

DRAFT
FOR DISCUSSION ONLY

UNIFORM ROLE OF ATTORNEYS REPRESENTING CHILDREN IN CUSTODY DISPUTES ACT¹

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

January 14, 2005

WITH PREFATORY NOTE AND PRELIMINARY COMMENTS

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ON UNIFORM STATE LAWS

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¹The Drafting Committee has proposed a change of title to more accurately reflect the scope of the Act. The proposed title, "Uniform Representation of Children in Abuse and Neglect and Custody Proceedings Act," will be submitted for approval in early 2005.

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**UNIFORM ROLE OF ATTORNEYS REPRESENTING CHILDREN IN CUSTODY
DISPUTES ACT**

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UNIFORM ROLE OF ATTORNEYS REPRESENTING CHILDREN IN CUSTODY DISPUTES ACT

Prefatory Note

The role of lawyers representing children in court proceedings affecting their interests has been the 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 children who lack that capacity, and whether a lawyer may both represent a child as the child's lawyer and also participate as guardian ad litem for the child.²

Several competing proposals have emerged to address the important question of representation of children. In 1995, the American Academy of Matrimonial Lawyers adopted a set of standards under which lawyers were to advocate the wishes of the "unimpaired" child but could act only as a conduit of information for the "impaired" child.³ At the same time, the Family

²For thoughtful explorations of all of these issues, see JEAN KOH PETERS, REPRESENTING CHILDREN IN CHILD PROTECTIVE PROCEEDINGS: ETHICAL AND PRACTICAL DIMENSIONS (2d ed. 2001). Professor Peters recommends that an attorney should develop a relationship with a child over time and interpret the child's wishes in 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. She also notes that ethical dilemmas can be minimized or eliminated if children's attorneys spend significant time advising their clients. Haralambie urges lawyers to explain to 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 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).

³*American 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.

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”),⁴ 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 immaturity is incremental and issue-specific.

A major conference on the representation of children was held at Fordham Law School in 1996 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 various refinements.⁵ The American Law Institute added its views with the publication of the Principles of the Law of Family Dissolution.⁶ The ALI recommends broad discretion in private custody disputes for a court 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.⁷ Most recently, the ABA returned to the same questions in the context of child custody proceedings and adopted Standards of Practice for Lawyers Representing Children in Custody Cases (ABA Custody Standards).⁸

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

Am Acad. Matrim. Law. 57 (1995).

⁴American 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).

⁵*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).

⁶American Law Institute, *Principles of the Law of Family Dissolution: Analysis and Recommendations* (2002).

⁷Id. at § 2.13.

⁸American Bar Association, *Standards of Practice for Lawyers Representing Children in Custody Cases*, 37 FAM. L. Q. 129 (2003).

to have his or her wishes presented by a zealous advocate.⁹ 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 GAL are largely undefined.¹⁰ Many states routinely appoint lawyers to function as GALs, without careful delineation of the distinctions between the ethical responsibilities of a lawyer toward the client and the professional obligations of the GAL 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 as a matter of judicial discretion.¹¹

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 [or model] law. The Conference concluded that a uniform act would enhance the quality and professionalism of children's counsel and would offer an objective model to clarify and distinguish the roles of various categories of children's representatives.

The proposed Act integrates the two sets of standards promulgated by the ABA – the Abuse and Neglect Standards and the Custody Standards—in an effort to devise guidelines governing all custody proceedings, including abuse and neglect cases. A major goal of the Act is to improve the representation of children in proceedings directly affecting their interests by

⁹See 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).

¹⁰See 42 U.S.C. § 5106a(b)(2)(A)(xiii)[requiring 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 recommendations to the court concerning the best interests of the child.”]. In response to CAPTA, states now require some form of child representation in abuse and neglect proceedings, but the nature of the representative ranges from lay guardians to legal counsel. See Howard A. Davidson, *Child Protection Policy and Practice at Century's End*, 33 Fam. L. Q. 765, 768-69 (1999).

¹¹Section 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.”

providing a clear definition of roles for courts and counsel. That objective is implemented through the definitions set out in section 101, standards for the appointment of counsel and guardians ad litem under Article 2, the qualifications of counsel and guardians ad litem under Article 3, and the description of powers and responsibilities under Article 4. Fees and expenses are addressed in Article 5.

The Act provides for two categories of lawyers for children—the child’s attorney and the best interests attorney—but does not endorse the dual role category of attorney/guardian ad litem.¹² The child’s attorney is in a traditional attorney/client relationship with the child and is therefore under traditional ethical limitations governing that relationship. The Act authorizes, however, a limited exercise of “substituted judgment” by the child’s attorney under section 402 where the child is incapable of reasonable judgment and meaningful communication as to a particular issue. In that circumstance, the child’s attorney may pursue the child’s “legal interests” in the proceeding and request appointment of a best interests attorney or guardian ad litem. Similarly, if a child’s expressed goals would put the child at risk of harm, the child’s attorney should again request the appointment of a best interests attorney or guardian ad litem but 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. 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 best interests attorney under the Act, while remaining in the professional role of an attorney, has the substantive responsibility of assisting the court in determining the child’s best interests. Thus, under section 402, the best interests attorney is not bound by the client’s expressed objectives and may use client’s confidences where necessary to protect the child’s interests in the proceeding.

Finally, the Act treats the guardian ad litem as a non-attorney representative of the child, with responsibilities that include making a recommendation to the court and testifying in court, where necessary. See section 404. As such, the Act makes clear in section 302 that the guardian ad litem may not perform acts that would be restricted to a licensed attorney, even if the person appointed to be guardian holds a license to practice law. The Act also endorses the widespread use of Court Appointed Special Advocates (CASAs) to fulfill the role of guardian ad litem.

Under section 201, a court must appoint either a child’s attorney or a best interests

¹²The Act rejects the dual role 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. 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).

attorney for children in abuse and neglect proceedings. The best interests attorney by definition should satisfy CAPTA's requirement that a guardian ad litem be appointed for children in abuse and neglect proceedings. If a best interests attorney has not been appointed, then section 202, Alternative A, directs the court to appoint a guardian ad litem or a court appointed special advocate (CASA)¹³ in order to ensure that the CAPTA requirement is met. Alternative B, in contrast, assumes that a child's attorney will also satisfy CAPTA's requirement for the appointment of a guardian ad litem. CAPTA provides that the guardian ad litem make recommendations to the court concerning the child's best interests. Even a child-directed lawyer functioning in the role of a child's attorney may, in situations justifying substituted judgment under section 402, advocate a position the lawyer believes is in the child's best interests. More generally, the child's attorney will advocate the child's views to facilitate the court's resolution in the child's best interests. Thus, a child's attorney arguably meets the CAPTA requirement as well. For that reason, under Alternative B, the appointment of a guardian ad litem 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 other than abuse and neglect cases, the Act leaves to judicial discretion the question of appointing a child's representative. Section 203 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 guardians ad litem, 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.

¹³The 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 must comply with the standards issued by the National Court Appointed Special Advocate Association. In addition, many states have established their own standards to assure quality volunteer representation. *See* www.nationalcasa.org

**UNIFORM ROLE OF ATTORNEYS REPRESENTING CHILDREN IN CUSTODY
DISPUTES ACT**

[ARTICLE] 1

GENERAL PROVISIONS

SECTION 101. SHORT TITLE. This [act] may be cited as the Uniform Role of Attorneys Representing Children in Custody Disputes Act.

SECTION 102. 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 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) “Custody proceeding” means a court proceeding in which legal or physical custody of a child, parenting time, access, or visitation is at issue, including a proceeding relating to divorce, separation, determination of parentage, adoption, private guardianship, and protection from domestic violence. The term does not include a juvenile delinquency, status offense, or other quasi-criminal proceeding initiated against a child because of the conduct of the

1 child.

2 (5) “Developmentally appropriate manner” means a method that will enable a
3 child to understand and communicate, taking into account such factors as the child’s age, level of
4 education, cultural background, and degree of language acquisition.

5 (6) “Guardian ad litem” means a person appointed to assist the court in
6 determining the best interests of a child.

7 **Comment**

8 The definitions reflect the range of court-appointed representatives for children that are
9 encompassed by the ABA Custody Standards: child’s attorney, best interests attorney, and
10 guardian ad litem. The definitions do not include the dual role attorney/guardian ad litem found
11 in the ABA Abuse and Neglect Standards. Because of widespread disagreement and confusion
12 about the functioning of the attorney/guardian ad litem for children, this Act rejects the dual role.
13

14 Courts and commentators agree that state law should clearly define the roles of such
15 representatives and should distinguish among the various roles in the terms of the appointment.
16 For purposes of this Act, court appointment means a formal order of the court directing the
17 representative to act on behalf of the child in a designated proceeding or with respect to a
18 designated issue. Although a representative may be court appointed without receiving
19 compensation from the court or other government sources, the order of appointment should
20 clearly delineate the source of any compensation and the method for determining fees. A best
21 interests attorney may only serve under the authority of a court appointment, while a privately
22 retained attorney may function as the child’s attorney without a court appointment. This Act,
23 however, governs only court-appointed representatives for children.
24

25 Under the definitions of this Act, abuse and neglect proceedings include child protection
26 proceedings ordinarily brought in juvenile court, such as dependency actions, foster care
27 placements, and actions to terminate parental rights. A custody proceeding, in contrast, includes
28 private custody disputes, adoptions, private guardianships, and other proceedings where the
29 child’s legal or physical custody is at issue. In some circumstances, credible and serious
30 allegations of abuse or neglect will surface in a custody proceeding. If the court determines that
31 the case should be processed as an abuse and neglect proceeding, then this Act’s provisions for
32 abuse and neglect proceedings will govern.
33

34 **SECTION 103. SCOPE.**

1 (a) This [act] governs the powers and duties of court-appointed attorneys and
2 guardians ad litem for children in abuse and neglect and child custody proceedings. It does not
3 apply to privately retained attorneys who have not been appointed by the court.

4 (b) This [act] does not create, enlarge, or diminish parents' or children's rights,
5 standing, or status under the law of this state other than this [act].

6 **Comment**

7 The Act does not govern privately-retained counsel for children since a child or parent
8 remains free to independently hire a lawyer to represent the child. While it is hoped that
9 privately retained counsel will adhere voluntarily to the standards announced in the Act, the Act
10 by its own force applies only to court appointed counsel and guardians ad litem. At the same
11 time, a lawyer who was initially privately retained may thereafter seek such an appointment.
12 Once such a formal appointment occurs, the Act's terms apply.

13
14 The Act is not intended to enlarge or diminish children's or parents' rights recognized
15 under other federal or state laws, except to the extent necessary to implement the Act. For
16 example, the Indian Child Welfare Act authorizes courts to appoint counsel for Indian children in
17 proceedings governed by the ICWA when such appointment is in the best interest of the child.
18 *See* 25 U.S.C. § 1912(b). While the ICWA establishes the federal right to court-appointed
19 counsel in Indian child welfare proceedings, this Act would supplement that right by clarifying
20 the role of the attorney or guardian ad litem for the child. At the same time, the ICWA provides
21 a set of priorities for the foster and adoptive placement of Indian children. *See* 25 U.S.C. § 1915.
22 That federal goal would necessarily govern the attorney's representation of an Indian child
23 governed by the ICWA.

24
25 Similarly, this Act does not diminish state laws that afford children standing or the right
26 to broader participation in abuse and neglect or custody cases than provided under the Act. In a
27 few state, for example, a child who is the subject of a custody dispute is viewed as an
28 indispensable party to the proceeding. *See, e.g., In re J.W.F. v. Schoolcraft*, 763 P.2d 1217 (Utah
29 App. 1988). In most states that have considered the issue, however, courts have concluded that
30 the child does not occupy formal party status in a custody proceeding. *See, e.g., Auclair v.*
31 *Auclair*, 730 A.2d 1260 (Md. App. 1999); *J.A.R. v. Superior Court*, 877 P.2d 1323 (Ariz. App.
32 1994); *In re Marriage of Hartley*, 886 P.2d 665 (Col. 1994). This Act establishes guidelines for
33 the appointment of representatives for children, without regard to a state's position on whether
34 the child should be recognized as a separate party to a custody proceeding. State laws regarding
35 parental preferences in custody disputes are also not affected by this Act.

36
37 Likewise, state law may impose specialized rules for particular proceedings, such as

1 guardianships or adoptions. In some states, for example, a child of a certain age has a statutory
2 right to veto a proposed adoption, and several states provide a right to counsel for children in
3 adoption proceedings. Where such specialized rules are in effect, they control the more general
4 provisions of this Act.

1 [ARTICLE] 2

2 APPOINTMENT OF CHILD’S ATTORNEY, BEST INTERESTS ATTORNEY, OR
3 GUARDIAN AD LITEM.
4

5 SECTION 201. MANDATORY APPOINTMENT IN ABUSE AND NEGLECT
6 PROCEEDING.

7 (a) In an abuse and neglect proceeding, the court shall appoint either a child’s
8 attorney or a best interests attorney. The appointment shall be made as soon as practicable to
9 ensure adequate representation of the child and in any event before the first court hearing that
10 substantially affects the interests of the child. If the court does not designate the role of the
11 attorney in the initial appointment, the court shall do so before or at the first hearing, based on
12 information provided by the appointed attorney and others.

13 (b) In determining whether to appoint a child’s attorney or a best interests
14 attorney, the court shall consider the child’s circumstances and the court’s needs in the particular
15 case, including such factors as the child’s age and emotional maturity, the value of an
16 independent advocate for the child’s best interests, the child’s expressed desire for an attorney,
17 and the child’s expressed objectives in the proceedings.

18 (c) The court may appoint a single attorney to represent siblings if there is no
19 actual conflict of interest, even if the attorney serves in different capacities with respect to two or
20 more siblings. If an actual conflict arises, the attorney shall take any action required by this
21 state’s ethical rules.

22 Comment

1 The ABA has long advocated the mandatory appointment of attorneys for children in
2 abuse and neglect proceedings in addition to the appointment of guardians ad litem, but federal
3 statutory law does not currently require appointment of attorneys. As a matter of practice, more
4 than half the states require the appointment of an attorney/guardian ad litem for a child in an
5 abuse and neglect proceeding . This section endorses the ABA position and requires the
6 appointment of counsel for children but leaves the choice between a best interests attorney or a
7 child's attorney to judicial discretion. The nature of the appointment—whether child's attorney or
8 best interests attorney--should reflect the court's individualized assessment of the child's
9 interests and the court's needs in the particular proceeding.

10
11 In some circumstances, a custody proceeding may effectively become an abuse and
12 neglect proceeding, giving rise to the mandatory appointment of counsel for the child. In
13 particular, where substantial allegations of abuse are made in the context of a private custody
14 dispute, the court should appoint a child's attorney or best interests attorney in order to provide
15 the child with adequate representation.

16
17 This section permits the appointment of a single lawyer for two or more siblings, even if
18 that lawyer is acting as child's attorney for one sibling and best interests attorney for another. A
19 lawyer for multiple siblings may have a better understanding of the children's family context
20 than would a lawyer for only one sibling. Thus, the presence of a *potential* conflict of interest
21 should not preclude the representation of multiple siblings. On the other hand, if an *actual*
22 conflict of interest arises, common representation may be ethically inappropriate. If the
23 representation of one child is materially limited by the lawyer's responsibilities to another child
24 (where, for example, one child seeks to establish parental unfitness and another opposes the
25 production of such evidence), the attorney must take remedial steps and may be forced to
26 withdraw from all representation. See ABA Model Rule 1.7.

27 28 **SECTION 202. APPOINTMENT OF GUARDIAN AD LITEM IN ABUSE AND** 29 **NEGLECT PROCEEDING.**

30 ***ALTERNATIVE A***

31 In an abuse and neglect proceeding, if a best interests attorney has not been appointed by
32 the court, the court shall appoint a guardian ad litem to represent the best interests of the child.
33 To ensure adequate representation of the child, the appointment shall be made as soon as
34 practicable and in any event before the first court hearing that substantially affects the interests of
35 the child. If a best interests attorney has been appointed, the court may appoint a guardian ad

litem if the court determines that a guardian ad litem 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 more information regarding the child's circumstances, the value of a guardian ad litem's expertise, and any request by the best interests attorney for the appointment of a guardian ad litem.

END OF ALTERNATIVE A

ALTERNATIVE B

Whether the attorney appointed pursuant to Section 201 is a child's attorney or a best interests attorney, the court may appoint a guardian ad litem if the court determines that a guardian ad litem 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 more information regarding the child's circumstances, the value of a guardian ad litem's expertise, and any request by the child's attorney or the best interests attorney for the appointment of a guardian ad litem.

Comment

This section is consistent with requirements of current federal law regarding the appointment of guardians ad litem. The Child Abuse Prevention and Treatment Act, 42 U.S.C. § 5106a(b)(2)(A)(xiii), requires that a guardian ad litem be appointed in every judicial proceeding involving an abused or neglected child and it further provides that the guardian ad litem may be an attorney. The Act does not define the role of the guardian ad litem beyond stating that the guardian 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." Arguably, the appointment of either a best interests attorney or a child's attorney will satisfy CAPTA. The appointment of a best interests attorney, whose role is to advocate for a resolution consistent with the best interests of the child, satisfies the requirements of CAPTA beyond doubt. See Section 403. The appointment of a child's attorney may also satisfy CAPTA unless CAPTA is read narrowly to require a best interests advocate rather than a child-directed representative. Alternative A permits states to require a best interests advocate, i.e., a guardian ad litem, where a

1 child's attorney has been appointed. Alternative B makes the appointment of a guardian ad litem
2 discretionary when either a child's attorney or best interests attorney has been appointed.
3 Alternative B thus takes the position that either a child's attorney or a best interests attorney will
4 satisfy the CAPTA requirement.
5

6 An appointment under this section should clearly delineate the powers and duties of the
7 guardian ad litem. The traditional duties of a guardian ad litem are set out in Section 404, but the
8 context of a particular appointment may warrant different or additional duties.
9

10 **SECTION 203. DISCRETIONARY APPOINTMENT IN CUSTODY**

11 **PROCEEDING.**

12 (a) In a custody proceeding, the court may appoint one or more of the following:

13 (1) a best interests attorney;

14 (2) a child's attorney; or

15 (3) a guardian ad litem.

16 (b) The court shall make an appointment under this section if, after considering
17 the criteria in subsection (c), it determines that an appointment is appropriate to ensure the
18 determination of the best interests of the child. The appointment may be made at any stage in
19 the custody proceeding.

20 (c) In deciding whether to make an appointment under this section, the court shall
21 consider the nature and adequacy of the evidence to be presented by the parties, the court's need
22 for additional information relevant to the best interests of the child, the cost to the parties and
23 their ability to pay, and the cost of available alternatives for resolving the issues in the case.

24 Appointment may be most appropriate in cases that involve one or more of the following:

25 (1) requests for extraordinary remedies, such as supervised visitation;

26 (2) the possibility of relocation that could substantially reduce the child's

1 time with a parent or sibling;

2 (3) the child's expressed views or concerns, including the child's request
3 for appointment of a representative;

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

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

8 (6) disputed paternity;

9 (7) past or present abduction of the child or risk of abduction;

10 (8) past or present domestic violence;

11 (9) past or present physical, sexual, or emotional abuse of the child by a
12 party, relative, or household member;

13 (10) past or present mental health problems of the child or a party;

14 (11) special physical, educational, or mental health needs of the child that
15 require investigation or advocacy;

16 (12) a high level of acrimony between the parties or a party and the child;

17 (13) inappropriate adult influence on or manipulation of the child;

18 (14) interference with custody or parenting time;

19 (15) the need to minimize harm to the child from the processes of family
20 separation and litigation; and

21 (16) any other factor or circumstance suggesting that the appointment of a
22 child's attorney or best interests attorney is necessary to protect the child or to enable the court to

1 determine the child's best interests.

2 (d) If the court decides that an appointment under this section is appropriate, the
3 court shall consider the child's circumstances and the court's needs in the particular proceeding
4 in determining whether to appoint a child's attorney, best interests attorney, or guardian ad litem.
5 The court's consideration should include such factors as the child's age and emotional maturity,
6 the value of an independent advocate for the child's best interests, the child's expressed desire
7 for an attorney, the child's expressed objectives in the proceeding, the child's special needs, and
8 any special expertise offered by one or more of the possible representatives.

9 **Comment**

10 This section leaves the appointment of attorneys or guardians ad litem for children in
11 custody cases to judicial discretion, but courts should recognize the significant benefit in having
12 a representative for a child. One of the key values of a lawyer acting in either role is to ensure
13 that the court is made aware of any views the child wishes to express and that those views will be
14 given the proper weight under the substantive law. Moreover, the lawyer should select a method
15 of conveying the child's views that is the least harmful to the child. The goal of child
16 representation is not only to advocate a particular outcome but also to protect children from
17 collateral damage from litigation.

18
19 In accordance with the ABA Custody Standards, the section enumerates a list of factors
20 for courts to consider in deciding whether the appointment of a child's attorney, best interests
21 attorney, or guardian ad litem is warranted. The appointment of a lawyer or guardian ad litem
22 for the child in a custody dispute may often be unnecessary and might introduce a potentially
23 intrusive and expensive advocate. On the other hand, in some circumstances, such as where
24 there are credible allegations of domestic violence or child abuse, the appointment of a separate
25 representative for the child may be essential for the court's determination of the child's best
26 interests. Similarly, in custody proceedings where parentage is at issue, the appointment of
27 counsel for the child may be warranted.

28
29 As noted in the comments to Section 201, in deciding whether to appointment a child's
30 attorney, a best interests attorney, or a guardian ad litem, the court should consider the child's
31 interests and the court's needs in the particular proceedings. This would include such factors as
32 the age and emotional maturity of the child, the value of an independent advocate for the child's
33 best interests, the child's expressed desire for an attorney, the child's expressed objectives in the
34 proceeding, and other circumstances relevant to the child's case. In addition, the court must take

1 into account the expense of an appointment and the parties' ability to pay. Section 502 provides
2 guidelines for assessing fees against the parties for children's representatives in custody
3 proceedings.
4

5 **SECTION 204. CONTINUED REPRESENTATION.**

6 (a) In an abuse and neglect proceeding, an order appointing a child's attorney,
7 best interests attorney, or guardian ad litem continues in effect until the proceeding is closed,
8 unless otherwise provided in the order of appointment.

9 (b) In a custody proceeding, an order appointing a child's attorney, best interests
10 attorney, or guardian ad litem continues in effect only for the term provided in the order of
11 appointment.

12 (c) In an abuse and neglect proceeding or a custody proceeding, the right of a
13 child's attorney, best interests attorney, or guardian ad litem to appeal a ruling of the trial court
14 on behalf of the child is determined by the law of this state other than this [act].

15 **Comment**

16 It is important to have continuity in representation, both in terms of practical impact and
17 in terms of the child's emotional perspective. A lawyer or guardian ad litem who has been
18 representing a child from the beginning of an abuse and neglect or custody proceeding will have
19 a deep understanding of the issues in the case. That representative's continued participation
20 ordinarily should be in the child's interests. Moreover, a child's sense of trust and confidence in
21 his or her representative will be enhanced if that representative is the same person over time. Of
22 course, a court remains free at any point to terminate the appointment of a representative
23 whenever the representative's performance is inadequate.
24

25 State law varies on the question of standing to file an appeal, just as it varies on whether
26 children have formal party status in abuse and neglect and custody proceedings. In states where
27 the child through a representative can file an appeal, the appointed representative should exercise
28 that option with care and consistent with the representative's role, taking into consideration the
29 seriousness of the perceived error, the available resources for prosecuting the appeal, and the
30 likelihood of success.
31

SECTION 205. ORDER OF APPOINTMENT An order of appointment under Section 201, 202, or 203 must be in writing and clearly set forth the terms of the appointment, including the role of the appointee in the proceeding, the reasons for and duration of the appointment, and the terms of compensation, if any.

Comment

The order of appointment should 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 tasks to be performed as precisely as possible, and it should 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.

1 [ARTICLE] 3

2 QUALIFICATIONS

3
4 SECTION 301. QUALIFICATIONS OF CHILD'S ATTORNEY OR BEST

5 INTERESTS ATTORNEY. The court shall appoint as a child's attorney or best interests
6 attorney only a person qualified through training or experience to represent children in child
7 custody or abuse and neglect proceedings according to standards established by law of this state
8 other than this [act] or by judicial rule.

9 Comment

10 All court-appointed attorneys for children, whether in the role of child's attorney or best
11 interests attorney, must have adequate training or experience to discharge their duties with
12 competence. States are encouraged to adopt state-wide standards of practice for all children's
13 attorneys through court rule or rule promulgated by the state bar regulatory agency or otherwise.
14 Such standards of practice should include a description of required training in applicable
15 statutory codes, case law and court procedures, the dynamics of child abuse and neglect, child
16 development and child psychology, treatment issues, communication with children, cultural
17 awareness, and the impact of separation and long-term consequences to a child of being in
18 temporary care.

19
20 Before making an appointment, courts should be satisfied that the attorney possesses the
21 relevant qualifications (including mandatory periodic trainings) on an ongoing basis. All
22 children's attorneys and best interests attorneys should become familiar with the ABA Abuse and
23 Neglect Standards, the suggested amendments to those standards adopted by the National
24 Association of Counsel for Children, and the ABA Custody Standards. Also, in making an
25 appointment under this Act, the court should ensure that the attorney's caseload is not so
26 burdensome as to undermine his or her ability to competently serve as the child's representative
27 and to fulfill the duties identified in Sections 401-03. See ABA Abuse and Neglect Standards L-
28 1 (providing duty of trial courts to control size of court-appointed caseloads).
29

30 SECTION 302. QUALIFICATIONS OF GUARDIAN AD LITEM.

31 (a) In a custody or abuse and neglect proceeding the court may appoint as a

guardian ad litem for a child a person or organization with competence in the subject matter of the proceeding, including:

(1) a non profit organization composed of volunteer advocates whose training includes the representation of children in custody or abuse and neglect proceedings; or

(2) a person who has received appropriate training regarding the representation of children in the proceeding involved and who has been determined qualified by the court to serve as a guardian ad litem for the child.

(b) The court may appoint an attorney to serve as guardian ad litem for a child if the attorney meets the qualifications in this section and is specifically appointed to serve solely in the role of guardian ad litem. An attorney appointed as a guardian ad litem may take only those actions that may be taken by a non-attorney guardian ad litem.

(c) The appointment of a guardian ad litem does not in itself create a professional relationship between that person and the child unless such a relationship is expressly established in the order of appointment.

Comment

In appointing a guardian ad litem for a child, the court may appoint an individual as guardian ad litem based on that person's training, ability, and experience in child advocacy. Alternatively, the court may identify a nonprofit organization 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.

This section makes clear that if the court appoints an attorney to function as guardian ad litem, 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. Although federal law may permit an attorney guardian ad litem to serve as an attorney, under this Act an attorney appointed as guardian ad litem is not appointed to serve as an attorney and should function only as a non-lawyer.

1 As with the training for attorneys for children, the guardian ad litem training should
2 include instruction on the applicable state and federal law, the dynamics of child abuse and
3 neglect, domestic violence, child development, treatment issues, communication with children,
4 cultural awareness, and the impact of separation and long-term consequences to a child of being
5 in temporary care.
6

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

1 [ARTICLE] 4

2 POWERS, DUTIES, AND IMMUNITY

3
4 SECTION 401. DUTIES OF CHILD’S ATTORNEY AND BEST INTERESTS

5 ATTORNEY. An attorney appointed as child’s attorney or best interests attorney shall, within
6 a reasonable time after appointment:

7 (a) meet with the child and ascertain, in a developmentally appropriate manner,
8 the child’s needs, circumstances, and views;

9 (b) meet and consult with any guardian ad litem appointed for the child;

10 (c) investigate the facts of the case to the extent the attorney considers appropriate,
11 including interviewing persons with significant knowledge of the child’s history and condition;

12 (d) obtain and review copies of relevant records relating to the child as provided
13 in Section 405, to the extent the attorney considers appropriate;

14 (e) seek to elicit, in a developmentally appropriate manner, the child’s expressed
15 objectives in the proceeding;

16 (f) present the child’s expressed objectives in the proceeding to the court, if the
17 child so desires, by a method that is appropriate in light of the needs of the child’s case and the
18 impact on the child;

19 (g) inform the child of the status of the proceeding and facilitate the child’s
20 participation in the proceeding if appropriate;

21 (h) take any action consistent with the child’s best interests that the attorney
22 considers necessary to expedite the proceedings and the resolution of contested issues; and

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

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 the attorney conversely 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. In those states where there is full participation by children's attorneys in alternative forms of dispute resolution, the bracketed phrase under subsection (i) should be omitted. For a detailed enumeration of the pretrial and trial responsibilities for children's attorneys, attorneys should refer to Standards III (F) and (G) of the ABA Custody Standards.

In addition, courts must ensure that children's attorneys receive notice and 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 facilitate the child's attendance at court proceedings where such participation is in the child's interest. A child might receive therapeutic benefit from being present during a dependency hearing, for example, but little benefit from observing an acrimonious custody dispute. Lawyers for children should also ensure that other parties observe ethical rules regarding contact with represented persons.

A lawyer may not serve both as a child's attorney and a best interests attorney for the same child at the same time. Such a blurring of roles would give rise to the problems that this Act is designed to avoid. On the other hand, a lawyer's role may change over time. For example, a best interests attorney appointed to represent a very young child may become a child's attorney as the child matures and gains the capacity to direct the attorney. In that circumstance, the lawyer should seek a modification of the order of appointment.

SECTION 402. DUTIES UNIQUE TO CHILD'S ATTORNEY.

(a) A child's attorney owes to the child the duties imposed by the law of this state

1 in an attorney-client relationship.

2 (b) A child's attorney shall:

3 (1) explain the nature of the attorney-client relationship to the child,
4 including the requirements of confidentiality;

5 (2) provide advice and counsel to the child;

6 (3) inform the child of the nature and status of the proceeding on an
7 ongoing basis;

8 (4) facilitate the child's participation in the proceeding if appropriate; and

9 (5) review and accept or decline to accept any proposed stipulation for an
10 order affecting the child and explain to the court the basis for any opposition.

11 (c) Subject to subsection (e), a child's attorney shall advocate the child's
12 expressed objectives of representation once the child has formed an attorney-client relationship
13 with the attorney, unless the attorney determines that the child:

14 (1) lacks the capacity to understand the nature of an attorney-client
15 relationship; or

16 (2) lacks the capacity to direct the attorney with respect to the particular
17 issue involved.

18 (d) If a child's attorney determines that the child cannot or will not formulate
19 objectives of representation as to a particular issue, the child's attorney may:

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

21 (2) request appointment of a guardian ad litem or best interests attorney;

22 or

1 (3) present to the court a position that the attorney determines will serve
2 the child's best interests so long as the position is not inconsistent with the child's expressed
3 objectives.

4 (e) If a child's attorney determines that, despite appropriate legal counseling, the
5 child continues to express objectives of representation that would put the child at risk of
6 substantial harm, the child's attorney shall:

7 (1) request appointment of a guardian ad litem or best interest attorney
8 without revealing the reason for the request; and

9 (2) continue to advocate the child's expressed objectives, unless the
10 child's position is prohibited by law or without factual foundation, or request to withdraw from
11 the representation.

12 **Comment**

13 The child's attorney is in a traditional lawyer/client relationship with the child and, as
14 such, should explain the meaning and consequences of the child's choices in terms the client can
15 understand. As in other lawyer/client relationships, the lawyer may express his or her assessment
16 of the case and advise the child of the best goals to pursue. On the other hand, the lawyer must
17 remain aware that the child may be more vulnerable to manipulation than an adult client. The
18 lawyer has a duty not to overbear the will of the client. The lawyer may not advocate a position
19 contrary to the child's expressed position except as permitted by applicable ethical standards.
20 The child's attorney is in a unique position to ensure that the child has a legal voice in the
21 proceeding.
22

23 Consistent with ABA Model Rule 1.14, the child's attorney should determine whether the
24 child has sufficient maturity to understand and form an attorney-client relationship and whether
25 the child is capable of making reasoned judgments and engaging in meaningful communication.
26 A determination of incapacity may be incremental and issue-specific, thus enabling the child's
27 attorney to continue to function as a client-directed lawyer as to major questions in the
28 proceeding. When a child does lack capacity to formulate objectives of representation as to a
29 particular matter, this section permits the child's attorney to advocate the best interests of the
30 child as to that matter. In so doing, however, the child's attorney may not take a position that is
31 contrary to an expressed objective of the child in the proceeding.

1 This section reflects the approach of the ABA Abuse and Neglect Standards and the ABA
2 Custody Standards as to the dilemma that can arise when the child's expressed goals in the
3 proceeding may place the child at risk of harm. A child's attorney may not refuse to advocate the
4 child's wishes simply because the attorney disagrees with the child's view or believes the child's
5 objectives will not further the child's best interests. On the other hand, the child's attorney is not
6 bound by the child's expressed wishes if pursuing those wishes would put the child at risk of
7 substantial physical, financial or other harm, and is not merely contrary to the lawyer's opinion of
8 the child's interests. In most cases, the ethical conflict involved in asserting a position that
9 would seriously endanger the child can be resolved through the lawyer's counseling function. If
10 it cannot be resolved, this section permits the child's attorney to request the appointment of a
11 guardian ad litem or a best interests attorney. A child's attorney should not reveal the reason for
12 the request unless such disclosure is authorized by the state's ethics rules on confidentiality.
13

14 Ordinarily, a court would not appoint both a child's attorney and a best interests attorney
15 for the same child. More typically, the court would appoint a guardian ad litem upon the request
16 of a child's attorney. Nevertheless, in exceptional cases involving a competent child who
17 persists in taking a position that poses a risk of serious harm, a court might conclude that a best
18 interests attorney should be appointed to ensure a full presentation of the facts to the court.
19 Alternatively, a court might appoint a guardian ad litem as well as a lawyer to represent the
20 guardian in the proceeding.
21

22 Even where the child's expressed objectives may place the child at risk of substantial
23 harm, the child has a right to have his or her views made known to the court. Under ordinary
24 ethical standards and court rules, however, a lawyer may not advocate positions that are not well
25 grounded in fact and warranted by existing law or a nonfrivolous argument for modification of
26 existing law. See ABA Model Rule 3.1. Thus, the child's attorney may not advocate the child's
27 wishes if the child's position is prohibited by law or lacks any factual foundation. In extreme
28 situations where the child persists in wanting the attorney to advocate a position unsupportable
29 under the law, the attorney may seek to withdraw from the representation. .
30

31 **SECTION 403. DUTIES UNIQUE TO BEST INTERESTS ATTORNEY.**

32 (a) A best interests attorney shall advocate for a resolution of the proceeding
33 consistent with the best interests of the child based on the facts of the case and according to
34 criteria established by law related to the purposes of the proceeding.

35 (b) A best interests attorney shall, in a developmentally appropriate manner:

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

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

(3) if the child does not also have a child's attorney:

(A) inform the child of the nature and status of the proceeding on an ongoing basis;

(B) facilitate the child's participation in the proceeding if appropriate;

(C) provide advice and counsel to the child; and

(D) review and accept or decline to accept any proposed stipulation for an order affecting the child and explain to the court the basis for any opposition.

(c) A best interests attorney is not bound by the child's expressed objectives but shall consider the child's position in determining what to advocate.

(d) A child's confidential communications with a best interests attorney are subject to this state's attorney ethics rules as if the child were the client of the best interests attorney, except that the attorney may use the child's confidences for the purpose of the representation without disclosing them.

Comment

The best interests attorney provides legal services for the purpose of protecting the child's best interests. Accordingly, in the course of the representation, the attorney must arrive at his or her own understanding of the child's best interests. Because the determination of best interests is imprecise and highly contextual, the best interests attorney should follow objective criteria and should not substitute his or her personal views of best interests. The "criteria established by law relating to the purposes of the proceeding" will include standards imposed by federal and state law for child protection in abuse and neglect proceedings, as well as a state's substantive law governing child custody determinations. See, e.g., Section 402 of the Uniform Marriage and Divorce Act. Moreover, the attorney's legal representation should be informed by an

1 understanding of the child's individual circumstances and needs, including the child's cultural
2 background, unique family relationships, and developmental level.

3
4 Under this section, a child's communications with a best interests attorney are
5 confidential except that *use* of the communications is permitted if necessary to protect a child's
6 interests. Although some states have permitted the hybrid lawyer/guardian ad litem to reveal the
7 child's confidential communications to the court where necessary to promote the child's best
8 interests, *see* Clark v. Alexander, 953 P.2d 145 (Wyo. 1998), this section provides a more limited
9 exception to the principle of client confidentiality. Thus, a best interests attorney may use a
10 child's confidential communications for the purpose of the representation without disclosing
11 them. The distinction between use and disclosure means, for example, that if a child tells the
12 attorney that a parent uses illegal drugs, the attorney may use that information to find and present
13 separate evidence of the drug use to the court but may not reveal that the initial source of
14 information was the child. The best interests attorney should explain to the child that the child's
15 communications may be used by the attorney in order to achieve the best resolution for the child
16 in the proceeding.
17

18 **SECTION 404. DUTIES OF GUARDIAN AD LITEM FOR CHILD.** A guardian ad
19 litem appointed for a child shall:

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

21 (A) meet with the child and ascertain, in a developmentally appropriate
22 manner, the child's needs, circumstances, and views;

23 (B) investigate the facts of the case to the extent the guardian ad litem
24 considers appropriate, including interviewing persons with significant knowledge of the child's
25 history and condition;

26 (C) obtain and review copies of relevant records relating to the child as
27 provided by Section 405, to the extent the guardian ad litem considers appropriate;

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

30 (2) seek to elicit, in a developmentally appropriate manner, the child's expressed

objectives in the proceeding;

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

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

(5) maintain the confidentiality of information relating to the case except as necessary to perform the duties of guardian ad litem or as may be specifically provided by law of this state other than this [act];

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

(7) encourage settlement and the use of any alternative forms of dispute resolution the guardian ad litem considers appropriate and participate in such proceedings [to the extent permitted under the law of this state]; and

(8) perform any specific task directed by the court not inconsistent with the role of guardian ad litem.

Comment

As court-appointed representative, the guardian ad litem should advise the child in terms the child can understand about the nature of the proceedings and the role of the guardian ad litem. This section describes the traditional function of the guardian ad litem and makes clear that the guardian ad litem has a duty to conduct an independent investigation in order to ascertain the facts of the case. In carrying out that duty, the guardian ad litem must have unfettered access to the child and a reasonable opportunity to interview persons with relevant knowledge of the child, including the parties. In addition, the guardian's investigation ordinarily should include a review of relevant records. To ensure that the guardian 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 proceedings, the guardian's obligations to the court typically include the duty to make recommendations concerning the child's best interests. In

1 custody proceedings, in contrast, the guardian may provide the court with information but not
2 present specific recommendations unless the court requests such a submission from the guardian.
3 In any event, the guardian should be prepared to make such recommendations if requested by the
4 court.

5
6 Guardians ad litem, including CASA's, must observe all statutes and court rules
7 concerning confidentiality and should not disclose information about the appointed case to non-
8 parties other than the court and court-authorized personnel. Although attorney-client
9 confidentiality rules do not govern the guardian ad litem's communications with the child, the
10 guardian should protect the child's privacy and should reveal the child's statements only when
11 necessary to fulfill the guardian's duties to the court. For guidelines governing the duty of
12 confidentiality for guardians ad litem, see Minnesota Rule 908, General Responsibilities of
13 Guardians Ad Litem; Standard 7.0, Standards for Guardians Ad Litem in Missouri Juvenile and
14 Family Court Matters.

15
16 Many states have developed more detailed standards governing the duties of guardians ad
17 litem than those contained in this Act. See, e.g., Judicial Council of Virginia, Standards to
18 Govern the Appointment of Guardians Ad Litem, at www.courts.state.va.us/1/cover.htm; There
19 are also numerous sources governing CASA programs and specifying the duties of CASA
20 volunteers. See, e.g., Nat'l CASA Association, Standards for National CASA Association
21 Member Programs (2002); Office of Juvenile Justice and Delinquency Prevention, Court
22 Appointed Special Advocates: A Voice for Abused and Neglected Children in Court (1997).

23
24 **SECTION 405. ACCESS TO CHILD AND INFORMATION RELATING TO**
25 **CHILD.**

26 (a) Subject to subsection (c) and any appropriate conditions imposed by the court,
27 an order of appointment under this [act] must authorize the child's attorney, best interests
28 attorney, or guardian ad litem to have immediate access to:

29 (1) the child; and
30 (2) any otherwise privileged or confidential information relating to the
31 child.

32 (b) Without requiring a further order or release, the custodian of any relevant
33 record relating to the child, including records regarding social services, drug or alcohol treatment,

1 and medical or mental health evaluation or treatment of the child, law enforcement records,
2 school records, records of a probate or court proceeding, and records of any trust or account for
3 which the child is a beneficiary, shall provide access to a person authorized by order issued
4 pursuant to subsection (a) to access the records.

5 (c) A child's record that is privileged or confidential under law other than this
6 [act] may be released to a person appointed under this [act] only in accordance with that law.

7 **Comment**

8 Persons appointed to represent children under this Act must have access to information
9 regarding the child in order to competently perform their assigned roles. Relevant files include
10 those concerning child protective services, developmental disabilities, juvenile delinquency,
11 mental health, and educational programs. A lawyer may still need to use subpoenas or other
12 discovery tools to obtain relevant records.

13
14 Under subsection (a), a court may impose conditions on access that are required by law,
15 ethical rules, the child's needs, or the circumstances of the case. For example, if a child's parent
16 is represented by counsel, a child's attorney or best interests attorney would need to comply with
17 applicable rules governing contact with represented parties. Similarly, a child's attorney or best
18 interests attorney may have the right to be present when the child is interviewed by others. To
19 the extent feasible, the order of appointment should explain the relevant limitations on access in
20 detail. Similarly, subsection (c) recognizes that federal or state law, such as the Family
21 Educational Rights and Privacy Act, 20 U.S.C. § 1232g, and the Health Insurance Portability and
22 Accountability Act of 1996, 42 U.S.C. § 201, may impose independent requirements for access
23 that a child's representative must observe. In some circumstances, the order of appointment will
24 need to contain qualifying language to enable the appointed representative to gain access to the
25 protected records.
26

27 **SECTION 406. PARTICIPATION BY CHILD'S ATTORNEY, BEST** 28 **INTERESTS ATTORNEY, OR GUARDIAN AD LITEM IN PROCEEDING.**

29 (a) A child's attorney, best interests attorney, and guardian ad litem for a child is
30 each entitled to:

31 (1) receive a copy of each pleading or other record filed with the court in

1 the proceeding;

2 (2) receive notice of and attend each hearing in the proceeding; and

3 (3) participate in any case staffing or case management conference
4 concerning the child in an abuse and neglect proceeding.

5 (b) A guardian ad litem is not a party and may not take any action that may be
6 taken only by a licensed attorney, including engaging in discovery other than as a witness,
7 making opening and closing statements, and examining witnesses.

8 (c) The court, a child's attorney, or a best interests attorney may compel the
9 guardian ad litem for a child to attend a trial or hearing relating to that child and to testify as
10 necessary for the proper disposition of the proceeding.

11 (d) The court shall ensure that any guardian ad litem for a child has an opportunity
12 to testify or submit a report setting forth:

13 (1) the guardian ad litem's recommendations regarding the best interests of
14 the child; and

15 (2) the bases for the guardian ad litem's recommendations.

16 (e) A guardian ad litem must provide copies of any report submitted to the court
17 under subsection (d) to any child's attorney or best interests attorney appointed for the child and
18 to the parties.

19 (f) In a [non-jury] custody proceeding, a party may call any guardian ad litem for
20 the child as a witness for the purpose of cross-examination regarding the guardian's report
21 without the guardian's being listed as a witness by a party. If the guardian is not called as a
22 witness, the court shall permit the guardian to testify in the narrative.

1 [(g) In a jury trial, disclosure to the jury of the contents of a guardian ad litem's
2 report to the court is subject to this state's rules of evidence.]

3 **Comment**

4 This section makes clear that a child's attorney, a best interests attorney, and a guardian
5 ad litem are each entitled to receive notice of all hearings and to receive copies of all documents
6 filed in the case. The right to participate in case staffings will arise in abuse and neglect
7 proceedings where periodic conferences among court personnel and children's representative are
8 mandated by state and federal law to assess the child's current placement and future status.
9 Unlike the child's attorney or the best interests attorney, the guardian ad litem may also testify or
10 submit a report to the court regarding recommendations as to the child's best interests. Indeed,
11 under Section 404, the guardian ad litem has a duty to submit such recommendations when
12 requested to do so by the court.
13

14 Under this section, the guardian is subject to cross-examination regarding the guardian's
15 recommendations to the court. Although the guardian ad litem is appointed to assist the court in
16 determining the child's best interests, ex parte communications with the court are not permitted.
17 The due process rights of the parties require the guardian to observe ordinary procedural rules in
18 making recommendations to the court, including notice requirements, opportunity to be heard,
19 and opportunity for cross examination. See, e.g., *In re Marriage of Bates*, 2004 WL 2403721 (Ill.
20 2004)(failure to provide copy of guardian ad litem report to mother in custody proceeding was
21 violation of due process); *Leinenbach v. Leinenbach*, 634 So.2d 252 (Fla. App. 1994)(trial court
22 erred in relying on report of guardian ad litem where father was not afforded opportunity to rebut
23 contents of report).
24

25 **SECTION 407. ATTORNEY WORK PRODUCT AND TESTIMONY.**

26 (a) Except as otherwise provided in subsection (b) and Sections 402 and 403, an
27 attorney appointed as a child's attorney or a best interests attorney may not:

28 (1) be compelled to produce attorney work product developed during the
29 appointment;

30 (2) be required to disclose the source of any information obtained as a
31 result of the appointment;

32 (3) submit a report into evidence; or

(4) testify in court, except as authorized by [cite applicable rules of professional conduct].

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

SECTION 408. IMMUNITY.

(a) A best interests attorney or a guardian ad litem appointed pursuant to this [act] is not liable for civil damages because of an action taken or recommendation or opinion given in the capacity of best interests attorney or guardian ad litem unless the action, recommendation, or opinion:

(1) was taken or given with conscious indifference to or reckless disregard for the safety of another;

(2) was taken or given in bad faith or with malice; or

(3) was grossly negligent or willfully wrongful.

(b) Only the child has a right of action in civil damages against a child's attorney, best interest attorney, or guardian ad litem.

Comment

This section provides qualified immunity for persons appointed to assist the court as best interest attorneys or guardians ad litem. The provision of qualified immunity is based on the recognition that such individuals need protection from civil actions for damages when performing functions consistent with their appointed roles. Immunity is necessary to ensure that best attorneys and guardians ad litem can fully investigate and formulate recommendations without fear of retaliation by the parties.

On the other hand, the Act does not provide immunity for persons appointed as a child's attorney, since such lawyers are in a traditional lawyer/client role and should be held to ordinary standards of care. The Act does recognize that only the child has standing to sue for malpractice or other breach of professional responsibility.

1 [ARTICLE] 5

2 FEES AND EXPENSES

3
4 SECTION 501. FEES AND EXPENSES IN ABUSE AND NEGLECT
5 PROCEEDING.

6 (a) In an abuse and neglect proceeding, any person appointed pursuant to this
7 [act], other than a volunteer advocate, is entitled to reasonable fees and expenses in an amount
8 set by the court.

9 (b) If the court determines that a parent or other responsible party is able to defray
10 the fees and expenses set pursuant to subsection (a), the court may:

11 (1) order one or more of those persons to pay the fees and expenses;

12 (2) order one or more of those persons, before final hearing, to deposit the
13 amount necessary to pay the fees and expenses into court or into an account authorized by the
14 court for the use and benefit of the payee on order of the court; or

15 (3) tax as costs the amount necessary to pay the fees and expenses against
16 one or more of those persons.

17 (c) If the parents or responsible party cannot pay the fees and expenses because of
18 indigency or other hardship, the fees and expenses set pursuant to subsection (a) must be paid
19 from [designated public funds]. The court may not award fees under this [act] against the state, a
20 state agency, or a political subdivision of the state except as provided in this subsection.

21 (d) In order to receive payment of fees and expenses under this section, the payee
22 must complete and submit to the court a voucher or claim for payment, listing the fees charged

and hours worked.

Comment

Adequate and timely compensation of attorneys and guardians ad litem is essential throughout the terms of appointment. The child's attorney, best interests attorney, and guardian ad litem should also have access, where necessary, to reimbursement for experts, investigative services, research costs, and other activities undertaken to fulfill the obligations of the appointment. Under the Act, state funds should be appropriated and made available to compensate children's representatives in abuse and neglect proceedings. Under the mandate of federal law, states are obligated to appoint guardians ad litem for children in abuse and neglect proceedings. See Child Abuse Prevention and Treatment Act, 42 U.S.C. § 5106a(b)(2)(A)(xiii). This Act supplements the federal requirement by requiring that indigent children receive publicly funded representation, whether in the form of a child's attorney, best interests attorney, or guardian ad litem.

SECTION 502. FEES AND EXPENSES IN CUSTODY PROCEEDING.

(a) In a custody proceeding, any person appointed pursuant to this [act], other than a volunteer advocate, is entitled to reasonable fees and expenses in an amount set by the court.

(b) The court shall:

(1) determine the amount payable by reference to the reasonable and customary fees and expenses for similar services in the county of jurisdiction; and

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

(c) The court may:

(1) allocate fees and expenses between the parties in proportion to their demonstrated ability to pay;

(2) before the final hearing, order an amount in addition to the amount ordered deposited under subsection (b)(2) to be paid to the credit of a trust account for the use

1 and benefit of the person or persons appointed under this [act].

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

5 **Comment**

6 In custody proceedings, courts should make clear to all parties how fees will be
7 determined and how and by whom the fees are to be paid. Lawyers should be paid in accordance
8 with prevailing legal standards of reasonableness. This section recognizes that most states do not
9 have public funds available to compensate children's representatives in custody disputes other
10 than abuse and neglect proceedings. The ordinary approach will be for the court to assess fees
11 against the parties, taking into account significant disparities in ability to pay and awarding fees
12 in proportion to ability to pay. This section recognizes, however, that in some cases public funds
13 will be available under other provisions of state law for fees and expenses in private custody
14 disputes.

15
16 The award of fees and expenses in all cases should include reasonable expenses for expert
17 witnesses where the attorney or guardian ad litem demonstrates to the court that such expenses
18 are necessary to accomplish the objective of the proceeding.

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