

**DRAFTING COMMITTEE ON REPRESENTATION OF CHILDREN  
IN CUSTODY DISPUTES ACT**

**REPORT**

At its meeting on January 10, 2004, the Executive Committee approved appointment of a drafting committee upon the following recommendation of the Committee on Scope and Program:

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).

This project was undertaken upon the recommendation of the Joint Editorial Board for Uniform Family Law Acts and was in response to the adoption by the American Bar Association of two sets of standards, (1) ABA Standards for Representation of Children in Abuse, Neglect, and Dependency Cases, adopted in 1995, and (2) Standards of Practice of Lawyers Representing Children in Custody Cases, adopted on August 12, 2003.

The role of lawyers representing children in court proceedings affecting their interests has been the subject of intense debate within the last decade, with disagreement focusing on such fundamental questions as whether appointment of counsel should be mandatory, how a lawyer should determine a child's capacity to direct the legal representation, what a lawyer should do for a child who lacks that capacity, and whether a lawyer may both represent a child as the child's lawyer and also advocate as guardian ad litem for the child's best interest.

State laws vary dramatically on the appointment of representatives for children, with some models emphasizing the unique vulnerability of children and children's need for adult protection and guardianship to determine their interests while other models affirm a child's right to have his or her wishes presented by a zealous advocate. In the abuse and neglect context, federal law requires the appointment of a guardian ad litem for a child, but the role and identity of that GAL are undefined. Many states routinely appoint lawyers to function as GALs without careful delineation of the distinction between the ethical responsibilities of a lawyer to the client and the professional obligations of the GAL as a best interests witness for the court. In the context of custody disputes outside of child protective proceedings, states have even fewer guidelines for the appointment of representatives for children. Typically, state law simply authorizes the appointment of counsel as a matter of judicial discretion.

Issues that the Drafting Committee will consider include:

### **1. 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 ABA Custody Standards require that a judge appointing a lawyer for a child specify whether the attorney is a "Child's Attorney" or a "Best Interests Attorney." They define a "Child's Attorney" as "a lawyer who provides independent legal counsel for a child and who owes the same duties of undivided loyalty, confidentiality, and competent representation as are due an adult client." A "Best Interests Attorney" is "a lawyer who provides independent legal services for the purpose of protecting a child's best interest, without being bound by the child's directives or objectives." The Custody Standards further provide that "a lawyer appointed as a Child's Attorney or Best Interests Attorney should not play any other role in the case, and should not testify, file a report, or make recommendations."

The ABA's Abuse and Neglect Standards, while similar in many respects to the Custody Standards, take a different approach on one important question. They permit a hybrid attorney/guardian ad litem role for lawyers under certain circumstances.

At its first meeting, the Drafting Committee decided that it would recommend against the creation of a hybrid attorney/guardian ad litem role for a lawyer appointed to represent a child, adopting the ABA Custody Standards for all cases.

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

A 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 of lawyers, whether appointed as the child's attorney or 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, guidelines for the child's attorney when the child's expressed wishes are not in the child's best interests, guidelines for determining when a child's confidences to a best interests attorney may be revealed, and detailed guidelines governing the conduct of the best interests attorney. Standards such as these are not normally set out by statute, and the Drafting Committee will consider whether there are special reasons to include them in statutory language in the context of legal representation of children.

### **3. 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 it does not require appointment of an attorney for the child. 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.

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. A 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, when 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.

#### **4. 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 (a role that the Drafting Committee has rejected). 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 initial draft of the Drafting Committee is consistent with the Custody Standards by providing qualified immunity for persons serving as best interests attorney or guardian ad litem. On the other hand, it does not provide immunity for lawyers serving solely as the child's attorney. In all cases, the draft provides that the only person with standing to bring a civil claim for malpractice is the child.

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 children's lawyers will be the target of lawsuits by disgruntled parents, and the essential service that such lawyers provide to the courts. Because of the power of those arguments, some states provide absolute immunity for court-appointed guardians ad litem. The argument against immunity, at least with respect to persons serving as the child's attorneys, is 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 to lawyers for children.

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

In drafting guidelines for counsel and guardians ad litem, the Committee will consider whether to include special provisions for abuse and neglect cases involving Native American children. Under the Indian Child Welfare Act of 1978, Native American children who remain in state court welfare systems are entitled to special procedures designed to promote the

reunification of the child and his or 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 established 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 interests of the child. It also provides that counsel may be compensated out of federal funds if no provision for appointment exists under state law.

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 must decide whether it is advisable to address the special circumstances of ICWA-covered children in the Act.