

Date: September 15, 2005
To: Drafting Committee
From: Barbara Atwood
**Re: Questions to be considered at October 2005 meeting of
Drafting Committee for URCANCPA**

I hope everyone will be able to attend our meeting in October. This memo identifies the major questions that have been raised regarding our proposed Act, both in comments received independently from outside experts and in comments received at the NCCUSL Annual Meeting in July when the Act had its first reading. A report prepared by Commissioner Battle Robinson contains a thoughtful analysis of the major issues raised at the Annual Meeting, and I have attached that report separately. I assume that we'll spend most of our time in October addressing these concerns.

I'm also sending as a separate attachment the current version of our proposed Act. This version contains some changes (using strike-outs and red-line) that implement some of the less controversial suggestions received from Committee members, commissioners, and others.

1. The mandatory appointment of counsel in Section 4 in abuse and neglect proceedings.

Commissioner Robinson notes that concerns surfaced at the Annual Meeting that the proposed Act goes beyond the requirements of federal law and that the Act will be unenactable due to the added costs imposed on the states. Since the Act requires the appointment of a lawyer for every child in an abuse or neglect proceeding, it does go beyond CAPTA, which requires the appointment of a GAL, who may be an attorney or a CASA. A suggestion was made from the floor to limit our Act to foster children. Another suggestion was to include bracketed language in Section 4 that would permit the appointment of a court advisor rather than a lawyer, at least in some cases. Commissioner Robinson in her Report similarly explores the advantages of permitting appointment of volunteer "court advisors" rather than attorneys. She notes the widespread use of CASA programs and the virtues of having volunteers, who are often older people with valuable life experience, function as representatives for children. She also suggests that the proposed Act might lessen the role of CASAs and thereby lose some of its appeal for the States where such programs are active and successful.

My sense of the Drafting Committee is that there is little support for changing our view on the basic command of Section 4. The recommendation that a lawyer be appointed for every child in an abuse and neglect proceeding has been endorsed by the ABA, the National Association of Counsel for Children, the Fordham Conference, the Administration for Children and Families in U.S. Department of Health and Human Services, and other child advocacy groups. At the Annual Meeting, Harry Tindall gave an eloquent defense of our position, and perhaps with Harry's help I can strengthen the commentary's justification for the requirement of appointed counsel.

As to the suggestion that we limit the command to foster children, that does not seem

workable to me. Such a limitation would make legal representation turn on the outcome of the initial dependency proceeding, rather than the initiation of the proceeding itself. An attorney for a child at the beginning stages of a dependency case can play a valuable role in helping the court decide whether removal of the child from the home is necessary in the first place.

We do need to address the question of the fiscal impact of an absolute requirement for the appointment of an attorney. My research indicates that 29 states already *require* the appointment of attorneys for children in abuse and neglect cases, although often in the hybrid attorney/GAL role, and that another 11 authorize the appointment of attorneys for children on a discretionary basis.¹ Other studies indicate that, as a practical matter, about 4/5 of the states typically appoint attorneys for children in abuse and neglect cases even though their laws may not require it.²

Thus, in evaluating the fiscal impact, one needs to keep in mind that most states are already appointing attorneys for children in dependency cases. In those many states that use the hybrid attorney/GAL model, one of the biggest impacts of our proposed Act would be the elimination of that hybrid role. CASA programs may be able to fill that gap without cost to the states. Also, my understanding is that CAPTA funding is intended, in part, to defray costs of providing representation for children. Howard Davidson can enlighten us on this point, I hope. Nevertheless, in the approximately ten states where courts rely exclusively on GAL's, the proposed Act clearly would cost more than their current system. Is that a sufficient reason to modify the mandate of Section 4? This is an important and basic question for us to consider at the meeting.

2. The exercise of judicial discretion to choose between child's attorney and best interests attorney under Sections 4 and 6.

Don Duquette, Director of the University of Michigan Child Advocacy Law Clinic, and Marvin Ventrell, president of the National Association of Counsel for Children, both have expressed strong reservations about the proposed Act's approach in Sections 4 and 6. Under those sections, a judge decides whether to appoint a child's attorney or a best interests attorney, with a loose set of factors to guide the judge's discretion. In his letter of May 17, 2005, Duquette wrote that precious time would be lost if judges were required in every case to make the "complex and subtle" determination of a child's circumstances and maturity. Moreover, he fears that the highly subjective assessment of a child's capacity might result in different appointments for similarly situated children. In his view, a better approach would be to adopt a "bright line age

¹The Representation of Children in Court Chart that I previously distributed has been updated and revised, and I'll bring hard copies to the meeting.

² A survey conducted by the National Council of Juvenile and Family Court Judges in 1998 found that 30 states typically appoint attorney/GAL's for children in dependency cases, and an additional 10 states typically appoint both an attorney and a separate GAL for the child. Dobbin, Gatowski, & Johns, *Child Abuse and Neglect Cases: Representation as a Critical Component of Effective Practice* (1998).

test” above which the child would get a client-directed attorney and below which the child would get a best interests attorney. Even the best interests attorney, according to Duquette, can be instructed to give due weight to the child’s stated preference.³

Similarly, in his memorandum to the Committee, dated June 15, 2005, Marvin Ventrell wrote that the case-by-case determination of type of representative is inappropriate. He identified two main reasons: judges won’t have adequate information to make the determination, and a judge’s choice of representative can materially slant the litigation towards a particular result based on the judge’s subjective assessment of the child’s circumstances. He is particularly concerned about the risk that a judge would choose a best interests attorney in order to limit the child’s access to zealous advocacy. According to Ventrell, a better approach would be for states “to opt for the model at the administrative level.” A later clarification from his office⁴ explained that a state could simply adopt statewide one model of representation for all children. Alternatively, a state could legislatively provide specific triggers as to when a child would receive one type of counsel or the other. These triggers should focus on the child’s ability to understand the proceedings and converse with counsel and not on the child’s objectives regarding the substantive issues.

Comments at the Annual Meeting echoed these concerns. Questions were asked about how a judge could determine the nature of the representative without a full hearing and whether we should include clearer standards. Commissioner Robinson suggests that an alternative would be to leave the initial choice of a child’s attorney or best interests attorney up to each state to designate on a statewide basis. Under her proposal, the attorney’s designation could be revised later if it turned out to be inappropriate.

We need to think carefully about our proposed approach and whether we want to adhere to it, since two of the leading people in the field and several commissioners have expressed serious concerns. Arguments on both sides clearly exist. The bright-line test has the virtue of certainty, consistency, and ease of application, and it removes the risk of judicial bias. On the other hand, all bright lines are imperfect. There may be children below an age cut-off who are capable of directing a lawyer and children above the age line who are not capable of directing counsel. There are children who can direct counsel for some issues and not for others.

If we do stick with the case-by-case determination, then I think that we need to provide

³In Michigan, for example, the “lawyer-guardian ad litem” must advocate for the child’s best interests and is not bound by the child’s wishes. At the same time, Michigan law directs the lawyer-guardian ad litem “to weigh the child’s wishes according to the child’s competence and maturity.” MCL 712A.17d(1)(h).

⁴ Email from Leslie Heimov, Policy Director, Children’s Law Center (6/17/05).

better guidance in terms of defining the child's capacity to direct counsel.⁵ Also, we need to address more directly the problem of how the judge is to make this determination at such an early stage of the proceeding. I don't think we intended for there to be mini-hearings about the child's competence at the start of every dependency case. An alternative would be for the lawyer to make the determination according to clear guidelines in law and to report to the court the nature of the representation. For practical purposes, that is basically what we have now, since under our proposed Act, judges will have to rely heavily on what the lawyer reports.⁶

3. The possibility of the appointment of multiple representatives for a child

Negative comments have been received regarding the potential appointment of multiple representatives for a single child under Sections 5, 6, and 12. Marvin Ventrell flatly opposes the appointment of a court advisor in addition to a best interests attorney and finds the reliance on court advisors in general misplaced. He emphasizes that talking to multiple people can be traumatizing and confusing for children. Ventrell also wants us to state more strongly that CAPTA is satisfied by the appointment of either a child's attorney or a best interests attorney.⁷

⁵ Because Sections 4 and 6 listed "any objectives in the proceedings expressed by the child" as a factor in the court's appointment of a representative, a concern was raised that this might be construed to give the court the right to designate a best interests attorney if the court didn't like the child's particular objectives. That wasn't our intention, but it seemed better to delete that factor from both sections and to make clear in the commentary that the determination of a child's capacity to direct counsel should not be based on the substance of the child's objectives.

⁶In Maryland, court-adopted guidelines seem to me to do a good job of getting at this problem. The Maryland Guidelines of Advocacy for Attorneys Representing Children in CINA and Related TPR and Adoption Proceedings require attorneys themselves to make the determination whether a child has "considered judgment." If the child does have considered judgment, defined in the Guidelines, the attorney must inform the court and then must advocate the child's wishes. If the child lacks considered judgment, the attorney must likewise tell the court and then advocate a position consistent with the child's best interests. The Guidelines go on to explain that in making the determination, the attorney "should focus on the child's decision-making process, rather than the child's decision." The attorney is directed to determine whether the child can understand the risks and benefits of the child's legal position and whether the child can reasonably communicate his or her wishes. The Guidelines direct the attorney to consider the child's developmental stage, the child's ability to communicate, and relevant reports from social workers, schools, etc. Significantly, the Guidelines also contemplate that lawyers will assess the child's considered judgment regarding each relevant issue as the case proceeds.

⁷In that regard, Ventrell helpfully pointed us to a publication from the U.S. Dept. of HHS Children's Bureau with which I wasn't familiar. See *Adoption 2002: The President's Initiative on Adoption and Foster Care, Guidelines for Public Policy and State Legislation governing Permanence for Children*. I looked at the language of Guideline 15A and commentary and found it helpful, although it's not a controlling interpretation of the law. The Guideline outlines

At the Annual Meeting, a comment was made that in states opting for Alternative A under Section 5, a clear incentive would exist to appoint a best interests lawyer (and thereby avoid the need to appoint a court advisor at all).

Although the possibility of multiple representatives may seem troublesome, I believe that many people who are receptive to our basic Act might still want to ensure that there will always be a best interests advocate in abuse and neglect cases. In other words, even if the appointment of a child's attorney is appropriate under the circumstances, judges may be uncomfortable for reasons unrelated to CAPTA if there is not also a representative charged with protecting the child's best interests. Requiring or permitting the appointment of a court advisor in addition to a child's attorney can ensure that a full presentation of evidence is made to the court. Do others agree?

Ventrell questions most strongly the language in Sections 5 and 6 that permits the discretionary appointment of a court advisor even where the child also has a best interests attorney. He's certainly right that appointing two best interests representatives for the same child may be unnecessary and cumbersome. On the other hand, a court may need the services of a court advisor that a best interests attorney can't provide (filing a report or testifying, for example). I'm not persuaded that we should change the proposed Act on this point, but perhaps we should add language in the commentary to make clear that the need for two best interests representatives would be rare.

4. The inclusion of ethical guidelines in legislation

Several people at the Annual Meeting voiced concerns about the proposed Act's inclusion of ethical guidelines. In states such as Wisconsin and Pennsylvania, rules of professional conduct for attorneys are the province of the court system and cannot be legislatively prescribed.⁸ We can try to accommodate that concern by providing a legislative note to the effect that Sections 11, 12, and 13 should be adopted as court rules in states that cannot legislatively prescribe duties of attorneys. I've included some language to that effect immediately before Section 11 in the new draft.

5. The Act's terminology

Marvin Ventrell objects to the designation of "best interests lawyer," since it implies that one model serves the child's best interests and the other does not. He suggests that we consider other terms, such as "substituted judgment attorney" or "law guardian." I understand the point

recommendations for children's representatives; the commentary states that the preferred method of satisfying CAPTA when a child has a client-directed lawyer would be for the child to also have a GAL. Nevertheless, it does also maintain that a child-directed attorney alone should satisfy CAPTA.

⁸ My research assistants are gathering information on this question, and I hope to be able to provide you with an overview of state law at the upcoming meeting.

but am not persuaded that the suggested alternatives are an improvement.

On a related note, I'm still not completely happy with "court advisor," since it almost suggests that such a person is part of the judicial staff rather than a representative for the child. This is also a concern raised by Commissioner Robinson in her report. Other possibilities include "special advisor," "advisor ad litem," or "best interests advisor." Also, we received a note from a commissioner who insists that "adviser" rather than "advisor" is the preferred spelling. My dictionary agrees with the commissioner. Should we change the spelling?

Although I understand our desire to break completely with the over-used and misunderstood "guardian ad litem" terminology, we will be asking states to swallow a great deal by proposing a new name, since "guardian ad litem" is a term used in almost every state. Moreover, the explicit reference to "guardian ad litem" in CAPTA means that the term will not disappear from the legal landscape. We might have more success in getting the Act adopted if we worked within the existing terminology and focused on getting states to redefine the role of the guardian ad litem.

6. The Act's non-application to privately retained attorneys and lay representatives appointed outside the Act, and the interaction of such persons with appointed representatives.

Commissioner Robinson notes that Section 3 exempts privately-retained lawyers from the Act and states that she's not sure she understands the basis for the distinction. She also notes that the title of the Act may be misleading if it does not apply to all representatives for children but only to court-appointed representatives. She suggests that we should rename the Act something like "Responsibilities of Court Appointed Representatives for Children." The non-application to privately retained attorneys was likewise criticized by both Duquette and Ventrell. As Duquette put it, "what justifies giving a different quality of representation to a child depending on who hires the lawyer and pays the bill?"

In our drafting discussions, we were hesitant to impose the Act's standards on the privately-retained lawyer. Members of this Committee felt that we might be interfering with an individual's basic right to select and hire counsel if we subjected all children's lawyers to the standards and requirements of the Act. We may want to rethink that position. If courts required every representative for a child to be appointed, not only would the standards of the Act be imposed across the board but the representatives would get the benefits of the provisions for participation and access in the Act. This makes sense to me. Alternatively we could include stronger language in the Commentary to indicate that privately retained lawyers should be held to the same standards.

I'm also concerned about how the responsibilities of attorneys and court advisors appointed under the Act would be affected by the presence of a privately retained lawyer for the child. I believe that Section 13 is the only place where we explicitly address that possibility. In subsection (b)(3), we reign in the best interests lawyer's duties if the child has a privately retained attorney. Should there be comparable limitations elsewhere in the Act? These

complications could be avoided if we simply made the Act apply across the board to all children's representatives.

On a related note, questions were raised at the Annual Meeting about how the Act might apply to lay representatives for children who were appointed in other proceedings (such as juvenile delinquency proceedings). Assuming that we want to stick to our original position, I've suggested changes in Section 3 to also exempt lay representatives for children who have not been appointed under this Act.

In addition, commissioners seemed concerned with how appointed representatives under the Act should function if the child had a permanent guardian. My sense is that if a child has a permanent guardian through an appointment outside the Act, the guardian is in a position similar to that of a parent under the Act. As such, the child's right to representation remains intact and a guardian would have no greater right to direct the representation than would a parent. It's possible, of course, that a guardian for a child could be appointed as "court advisor" under the Act.

Another tentative addition I've made to Section 3 is a provision stating that neither the child nor a parent or permanent guardian can waive the child's rights under the Act. We have not included waiver language before, but it may come up in the context of an older child who wishes to represent himself or herself, or it could arise if a privately retained lawyer tried to waive the child's right to an appointed representative. I've inserted an absolute "no waiver" rule (such as that provided by Michigan Court Rule 3.915), but some of you may want something more flexible.

Finally, questions were also raised at the Annual Meeting about the responsibilities of a lawyer appointed for a court advisor. Under the commentary to Section 12, we acknowledge the possibility of a court advisor's having a lawyer. Should we spell out this lawyer's duties in black letter? Since such a lawyer would be taking direction from an adult representative for the child, that lawyer's role would be no different from that of any other lawyer; thus, I don't think the Act needs to address that scenario. Do others agree?

It would be helpful to have discussion on all of these questions.

7. The use of long lists in the Act

Several people at the annual Meeting complained that the Act contains several long lists of factors (Sections 6 11, and 14), and that this produces an unwieldy law. They seemed particularly bothered by Section 6, and I think they are absolutely right. I've tried to streamline it a bit by combining some factors, moving one important and quite general factor to an earlier subdivision, and eliminating some factors. Doing all of that only gets it down to 14 factors! Do we want to put these factors in commentary and try to rely on more general guidelines in the black letter?

8. Concerns about role of child's attorney under Section 12 and role of best interests attorney under Section 13

Opposing concerns were voiced at the Annual Meeting about the two categories of lawyers. On the one hand, some people were bothered that a child's attorney under Section 12 would sometimes argue to the court a position that might expose the child to risk of harm. Others had the opposite concern – that the risk of harm identified under Section 12(e) should be more carefully defined as “reasonably certain and substantial harm,” to prevent lawyers from too easily avoiding the duty to advocate the child's wishes. I like the latter suggestion and have inserted that language into the black letter and commentary.

The duties of the best interests attorney under Section 13 were also the subject of some concern at the Annual Meeting. In particular, some commissioners felt that the novel role of the best interests attorney, including the unusual approach to confidentiality under Section 13(d) which distinguishes between disclosure and use, is hard for adults to grasp and will be impossible for children to understand. I agree that this is a real problem, but I've not come up with a suitable alternative approach.

9. The immunity provision in Section 18

We received some comments from Commissioner Roger Henderson, a torts expert, about the immunity provision. He does not like its present wording, since we are attempting to create a universal list for all states of the showing required to overcome the qualified immunity of best interests attorneys and court advisors (gross negligence, intentionally wrongful conduct, bad faith or malice). In his view, those showings vary from state to state, and the better approach would be to articulate what will *not* overcome immunity, i.e., mere negligence. He would prefer something along the lines of the following:

A best interests attorney or court advisor appointed pursuant to this [act] is not liable for civil damages because of inaction or action taken, including any recommendation or opinion given, in the capacity of best interests attorney or court advisor if the inaction or action was merely negligent.

I understand the point he's making, but I haven't seen immunity provisions along this line. I have left our provision as is, with a reordering of the subsections. I'm interested in your thoughts.