed in the case. The right to participate in case staffings will arise in abuse and
4 neglect proceedings where periodic conferences among court personnel and a child's
5 representative are mandated by state and federal law to assess the child's current placement and
6 future status. Unlike the child's attorney or the best interests attorney, the ~~court~~court-
7 appointed advisor may also testify or submit a report to the court regarding recommendations as to the
8 child's best interests. Indeed, under Section 14, the ~~court~~court-
9 appointed advisor may have a duty
10 to submit such recommendations in certain cases.

11 Under this section, the ~~court~~court-
12 appointed advisor is subject to cross-examination
13 regarding the advisor's recommendations to the court. Although the ~~court~~court-
14 appointed advisor is appointed to assist the court in determining the child's best interests, ex parte communications
15 with the court are not permitted. The due process rights of the parties require the ~~court~~court-
16 appointed advisor to observe ordinary procedural rules in making recommendations to the court,
17 including giving notice to other participants and affording parties an opportunity to be heard and
18 an opportunity for cross examination. *See, e.g.,* In re Marriage of Bates, 2004 WL 2403721 (Ill.
19 2004) (failure to provide copy of guardian ad litem report to mother in custody proceeding was
20 violation of due process); Leinenbach v. Leinenbach, 634 So.2d 252 (Fla. App. 1994) (trial court
21 erred in relying on report of guardian ad litem where father was not afforded opportunity to rebut
22 contents of report). Likewise, neither the child's attorney nor the best interests attorney may
23 engage in ex parte communication with the court except as otherwise authorized by law.
24 Although this prohibition is rooted in the rules of professional conduct governing all lawyers,
25 experience has shown that lawyers for children sometimes bend the rules in their desire to protect
26 the interests of their clients. Thus, the principle is restated in the Act.

27 **SECTION 17. ATTORNEY WORK PRODUCT AND TESTIMONY.**

28 (a) Subject to subsection (b) and except as authorized by [this state's rules of
29 professional conduct or] court rule, an attorney appointed as child's attorney or best interests
30 attorney may not:

31 (1) be compelled to produce the attorney's work product developed during
32 the appointment;

33 (2) be required to disclose the source of information obtained as a result of
34 the appointment;

35 (3) submit a report authored by the attorney into evidence; or

1 (4) testify in court.

2 (b) Subsection (a) does not alter ~~the~~any duty of an attorney to report child abuse or
3 neglect under [applicable law].

4 **Comment**

5 There is widespread disagreement about the proper function of children's lawyers in abuse
6 and neglect and custody proceedings, particularly as a result of the attorney/guardian ad litem
7 model. *See generally* Ann M. Haralambie, *The Child's Attorney* 1-23 (ABA 1993). In several
8 states, the attorney/guardian ad litem may testify and be cross-examined. *See, e.g.,* Jacobsen v.
9 Thomas, 100 P.3d 106 (Mt. 2004). This section clarifies that the child's attorney and the best
10 interests attorney are to stay within their professional role as lawyers. Thus, the work product of
11 both the child's attorney and the best interests attorney is presumptively shielded from disclosure.
12 Likewise, neither category of attorney ordinarily should testify as a witness in a proceeding in
13 which the attorney is representing a child.

14
15 **SECTION 18. IMMUNITY.**

16 (a) Only the child has a right of action in civil damages against a child's attorney,
17 best interest attorney, or ~~court~~court-appointed advisor for inaction or action taken, including any
18 recommendation or opinion given, in the capacity of child's attorney, best interests attorney or
19 ~~court~~court-appointed advisor.

20 (b) A best interests attorney or ~~court~~court-appointed advisor appointed pursuant to
21 this [act] is not liable for civil damages because of inaction or action taken, including any
22 recommendation or opinion given, in the capacity of best interests attorney or ~~court~~court-
23 appointed advisor unless the inaction or action ~~was:~~

24 ~~_____ (1) grossly negligent or reckless;~~

25 ~~_____ (2) intentionally wrongful; or~~

26 ~~_____ (3) based on bad faith or malice.~~

27 ~~_____~~ **Comment**

1 ~~_____taken exceeded ordinary negligence.~~

2 **Comment**

3 _____ Under this section, only the child has standing to sue for malpractice or other breach of
4 professional responsibility. As courts have recognized, the representative owes a duty of
5 professional competence to the child, not to other parties in the litigation. *See In the Interest of*
6 *Z.J.*, 153 S.W.3d 535 (Tex. App. 2004)(mother lacked standing to challenge performance of
7 child's appointed attorney ad litem in parental rights termination proceeding). Children may sue
8 through a next friend or other guardian ad litem, but this section would not permit a parent or
9 care-giver to assert her own challenge to the performance of a child's representative.

10
11 This section provides qualified immunity for persons appointed to assist the court as best
12 interest attorneys or ~~court advisors~~. The court-appointed advisors. States vary in the standards that
13 plaintiffs are required to meet to overcome the defense of qualified immunity, ranging from gross
14 negligence to intentional misconduct and bad faith. For that reason, this section does not attempt
15 to define the precise standard necessary to surmount the immunity. Instead, the section makes
16 clear that conduct more egregious than ordinary negligence must be shown in order for the child
17 to recover.

18
19 _____ The provision of qualified immunity is based on the recognition that ~~such individuals~~ best
20 interest attorneys and court-appointed advisors need protection from civil actions for damages
21 when performing functions consistent with their appointed roles. Immunity is necessary to ensure
22 that ~~best attorneys and court advisors~~ they can fully investigate and formulate recommendations
23 without fear of retaliation ~~by the parties~~. The threat of litigation from a ~~disgruntled child client,~~
24 often fueled by an unhappy parent in the wings, might interfere with the representative's decision-
25 making and might deter qualified individuals from accepting appointment in the first place.
26 Although in some states children's representatives have absolute immunity, *see, e.g., Paige K.B.*
27 *by Peterson v. Molepske*, 580 N.W. 2d 289 (Wis. 1998)(recognizing absolute immunity for
28 guardian ad litem in custody dispute for actions within scope of authority); *Billups v. Scott*, 571
29 N.W. 2d 603 (Neb. 1997)(recognizing absolute immunity for guardian ad litem in abuse and
30 neglect proceeding for actions within scope of authority); ~~*Carrubba v. Moskowitz*, 877 A.2d 773~~
31 ~~(Conn. 2005)(recognizing absolute immunity for child's attorney whose primary duty was to~~
32 ~~protect child's best interests)~~, the qualified immunity provided in this section gives the best
33 interests attorney and ~~court~~ court-appointed advisor adequate protection from suit while still
34 holding them accountable for egregious misconduct. *See Ore. Rev. Stat. § 419A170* (providing
35 qualified immunity to court appointed special advocate).

36
37 On the other hand, the Act does not provide immunity for persons appointed as a child's
38 attorney. Although a few states have extended immunity to children's attorneys, *e.g., Vernon's*
39 *Texas Code Ann. Family Code § 107.009* (2004), the premise of this section is that such lawyers
40 are in a traditional lawyer/client role and should be held to ordinary standards of care.
41 ~~Nevertheless,~~ Rather than independently formulating the child's best interests, the child's attorney

1 for the most part is a client-directed lawyer in a traditional mode of client representation. It
2 should be noted, however, that in some circumstances children's attorneys may function as best
3 interests attorneys. If a child's attorney receives no direction from a child on a particular issue
4 and, for example, the attorney may takes an action under Section 12(d) that the attorney has
5 determined will serve the child's best interests, the attorney should be protected by. In that
6 circumstance, courts may wish to extend qualified immunity for to cover the action taken.
7 Similarly, if a child's attorney takes protective action under Section 12(e) because the child's
8 objectives place the child at risk of harm, the attorney's action should fall within the qualified
9 immunity. In other words, courts should are encouraged to take a functional approach to the
10 question of immunity. See Carrubba v. Moskowitz, 877 A.2d 773 (Conn. 2005)(recognizing
11 absolute immunity for child's attorney whose primary duty was to protect child's best interests);
12 Marquez v. Presbyterian Hospital, 608 N.Y.S.2d 1012 (Sup. Ct. 1994)(holding that law guardian
13 is entitled to qualified immunity when functioning primarily as child's guardian ad litem but
14 would be liable for ordinary negligence when functioning as child's attorney).
15
16

17 **SECTION 19. FEES AND EXPENSES IN ABUSE AND NEGLECT**

18 **PROCEEDING.**

19 (a) In an abuse and neglect proceeding, an individual ~~or organization~~ appointed
20 pursuant to this [act], other than a volunteer advocate, is entitled to reasonable fees and expenses
21 in an amount set by the court.

22 (b) If the court determines that a parent or other responsible party is able to defray
23 all or part of the fees and expenses set pursuant to subsection (a), the court shall:

24 (1) order one or more of those persons to pay all or part of the fees and
25 expenses; or

26 (2) order one or more of those persons, before final hearing, to deposit the
27 amount necessary to pay all or part of the fees and expenses into court or into an account
28 authorized by the court for the use and benefit of the individual or organization appointed under
29 this [act].

1 (c) Any fees and expenses set pursuant to subsection (a) that cannot be paid by a
2 parent or responsible party because of indigency must be paid from [designated public funds].
3 The court may not award fees under this [act] against the state, a state agency, or a political
4 subdivision of the state except as provided in this subsection.

5 (d) In order to receive payment of fees and expenses under this section, the payee
6 must complete and submit to the court a voucher or claim for payment, listing the fees charged,
7 actions taken, and hours worked.

8 **Comment**

9 This section requires that attorneys and ~~court~~court-appointed advisors receive adequate
10 and timely compensation in abuse and neglect proceedings throughout the terms of appointment,
11 unless the appointee is a volunteer advocate. States should ensure that adequate funds are
12 appropriated and made available to compensate children's representatives. Under the mandate of
13 federal law, states are obligated to appoint guardians ad litem for children in abuse and neglect
14 proceedings. *See* Child Abuse Prevention and Treatment Act, 42 U.S.C. § 5106a(b)(2)(A)(xiii)
15 (2000). As a matter of state law, this Act supplements the federal requirement by requiring that
16 indigent children receive publicly-funded legal representation, whether in the form of child's
17 attorney or best interests attorney. *See* Section 4. When a ~~court~~court-appointed advisor is also
18 required under Section 5, that appointment will likewise be at public expense for indigent
19 children. The child's attorney, best interests attorney, and ~~court~~court-appointed advisor should
20 also have access, where necessary, to reimbursement for experts, investigative services, research
21 costs, and other activities undertaken to fulfill the obligations of the appointment.

22 **SECTION 20. FEES AND EXPENSES IN CUSTODY PROCEEDING.**

23 (a) In a custody proceeding, ~~any individual or organization~~ appointed pursuant to
24 this [act], other than a volunteer advocate, is entitled to reasonable fees and expenses in an
25 amount set by the court by reference to the reasonable and customary fees and expenses for
26 similar services in the county of jurisdiction.

27 (b) The court may:

28 (1) allocate fees and expenses between the parties in proportion to their

1 ability to pay;

2 (2) order a reasonable cost deposit to be made at the time the court makes
3 the appointment; and

4 (3) before the final hearing, order an amount in addition to the amount
5 ordered deposited under paragraph (2) to be paid into an account authorized by the court for the
6 use and benefit of the individual ~~or organization~~ appointed under this [act].

7 (c) [Except as otherwise authorized by [cite state law], a] [A] court may not award
8 costs, fees, or expenses under this section against the state, a state agency, or a political
9 subdivision of the state.

10 **Comment**

11 In custody proceedings, courts should make clear to all parties how fees will be
12 determined and how and by whom the fees are to be paid. Lawyers and ~~court~~court-appointed
13 advisors, unless functioning as ~~volunteers~~volunteer advocates, should be paid in accordance with
14 prevailing legal standards of reasonableness. This section recognizes that most states do not have
15 public funds available to compensate children's representatives in custody disputes other than
16 abuse and neglect proceedings. The ordinary approach will be for the court to assess fees against
17 the parties, taking into account significant disparities in ability to pay and awarding fees in
18 proportion to ability to pay. This section recognizes, however, that in some cases public funds
19 will be available under other provisions of state law for fees and expenses in private custody
20 disputes. Courts may also require periodic reporting from appointed representatives regarding
21 their services and fees ~~on an ongoing basis~~.

22
23 The award of fees and expenses in all cases should include reasonable ~~expenses~~costs for
24 expert witnesses, investigative services, research, and other activities where the attorney or
25 ~~court~~court-appointed advisor demonstrates to the court that such expenses are necessary to
26 accomplish the objective of the proceeding.

27 **SECTION 21. UNIFORMITY OF APPLICATION AND CONSTRUCTION.** In
28 applying and construing this Uniform Act, consideration must be given to the need to promote
29 uniformity of the law with respect to its subject matter among states that enact it.

1 **SECTION 22. TRANSITIONAL PROVISION.** This [act] applies to proceedings filed
2 on or after [the effective date of this [act].] A proceeding filed before [the effective date of this
3 [act]] is governed by the law in effect when the proceeding was filed, and the former law is
4 continued in effect for that purpose.

5 **SECTION 23. EFFECTIVE DATE.** This [act] takes effect on

6 _____.-