

To: Howard Swibel, President, NCCSUL
From: Battle Robinson, Commissioner
Re: Issues in the Representation of Children in Abuse and Neglect and Custody Proceedings draft Act
Date: August 2, 2005

At its meeting in January 2005, the Executive Committee authorized President Fred Miller to appoint committees to review two of the new draft Acts and to raise issues during floor discussion. Martha Walters, Peter Munson and I were asked by Fred to serve as an ad hoc committee to review the then-titled Representation of Children in Neglect and Abuse Cases and Custody Proceedings. After the floor discussion by the Committee of the Whole in July, Pres. Miller asked me if I would send to you a written memo about the issues which were raised. This is in response to that request.

1. STANDARDS FOR LAWYERS AND LAY ADVISORS

The fundamental purpose of the Act is to clearly delineate the responsibilities of the various types of “representatives” for children who are the subject of abuse, neglect, termination, and custody proceedings. The Act does an admirable job in sorting out the roles and responsibilities of each type of representative and in delineating its duties. The descriptive titles given to each type of representative are also helpful. (The Act avoids using the term “guardian ad litem” and instead refers to “child’s attorney”, “best interest attorney”, and “court advisor”.) My only reservation is the use of the term “court advisor” since I believe most people who fulfill this role would argue that their duty is to the child’s interests, rather than to the court. Perhaps “best interest advisor” would be a preferable term. The Act also authorizes a judge to appoint an attorney or advisor for a child in custody proceedings. Putting this authority in the statute will be helpful to courts handling contentious custody cases.

2. DEMANDS ON STATE RESOURCES

The draft act requires the appointment of an attorney to represent the child or the child’s interests in all neglect, abuse and termination of parental rights cases. Section 19 of the draft provides that the state is to pay for this representation out of state funds. I do not know how many states are now in compliance with this requirement, but I suspect that in many states it will put an additional burden on state resources, both fiscal and human, which may affect the enactability of the Act. The Conference needs to have more information about this potential impact in light of its traditional reluctance to impose significant expenditures on the states to implement Uniform Acts.

[In this regard, it should be noted that the provision in the draft for appointment of attorneys in all neglect, abuse, and termination proceedings goes beyond what is now required under federal law. Federal law does not require the appointment of attorneys but

permits use of volunteer lay court advisors, thus limiting somewhat the expense to the states. Federal law also conditions the receipt of funds for foster care for children on the appointment of attorneys and advisors. (Children involved in neglect and abuse cases do not necessarily end up in foster care. Some may be returned to their parents, with services in place; others may be placed with relatives.) It is not clear to me whether appointments are mandated in neglect, abuse, and termination cases which do not involve foster care placements, and, if they are, how many states are now in compliance with this requirement. I also do not know what percentage of neglect and abuse cases involve foster care placement.]

The Committee needs to consider carefully this type of information and, if it appears that mandating appointment of attorneys in all cases will have a significant impact on state finances, the Committee may want to consider a narrower or an alternative provision. For instance, the Act could leave it to each state to determine the scope of the appointment mandate, based on federal requirements, existing state practice, and availability of resources. Or, if federal law permits, the Act could require the appointment of an attorney only in foster care cases, making other appointments discretionary with the court. Another way to lessen the fiscal impact on the states is to permit appointment of volunteer “court advisors” in some cases in lieu of attorneys, which is discussed in paragraph 3, below.

3. ATTORNEYS VS. COURT ADVISORS

Another policy issue in the act is the role of volunteer “court advisors”.

As noted above, the Committee, in its draft Act, requires the appointment of attorneys in all neglect, abuse and termination cases. However, this requirement exceeds the current requirement in federal law, which permits the appointment of a guardian ad litem, which, I believe, most states interpret as permitting appointment of a volunteer lay person to assist the court with determining the child’s best interest.

The ABA strongly endorses the attorney appointment requirement and whether or not the Act contains such a provision may influence whether the ABA will endorse the Conference’s product. It is not surprising that the Conference and the American Bar Association would endorse the appointment of attorneys in all cases. Abuse, neglect, and termination cases, are, after all, legal proceedings. Having attorneys involved is clearly beneficial in helping to present and resolve legal issues. Attorney involvement would also help lend stature to neglect and abuse cases.

However, many states already have volunteer lay advocate programs in place, such as the CASA program. These volunteers serve as “guardians ad litem” for children who are subject to abuse and neglect proceedings. While the draft Act has a role for these volunteers, they may be appointed only in conjunction with the appointment of an attorney and their impact will probably be somewhat reduced under the Act. It is difficult to assess what effect this reduced role for volunteers might have on the Act’s acceptance

by the states.

As with attorneys, the ability and dedication of CASAs vary. In general, CASAs tend to be older and have had a greater variety of life experiences than the young attorneys who often serve as child advocates; they are also likely to have raised children. Some CASAs may have more time to devote to their investigations and to following the child in his or her placement than does a busy attorney. These traits may be very helpful to the Court in assessing a child's "best interests".

In short, in the event it is decided to narrow the appointment mandate, I do not think the Conference should fear that children are being short-changed if in some cases only lay advisors are appointed. Thus, for instance, the Act could require attorneys in the more complex cases, or in cases in which a child is placed in foster care, and use lay advisors in other cases. Or the court could be given the discretion to determine which type of representative to appoint.

4. 'CHILD'S ATTORNEY' v. 'BEST INTERESTS ATTORNEY'

The draft Act requires appointment of an attorney, but leaves it to the court to determine if the attorney is to be a child attorney or a best interests attorney. Under the Act, this decision is to be made at the outset of the litigation after the Court reviews a number of factors set out in Section 4.

This procedure may be needlessly complicated. In many cases it would require an additional evidentiary hearing, held in the earliest stage of the case.

An alternative and less cumbersome way to deal with this would be for the Act to leave it to each State to determine, based on its resources, established practice, etc., whether the attorney appointed initially would be a child's attorney or best interests attorney. The Court could be given the discretion to appoint another type of attorney at a later stage of the proceedings if it appears the initial appointment is not appropriate. (The draft Act makes provision for this.) [For instance, in my state, the practice is to make the initial appointment of a best interests attorney and the Child Advocate advises that this appointment is usually effective throughout the proceedings in about 97% of the cases. In those rare cases – usually involving older children – where it becomes apparent that the traditional attorney-client relationship is appropriate – the court is requested to make an appointment of a "child's attorney".]

5. PRACTICE OF LAW

Several Commissioners noted that in some states the detailed specifications for the role of the attorney which are contained in Sections 12 and 13 may intrude on the courts' prerogative to regulate the practice of law. The Committee indicated it would consider

bracketing the language so states in which the language would present a problem could handle it in another fashion, perhaps by court rule.

Section 3 exempts lawyers who are retained privately from the provisions of the Act. I am not sure I understand the basis for the distinction the Act makes between lawyers who are privately retained, who are exempted from the provisions of the Act dealing with duties of lawyers, and those who are court-appointed, who are subject to the restrictions of the Act. If this distinction is valid, the Title of the Act may be somewhat misleading.

6. TITLE OF ACT

Peter Munson suggested that, if the Act does not apply to privately retained counsel for children, the Title of the Act should be changed. He believes that the Act should specify that it applies only to Court appointed representatives for children. Even without this addition, the Title of the Act is long and unwieldy, but it is difficult to think of an alternative. How about “Responsibilities of Court Appointed Representatives for Children”? (URCARC!)

Howard, I hope this may be helpful to you and to the Committee. If I may furnish any other information or thoughts, please let me know.

Cc: Peter Munson
Martha Walters
Rhoda Billings
Harry Tindall
Michael Kerr