

Date: December 21, 2005
To: Drafting Committee for Uniform Representation of Children in Abuse and Neglect and Custody Proceedings Act
From: Barbara Atwood, Reporter
Re Comments on Current Draft in Preparation for February 2006 Meeting

The new Draft incorporates substantive and stylistic changes that we agreed upon at the October 2005 meeting of the Drafting Committee. The Draft also contains some additional changes that seemed appropriate based on suggestions from outside commentators or my own further reflection. Chair Rhoda Billings has had valuable input as always. This memo summarizes the major changes and raises a few questions for you to be thinking about in preparation for our upcoming meeting. I look forward to discussing all of these important issues with you in February 2006. In the meantime, have a good, safe holiday season.

Substantive changes

1. The definition of best interests attorney in Section 2 now makes clear that the attorney provides legal representation for the child – per our evolving understanding of the role of that lawyer.
2. Section 3 omits any reference to privately retained lawyers. They are briefly mentioned in the commentary to Section 2.
3. Section 4 now includes language that gives states the responsibility of choosing a presumptive default category for appointments in abuse and neglect proceedings – a major change that we agreed on in October. Under subsection (b), the presumptive default category applies unless the child's circumstances and court's needs make a different category appropriate. We opted for this model because of the many comments we received suggesting that our earlier approach (having a judge determine the role at the outset of the proceeding) was unworkable and might delay needed appointments. See below for my thoughts on reconsidering the option of an age demarcation.
4. Section 9 now allows courts to identify private or governmental organizations in the initial order of appointment – for attorneys as well as court-appointed advisors – with the requirement that an individual representative be identified as soon as feasible. We changed the Draft on this point because of the common judicial practice of initially designating an agency of attorneys rather than naming an individual.
5. Section 10(c) now extends the duration of appointment through any appeal – if standing to participate in an appeal is recognized under state law. Our intent is to extend the term of representation to include appeals if standing exists but not to create standing where it doesn't exist.
6. Section 11 now lists more of the general duties that are applicable to both the child's attorney

and the best interests attorney. This was appropriate since we have eliminated the possibility of two lawyers being appointed simultaneously for one child. Thus, the best interests attorney will be the child's lawyer and has the general responsibilities that go with that role.

In addition, Section 11(b)(2) now clarifies the duty to make the child available to meet with the court appointed advisor. In its new version, the attorney has the right to be present during any meeting.

7. Section 12 omits any provision for a best interests attorney to be appointed while the child has a child's attorney. Under the revised version, the child's attorney must withdraw in order for the court to appoint a best interests attorney.

8. Section 13 has been modified to more clearly express our idea that the best interests attorney is an attorney for the child in all respects except the duty to follow the client's directives.

I've also added language in Section 13 that is minor but important, in my view. Under subsection (c), I've included "with due regard to the child's developmental level" in describing the best interests attorney's duty to consider the child's objectives in determining what to advocate. The intent of this addition is to encourage the attorney to give weight to the views of a mature 10-year-old, for example, even if the attorney is functioning in the role of a best interests attorney. Language similar to this is included in the Michigan statute that defines the role of the lawyer-GAL: "The child's wishes are relevant to the lawyer-guardian ad litem's determination of the child's best interests, and the lawyer-guardian ad litem shall weigh the child's wishes according to the child's competence and maturity." MCLA 712A.17d(1)(h). Lawyers in Michigan have reported to Don Duquette that the language has helped them interpret their own roles. He thinks the lawyers are more likely to defer to the wishes of older children, for example, and are less likely to give significant weight to the views of very young children. I think this principle is particularly important if we go with our default approach, since I am fairly certain most states will opt for a best interests default category.

9. Section 18 on immunity now provides qualified immunity except where conduct exceeds ordinary negligence rather than attempting to define the kind of misconduct required.

Major stylistic changes

1. "Court-appointed advisor" is the term we opted for in October to describe the non-lawyer best interests advocate.

2. Some reorganization of Sections 7-10 has been implemented, per our discussions in October.

3. In light of some good suggestions from Marvin Ventrell, the Prefatory Note has been revised in minor ways to explain in a more positive manner the need for a uniform law in this area. Also, in commentary throughout the Act, I've tried to incorporate changes that committee members and others have suggested. Also, I've moved some of the CAPTA explanation from Section 2's commentary to Section 5's commentary.

4. Section 5 has been simplified a bit, and some of the subsections and lists in Section 6 have been collapsed.

Other questions to think about

1. Our use exception to confidentiality for the best interests attorney (drawn primarily from the ABA Custody Standards and the Texas statutes) still seems to create confusion, and I'm wondering if we can eliminate it without undermining the role of the best interests attorney. In my view, the ability to *use* information received from the child is inherent in the duty of the lawyer to advocate the child's best interests.

Interestingly, under the Michigan law, a "lawyer/GAL," which is somewhat similar to our best interests attorney, is bound by "the obligations of the attorney/client privilege." MCLA 712A.17d(1)(a). No exception is provided under the Michigan statute for "use" of information received from the client, but the statute is interpreted to permit the lawyer to rely on information given to the lawyer by the child to advocate an outcome the child may not want. I spoke with Don Duquette about how the Michigan model works, and he said that lawyers typically will use whatever information they have to determine and advocate the child's best interests, while still being careful not to disclose the child's confidential communications.

Under our Act, the best interests lawyer must explain to the child the role of the best interests lawyer as well as the use/disclosure distinction – a distinction that perplexed some of the commissioners at last year's annual meeting. If we eliminated the use exception, I think we could simplify Section 13 without undermining the functioning of the best interests attorney. A best interests attorney would still have to explain that the lawyer may take positions that are contrary to the child's wishes based on all the information available to the lawyer -- including information received from the child. At the same time, the best interests attorney would assure the child that what the child says remains confidential. The child's attorney, on the other hand, would not be free to use information without the child's consent because of that attorney's basic duty to follow the client's wishes. Either attorney, it should be noted, may disclose confidential information when permitted by ordinary ethical rules, e.g., when necessary to protect a client of diminished capacity from harm pursuant to Model Rule 1.14. Thus, it seems to me that it's not a question of confidentiality but of role. In other words, I think we could eliminate the reference to use without disturbing the functioning of the best interests attorney.

2. Should we reconsider our opposition to using the child's age as a presumptive line for determining which category of lawyer to appoint? As written, the Act allows states to choose a default model, and as stated above I think most states will opt for the best interests model. (Recall that most states today endorse the hybrid lawyer/GAL category.) This means that an unintended effect of our Act may be to make it less likely, rather than more likely, that children will have traditional attorneys advocating their expressed wishes. This is especially true in light of our immunity provisions; the asymmetrical provision of immunity in Section 18 creates a strong incentive for lawyers to want to be best interests attorneys rather than child attorneys. Because of these concerns, a bright line age approach might be the best framework after all.

A presumptive age demarcation would at least ensure that a certain population of older children would have traditional advocates, and it would create some needed certainty and predictability. We could leave the actual age determination to the states, of course, although I would hope that states wouldn't set the break any older than 12. Also, if we build into the best interests attorney's role a duty to defer to the child's objectives as the child matures (per my new language in Section 13 discussed above), the disadvantages of the bright line approach can be softened.

On a related point, we should consider whether the Act needs to provide more explicit guidance on when appointment of a child's attorney is appropriate. I've eliminated from Section 12 the bracketed language in subsection (d) ("if the child lacks the capacity to understand the nature of an attorney-client relationship") since that phrase seemed to pose too high a hurdle. Capacity to understand the nature of an attorney-client relationship might eliminate most children and many adults. Capacity to direct an attorney seems more reasonable, but what does that mean? The commentary to Section 12 uses capacity to understand and form an attorney-client relationship and capacity to make reasoned judgments. Sections 4 and 6 include some generic language to guide the decision of which kind of lawyer to appoint: "*child's age and developmental level; any desire for a representative expressed by the child and whether the child has expressed objectives in the proceeding; the value of an independent advocate for the child's best interests.*" Commentary to Section 4 refers to capacity to exercise considered judgment. Should we have one defining standard for when a child's attorney is appropriate, or is it best to leave this somewhat fluid?

3. Much more minor point: In Section 12, governing child's attorney, I recommend changing subsection (c) to say "unless unwarranted by law" rather than "prohibited by law." I think our intent was to require the child's attorney to advocate client objectives unless ethical constraints and Rule 11 would prevent it. "Unwarranted by law" seems to more closely track ethical rules and Rule 11 than the phrase "prohibited by law." Model Rule 3.1, for example, prohibits a lawyer from taking a position "unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law."