

## Preliminary Questions for Discussion

### 1. Nature of proceedings to be included

In 2003, the National Conference of Commissioners on Uniform State Laws appointed a study committee to review the new ABA Standards of Practice for Lawyers Representing Children in Custody Cases (Custody Standards) and explore the idea of a uniform law in this area. The possible scope of the project was discussed at a meeting of the Joint Editorial Board for Uniform Family Law Acts on October 18, 2003. At that meeting, the consensus was that the project should start with a wide scope—including dependency and neglect hearings—to be narrowed as the project progresses. By resolution at that meeting, the Joint Editorial Board urged the NCCUSL Committee on Scope and Program to recommend the rapid creation of a drafting committee in this area.

At its meeting on August 5, 2003, the Executive Committee of NCCUSL approved a recommendation of the Scope and Program Committee that the Executive Committee form "a study committee to investigate the feasibility of a Representation of Children in Custody Disputes Act."

The study committee was formed and met by telephone conference call on December 3, 2003. In its report to Scope and Program, dated December 19, 2003, the study committee noted that questions had been raised as to whether a NCCUSL act should be limited to child custody per se or also cover abuse and neglect cases, parental termination cases, and delinquency cases. The general consensus was that the term "cases affecting child custody" was broad enough to cover most of the scope discussed. The study committee's report, submitted to Scope and Program at its January 9, 2004 meeting, recommended that "a drafting committee on the representation of children in cases affecting child custody be approved by the committee on scope and program to draft legislation to implement the Standards of Practice for Lawyers Representing Children in Custody Cases adopted by the American Bar Association on August 12, 2003, and to study and report back to Scope and Program as to whether the project should include legislation implementing the ABA Standards for Representation of Children in Abuse, Neglect, and Dependency Cases and representation of children in termination of parental rights cases."

The Scope and Program Committee instead passed the following resolution, which was approved by the Executive Committee of NCCUSL the following day:

**RESOLVED, that the Committee on Scope and Program recommends to the Executive Committee that a drafting committee be formed to draft an act on the role of attorneys representing children in custody disputes, and that the committee be initially charged to cover custody matters broadly (including the full spectrum of custody matters, including abuse, neglect, dependency, and termination cases, but not delinquency).**

The Conference subsequently appointed a Drafting committee on the Role of Attorneys Representing Children in Custody Disputes.

The positions of the Joint Editorial Board and the Committee on Scope and Program reveal significant questions about the initial scope of the project. Thus, a preliminary issue facing the Drafting Committee is whether to limit the project to custody cases or whether to expand it to include government-initiated dependency and termination proceedings.

As a matter of information, the ABA's Custody Standards and its Abuse and Neglect Standards, while similar in many respects, do take a different approach on one important question. The Custody Standards, which govern all types of custody proceedings except abuse and neglect cases initiated by a government entity, recommend that lawyers appointed to represent children should continue to function as lawyers rather than as witnesses. The guidelines are intended to ensure that children receive adequate representation in court by offering guidance to courts as to when to appoint counsel and detailing what lawyers should do when appointed. The overriding theme of the Custody Standards is that "a lawyer should act like a lawyer," and the Standards recommend that lawyers should be appointed as lawyers without regard to the age of the client.<sup>1</sup> Under the Standards, lawyers may be appointed in two alternative capacities: the "child's attorney" or a "best interests attorney." If appointed as the child's attorney, a traditional lawyer-client relationship exists. The child's attorney must advocate the child's wishes, or, if the wishes cannot be determined, the child's *legal* interests. If appointed as the best interests attorney, the lawyer represents the child's best interests to the court but does not act as guardian ad litem or other agent of the court. The best interests attorney is not bound by the child's directives but is committed to protecting the child's individual interests and needs according to objective criteria.<sup>2</sup>

Interestingly, the American Law Institute's Principles of the Law of Family Dissolution similarly aim to keep lawyers for children within the role of lawyers. Under the ALI Principles, which focus on custody rather than abuse and neglect, a court may appoint a lawyer to represent the child "if the child is competent to direct the terms of the representation and the court has a reasonable basis for finding that the appointment would be helpful in resolving the issues of the case."<sup>3</sup> Under the ALI approach, where the child is competent but "impaired" such that the child cannot adequately act in his or her own interests, the child's lawyer may seek appointment of a guardian ad litem.<sup>4</sup> The ALI does not recommend the "best interests attorney" model that the ABA has endorsed.

The earlier ABA Abuse and Neglect Standards, unlike the Custody Standards or the ALI Principles, do acknowledge a hybrid attorney/guardian ad litem role for lawyers under certain

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<sup>1</sup>Linda D. Elrod, Raising the Bar for Lawyers Who Represent Children: ABA Standards of Practice for Custody Cases, 37 Fam. L. Q. 105, 115 (2003).

<sup>2</sup>*Id.*

<sup>3</sup>AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION § 2.13(3) (2002).

<sup>4</sup>*Id.* at Comment e.

circumstances. Under Standard A-2, a lawyer may be appointed as “guardian ad litem” for a child and has the obligation of protecting the child’s interests without being bound by the child’s expressed preferences. If a conflict arises because a lawyer is performing both the role of attorney and that of GAL, the Abuse and Neglect Standards recommend that the lawyer continue to function as the child’s attorney, withdraw as guardian ad litem, and request appointment of a new guardian ad litem without revealing the basis for the request. The hybrid status of attorney/guardian ad litem could potentially place the lawyer in the position of becoming a witness in the case, or submitting a report to the court in areas that are not necessarily within a lawyer’s expertise. Because the newer Custody Standards and the ALI Principles reject that hybrid role, the inconsistency is relevant to the scope of this project. If NCCUSL wants to implement the ABA Custody Standards and the ABA Abuse and Neglect Standards, then NCCUSL will need to determine whether the hybrid role attorney/guardian ad litem will be eliminated altogether (as recommended by the Custody Standards) or retained for some limited purpose (as provided for in the Abuse and Neglect Standards).

On the assumption that NCCUSL will ultimately want the broader scope encompassing custody proceedings and dependency and termination proceedings, this Reporter has included provisions on dependency proceedings and termination of parental rights in the initial draft. In addition, the proposed draft follows the ABA Custody Standards in rejecting the hybrid attorney/guardian ad litem role for private custody disputes but retains it for government-initiated dependency and termination proceedings in accordance with the ABA Abuse and Neglect Standards. Significantly, as discussed under Part 3 below, federal law also acknowledges that attorneys will function as guardians ad litem on occasion in abuse and neglect proceedings.

## **2. The attorney vs. guardian model**

Debates within the child welfare community continue to occur between those who emphasize the traditional obligation of lawyers to advocate client’s wishes, and those who want children’s representatives to advocate for children’s best interests. The National Association of Counsel for Children has recommended refinements to the ABA Abuse and Neglect Standards that place somewhat greater emphasis on the substituted judgment of the child’s attorney than do the original ABA Standards. Under the NACC Revised Version of the Abuse and Neglect Standards, the lawyer’s counseling function is a central feature of client-directed representation, Standard B-4. Where a child cannot meaningfully participate in the formulation of a position, the NACC Revised Version recommends that the attorney substitute his or her judgment for the child’s and formulate a position that serves the child’s interests according to objective criteria. See Standard B-4(2).

The Drafting Committee needs to determine which model to implement in its proposed Act. The draft attempts to follow the ABA Standards, since the early discussion of this project indicated that the goal was to implement the ABA Standards, but Section 9 on substituted judgment includes some of the recommendations of the NACC.

## **3. Legislation addressing ethical dimensions of lawyer-client relationship**

Another question as to scope is the extent to which the proposed act should address the ethical dimensions of the lawyer's responsibilities toward the child client. The ABA Custody Standards address in detail the ethical obligations on lawyers, whether appointed as the child's attorney or as the best interests attorney. These include guidelines for the child's attorney in determining whether the child has "diminished capacity" with respect to a particular issue involved in the representation;<sup>5</sup> guidelines for the child's attorney when the child's expressed wishes are not in the child's best interests;<sup>6</sup> guidelines for determining when a child's confidences to a best interests attorney may be revealed;<sup>7</sup> and detailed guidelines governing the conduct of the best interests attorney.<sup>8</sup> Standards such as these are not normally set out by statute, and the Drafting Committee should consider whether there are special reasons to include them in statutory language in the context of legal representation of children. Most states regulate lawyer behavior through ethics rules promulgated by the state judiciary rather than through legislation. If specific ethical guidelines are included in the proposed Act, then there may need to be some kind of clarification that a lawyer's failure to perform all the duties should not give rise to a civil action by third parties. *See, e.g., In the Interest of Z.J.*, 2004 WL 609328 (Tex. App 2004)(in parental rights termination case, mother could not challenge termination order on ground that child's attorney ad litem failed to perform all duties set out in state law and ABA Abuse and Neglect Standards).

#### **4. Discretionary vs. mandatory appointment**

The appointment of counsel for children in government-initiated suits for dependency or termination of parental rights is not mandatory under current federal law. In abuse and neglect cases, federal law requires the appointment of a guardian ad litem for the child as a condition of receiving federal funds to assist in the state's child protection system but does not require

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<sup>5</sup>The Standards recommend that the child's attorney make a separate determination as to whether the child has diminished capacity pursuant to Model Rule 1.14 (2000) with respect to each issue in which the child is called upon to direct the representation. The Standards do not presume that children of certain ages are "impaired," "disabled," or "incompetent." See Standard IV(C)(1).

<sup>6</sup>According to the Standards, if the child's expressed objective would put the child at risk of substantial physical, financial or other harm, the lawyer may request appointment of a separate Best Interests Attorney and continue to represent the child's wishes unless the child's position is prohibited by law. See Standard IV(C)(3).

<sup>7</sup>Standard V(B).

<sup>8</sup>Standard V(F)(best interests attorney should follow objective criteria concerning the child's needs and interests and should present child's expressed desires to court unless child does not want them presented).

appointment of an attorney for the child.<sup>9</sup> At the same time, the federal statute explicitly permits the guardian ad litem to be an attorney. On the other hand, some states do require appointment of an attorney for the child in abuse and neglect and termination cases. Consistent with federal law, the proposed draft makes the appointment of a guardian ad litem mandatory but leaves the appointment of an attorney for the child as a matter within the court's discretion. It also permits the court to appoint a lawyer to serve in the dual role of guardian ad litem and the child's attorney.

Under the ABA Custody Standards, the factors a court should consider in deciding whether to appoint a lawyer in a custody case include the need for extraordinary remedies, the presence of a high level of acrimony, the possibility of relocation, the existence of family violence, and other indicia of the need for counsel.<sup>10</sup> Judicial discretion would seem particularly valuable on the question of the appointment of legal counsel. A flat rule requiring appointment of counsel poses significant practical problems because of the monetary and potential emotional costs of introducing another lawyer into custody dispute resolution. On the other hand, where the child is able and willing to articulate preferences, the appointment of independent counsel for the child may be particularly helpful in high conflict cases as a means of getting the child's views before the decision-maker. Judges should retain discretion to select on a case-by-case basis the best procedural mechanism for ensuring that the child will be heard, with due regard for family dynamics and the particular child's willingness and ability to express her views. The proposed draft follows this model in making the appointment of counsel discretionary in private custody disputes, and it provides a non-exclusive list of factors to guide the court's discretion. It also takes the position, consistent with the recent Custody Standards, that lawyers should not serve in a dual capacity as guardians and attorneys in custody cases.

## **5. Immunity**

The ABA Custody Standards propose a qualified immunity from civil liability for court-appointed best interests attorneys, guardians ad litem, and persons serving in the dual role of attorney and GAL. The Standards do not establish immunity for lawyers functioning as the child's attorney. The ABA Abuse and Neglect Standards do not address immunity concerns. The proposed draft is consistent with the Custody Standards by providing qualified immunity for persons serving as best interests attorneys, guardians ad litem, or in the dual role of lawyer and guardian ad litem. *See* Section 10. On the other hand, it does not provide immunity for lawyers serving solely as the child's attorney rather than as best interests attorneys or guardians ad litem. In all cases, the draft provides that the only person with standing to bring a civil claim for

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<sup>9</sup>See 42 U.S.C. 5106a(b)(2)(xiii). The federal standard requires that the guardian ad litem have received appropriate training and provides that the guardian ad litem may be an attorney or a court-appointed special advocate and "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 recommendations to the court concerning the best interests of the child."

<sup>10</sup>*See* American Bar Association, *Standards of Practice for Lawyers Representing Children in Custody Cases*, 37 FAM. L. Q. 131 (2003).

malpractice is the child. It should be noted that the new Texas statute which served as a model for this draft extends qualified immunity to *all* appointed counsel. *See* Sec. 107.009, TEXAS FAMILY CODE.

The question of immunity is a sensitive one. Arguments for immunity focus on the need to attract lawyers to be willing to represent children, the risk that they will be the target of lawsuits by disgruntled parents, and the essential service that such lawyers are providing to the courts. Because of the power of that argument, some states provide *absolute* immunity for court-appointed guardians ad litem. *See, e.g.,* Paige K.B. v. Molepske, 580 N.W.2d 289 (Wis. 1998). The argument against immunity, at least with respect to persons serving as the child's attorney, is fundamentally that lawyers should be held to ordinary professional standards of practice, whether they are representing children or adults, and that the use of immunity suggests that professional standards of practice do not apply.

## **6. Indian Child Welfare Act concerns**

In drafting guidelines for counsel and guardians ad litem, the Committee should consider whether to include special provisions for abuse and neglect cases involving Native American children. Under the Indian Child Welfare Act of 1978, 25 U.S.C. § 1901 et seq., Native American children who remain in state court child welfare systems are entitled to special procedures designed to promote the reunification of the child with her family and, if reunification is not feasible, to promote the placement of the child with extended family members, other tribal members, or other Native Americans. While the Act establishes a right to court-appointed counsel for indigent parents, it provides for appointment of counsel for children on a discretionary basis when it is in the best interest of the child. 25 U.S.C. § 1912(b). It also provides that counsel may be compensated out of federal funds if no provision for appointment exists under state law. *Id.*

In light of the unique legal framework created by the ICWA, qualifications of guardians or attorneys appointed to represent Native American children should include special knowledge about the child's tribe, relevant cultural practices, and the ICWA. Thus, the Drafting Committee should decide whether it is advisable to address the special circumstances of ICWA-covered children in the Act. The proposed draft does not include such a provision.