

D R A F T

FOR DISCUSSION ONLY

ROLE OF ATTORNEYS REPRESENTING CHILDREN IN CUSTODY DISPUTES ACT

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM LAWS

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With Prefatory Note and Comments

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TABLE OF CONTENTS

Prefatory Note	1
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PART 1. GENERAL PROVISIONS

SECTION 1. SHORT TITLE	4
SECTION 2. DEFINITIONS	4

PART 2. COURT-ORDERED REPRESENTATION IN COURT PROCEEDINGS AFFECTING THE PARENT-CHILD RELATIONSHIP

SECTION 3. POWERS AND DUTIES OF GUARDIAN AD LITEM FOR CHILD	6
SECTION 4. POWERS AND DUTIES OF CHILD'S ATTORNEY AND BEST INTERESTS ATTORNEY	8
SECTION 5. ADDITIONAL DUTIES OF CHILD'S ATTORNEY	10
SECTION 6. ADDITIONAL DUTIES OF BEST INTERESTS ATTORNEY	11
SECTION 7. ACCESS TO CHILD AND INFORMATION RELATING TO CHILD	12
SECTION 8. ATTORNEY WORK PRODUCT AND TESTIMONY	13
SECTION 9. SUBSTITUTED JUDGMENT OF ATTORNEY FOR CHILD	14
SECTION 10. IMMUNITY	15

PART 3. APPOINTMENTS IN CERTAIN SUITS

SUBPART A. APPOINTMENTS IN SUITS BY GOVERNMENTAL ENTITY

SECTION 11. MANDATORY APPOINTMENT OF GUARDIAN AD LITEM	17
SECTION 12. DISCRETIONARY APPOINTMENT OF CHILD'S ATTORNEY	18
SECTION 13. APPOINTMENT OF ATTORNEY IN DUAL ROLE	18
SECTION 14. ATTORNEY FEES	19
SECTION 15. CONTINUED REPRESENTATION	20
SECTION 16. APPOINTMENT OF BEST INTERESTS ATTORNEY PROHIBITED	21

SUBPART B . APPOINTMENTS IN SUITS OTHER THAN SUITS BY GOVERNMENTAL ENTITY

SECTION 17. DISCRETIONARY APPOINTMENTS	21
SECTION 18. CERTAIN PROHIBITED APPOINTMENTS	23
SECTION 19. FEES IN SUITS OTHER THAN SUITS BY GOVERNMENTAL ENTITY ..	23

PART 4.
APPOINTMENT OF VOLUNTEER ADVOCATES

SECTION 20. VOLUNTEER ADVOCATES 25

SECTION 21..... 25

SECTION 22 25

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, 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 children who lack that capacity, and whether a lawyer may both represent children as their lawyer while also advocating as guardian ad litem for their best interests.¹ 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.² At the same time, the Family 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"),³ 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 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

¹For 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. 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). 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).

²*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. Am Acad. Matrim. Law. 57 (1995).

³American 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).

1 1996 titled Ethical Issues in the Legal Representation of Children. This conference examined the
2 principles set out in the then-proposed standards promulgated by the ABA and proposed various
3 refinements.⁴ Recently, the ABA addressed the same questions in the context of child custody
4 proceedings and adopted Standards of Practice for Lawyers Representing Children in Custody
5 Cases (ABA Custody Standards).⁵

6
7 State laws vary dramatically on the appointment of representatives for children, with
8 some models emphasizing the unique vulnerability of children and children's need for adult
9 protection and guardianship to determine their interests, while other models affirm a child's right
10 to have his or her wishes presented by a zealous advocate.⁶ In the abuse and neglect context,
11 federal law requires the appointment of a guardian ad litem for a child, but the role and identity
12 of that GAL are undefined.⁷ Many states routinely appoint lawyers to function as GALs, without
13 careful delineation of the distinctions between the ethical responsibilities of a lawyer toward the
14 client and the professional obligations of the GAL as a best interests witness for the court. In the
15 custody context outside of child protective proceedings, states have even fewer guidelines about
16 the appointment of representatives for children; typically, state law simply authorizes the
17 appointment of counsel as a matter of judicial discretion.

18
19 In light of the disagreements among the various professional organizations committed to
20 child advocacy and the marked variation in approaches across the United States, the National
21 Conference of Commissioners on Uniform State Laws concluded that this important area could
22 benefit from a uniform [or model] law. The Conference concluded that a uniform Act would

⁴*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).

⁵American Bar Association, *Standards of Practice for Lawyers Representing Children in Custody Cases*, 37 FAM. L. Q. 129 (2003).

⁶See 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).

⁷See 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.”].

1 enhance the quality and professionalism of children's counsel and would offer an objective
2 model to clarify the roles of children's representatives. The proposed Act integrates the two sets
3 of standards promulgated by the ABA – the Abuse and Neglect Standards and the Custody
4 Standards.
5
6

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

2
3
4 **PART I. GENERAL PROVISIONS**

5
6
7 **SECTION 1. SHORT TITLE.** This [act] may be cited as the Role of Attorneys
8 Representing Children in Custody Disputes Act.

9 **SECTION 2. DEFINITIONS.** In this [act]:

10 (1) "Best interests attorney" means an attorney appointed by the court to provide
11 legal services necessary to assist the court in protecting a child's best interests rather than to
12 provide legal services to the child.

13 (2) "Child's attorney" means an attorney who provides legal services to a child
14 and who owes to the child the duties of undivided loyalty, confidentiality, and competent
15 representation.

16 (3) "Developmentally appropriate" means structured to account for a child's age,
17 level of education, cultural background, and degree of language acquisition.

18 (4) "Dual role" means the role of an attorney who is appointed under Section 13 to
19 act as both guardian ad litem and child's attorney for a child in a suit filed by a governmental
20 entity.

21 (5) "Guardian ad litem" means a person appointed to represent the best interests of
22 a child. The term includes:

23 (A) a volunteer advocate appointed under [other provisions of law];

24 (B) a professional, other than an attorney, who holds a relevant
25 professional license and whose training relates to the determination of a child's best interests;

1 (C) an adult having the competence, training, and expertise determined by
2 the court to be sufficient to represent the best interests of the child; or
3 (D) a child’s attorney appointed to serve in the dual role.

4 **Comments**

5
6 The definitions reflect the range of court-appointed representatives for children that are
7 encompassed by the ABA Abuse and Neglect Standards and the ABA Custody Standards. Court
8 and commentators agree that state law should clearly define the roles of such representatives and
9 should distinguish among the various roles in the terms of the appointment.
10
11

1 **PART 2.**

2 **COURT-ORDERED REPRESENTATION IN COURT PROCEEDINGS**

3 **AFFECTING THE PARENT-CHILD RELATIONSHIP**

4
5 **SECTION 3. POWERS AND DUTIES OF GUARDIAN AD LITEM FOR CHILD.**

6 (a) A guardian ad litem appointed for a child under this chapter is not a party to
7 the suit but may:

8 (1) conduct an investigation to the extent that the guardian ad litem
9 considers necessary to determine the best interests of the child and

10 (2) obtain and review copies of the child's relevant medical, psychological,
11 and school records as provided by Section 7.

12 (b) A guardian ad litem appointed for the child under this chapter shall:

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

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

16 (B) interview each person who has significant knowledge of the
17 child's history and condition, including any foster parent of the child; and

18 (C) interview the parties to the suit;

19 (2) seek to elicit in a developmentally appropriate manner the child's
20 expressed objectives of representation;

21 (3) consider the child's expressed objectives of representation without
22 being bound by those objectives;

(4) encourage settlement and the use of alternative forms of dispute resolution; and

(5) perform any specific task directed by the court.

(c) A guardian ad litem appointed for the child under this chapter is not a party to the suit but is entitled to:

(1) receive a copy of each pleading or other paper filed with the court in the case in which the guardian ad litem is appointed;

(2) receive notice of each hearing in the case;

(3) participate in case staffings by an authorized agency concerning the child;

(4) attend all legal proceedings in the case but may not call or question a witness or otherwise provide legal services unless the guardian ad litem is a licensed attorney who has been appointed in the dual role;

(5) review and sign, or decline to sign, an agreed order affecting the child; and

(6) explain the basis for the guardian ad litem's opposition to the agreed order if the guardian ad litem does not agree to the terms of a proposed order.

(d) The court may compel the guardian ad litem to attend a trial or hearing and to testify as necessary for the proper disposition of the suit.

(e) Unless the guardian ad litem is an attorney who has been appointed in the dual role and subject to [this State's] Rules of Evidence, the court shall ensure in a hearing or in a trial on the merits that a guardian ad litem has an opportunity to testify or submit a report regarding

the guardian ad litem's recommendations regarding:

(1) the best interests of the child; and

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

(f) In a nonjury trial, a party may call the guardian ad litem as a witness for the purpose of cross-examination regarding the guardian's report without the guardian ad litem being listed as a witness by a party. If the guardian ad litem is not called as a witness, the court shall permit the guardian ad litem to testify in the narrative

(g) In a contested case, the guardian ad litem shall provide copies of the guardian ad litem's report, if any, to the attorneys for the parties as directed by the court, but not later than the earlier of:

(1) the date required by the scheduling order; or

(2) the 10th day before the date of the commencement of the trial.

(h) Disclosure to the jury of the contents of a guardian ad litem's report to the court is subject to [this State's] Rules of Evidence.

Comments

This section describes the traditional functioning of the court-appointed guardian ad litem and makes clear that the GAL, while not a party to the judicial proceeding, is entitled to receive notice of all hearings and to receive copies of all documents filed in the case. If the GAL is not an attorney appointed in the dual role, the GAL may also testify or submit a report to the court containing a recommendation as to the child's best interests.

SECTION 4. POWERS AND DUTIES OF CHILD'S ATTORNEY AND BEST INTERESTS ATTORNEY. A child's attorney appointed to represent a child or a best interests attorney appointed to assist the court:

1 (1) shall:

2 (A) within a reasonable time after the appointment:

3 (i) meet with the child and ascertain the child's needs,
4 circumstances, and views in a developmentally appropriate manner;

5 (ii) interview each person who has significant knowledge of the
6 child's history and condition, including any foster parent of the child; and

7 (iii) interview the parties to the suit;

8 (B) investigate the facts of the case to the extent the attorney considers
9 appropriate;

10 (C) obtain and review copies of relevant records relating to the child as
11 provided by Section 7;

12 (D) participate in the conduct of the litigation to the same extent as an
13 attorney for a party;

14 (E) take any action consistent with the child's interests that the attorney
15 considers necessary to expedite the proceedings; and

16 (F) encourage settlement and the use of alternative forms of dispute
17 resolution;

18 (2) must be trained in child advocacy or have experience determined by the court
19 to be equivalent to that training; and

20 (3) is entitled to:

21 (A) receive a copy of each pleading or other paper filed with the court;

22 (B) receive notice of each hearing in the suit;

1 (C) participate in any case staffing concerning the child conducted by an
2 authorized agency; and

3 (D) attend all legal proceedings in the suit.

4 **Comments**

5
6 The general duties of an attorney appointed to represent a child, whether as the child's
7 attorney or as best interests attorney, include developmentally appropriate communication with
8 the child and interviews of all parties and persons likely to have knowledge of the child's
9 circumstances. In addition, courts must ensure that children's attorneys receive notice and
10 opportunity to participate in all judicial proceedings affecting the child's welfare.
11

12 **SECTION 5. ADDITIONAL DUTIES OF CHILD'S ATTORNEY**

13
14 Except as otherwise provided by this chapter, the child's attorney shall:

15 (1) seek to elicit in a developmentally appropriate manner the child's
16 expressed objectives of representation;

17 (2) advise the child;

18 (3) provide guidance to the child;

19 (4) follow the child's expressed objectives of representation during the
20 course of litigation if the child's attorney determines that the child is competent to understand the
21 nature of an attorney-client relationship, has formed that relationship with the child's attorney,
22 and is competent to direct the attorney with respect to the particular issue involved;

23 (5) consider the impact on the child in formulating the presentation of the
24 child's expressed objectives of representation to the court; and

25 (6) become familiar with:

26 (A) the American Bar Association's standards of practice for

attorneys who represent children in abuse and neglect cases; and

(B) the suggested amendments to those standards adopted by the National Association of Counsel for Children.

Comments

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

SECTION 6. ADDITIONAL DUTIES OF BEST INTERESTS ATTORNEY.

(a) Subject to any specific limitation in the order of appointment, a best interests attorney shall advocate the best interests of the child after reviewing the facts and circumstances of the case according to objective criteria. Notwithstanding Subsection (b), in determining the best interests of the child, a best interests attorney is not bound by the child's expressed objectives of representation.

(b) A best interests attorney shall:

(1) seek to elicit in a developmentally appropriate manner the child's expressed objectives of representation;

(2) with the consent of the child, ensure that the child's expressed objectives of representation are made known to the court;

(3) consider the impact on the child in formulating the best interests attorney's presentation of the child's expressed objectives of representation to the court;

(4) review and sign, or decline to sign, an agreed order affecting the child;

(5) explain the basis for the best interests attorney's opposition to the agreed order if the best interests attorney does not agree to the terms of a proposed order;

(6) explain the role of the best interests attorney to the child; and

(7) inform the child that the best interests attorney may use information that the child provides in providing assistance to the court.

(c) A best interests attorney may not disclose confidential communications between the best interests attorney and the child unless the best interests attorney determines that disclosure is necessary to assist the court regarding the best interests of the child.

Comments

The best interests attorney are governed by their states' ethical rules except as dictated by the absence of a traditional attorney/client relationship with the child and the particular requirements of their appointment. A child's communication with a best interests attorney are confidential except where disclosure is necessary to protect a child's interests. A best interests attorney may use a child's communications for the purpose of the representation without disclosing them.

SECTION 7. ACCESS TO CHILD AND INFORMATION RELATING TO CHILD.

(a) Except as provided by Subsection (c), in conjunction with an appointment under this Act, the court shall issue an order authorizing the child's attorney, guardian ad litem for the child, or best interests attorney, or attorney appointed to serve in the dual role, to have immediate access to:

- (1) the child; and
- (2) any otherwise privileged or confidential information relating to the

1 child.

2 (b) Without requiring a further order or release, the custodian of any relevant
3 records relating to the child, including records regarding social services, drug and alcohol
4 treatment, or medical or mental health evaluation or treatment of the child, law enforcement
5 records, school records, records of a probate or court proceeding, and records of a trust or
6 account for which the child is a beneficiary, shall provide access to a person authorized to access
7 the records under Subsection (a).

8 (c) A mental health record of a child at least [] years of age that is privileged
9 or confidential under other law may be released to a person appointed under Subsection (a) only
10 in accordance with the other law.

11 **Comments**

12
13 State law must enable attorneys for children, whether appointed as child's attorney or best
14 interests attorney, and guardians ad litem to have sufficient information to competently perform
15 their assigned roles. Relevant files include those concerning child protective services,
16 developmental disabilities, juvenile delinquency, mental health, and educational agencies. A
17 lawyer may still need to use subpoenas or other discovery tools to obtain relevant records.
18
19

20 **SECTION 8. ATTORNEY WORK PRODUCT AND TESTIMONY.**

21 (a) A child's attorney, an attorney serving in the dual role, or a best interests
22 attorney may not:

23 (1) be compelled to produce attorney work product developed during the
24 appointment as an attorney;

25 (2) be required to disclose the source of any information;

26 (3) submit a report into evidence; or

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

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

5 **SECTION 9. SUBSTITUTED JUDGMENT OF ATTORNEY FOR CHILD.**

6 (a) A child's attorney or an attorney appointed in the dual role may determine that
7 the child cannot meaningfully formulate the child's objectives of representation in a case because
8 the child:

9 (1) lacks sufficient maturity to understand and form an attorney-client
10 relationship with the attorney;

11 (2) despite appropriate legal counseling, continues to express objectives of
12 representation that would be seriously injurious to the child; or

13 (3) for any other reason is incapable of making reasonable judgments and
14 engaging in meaningful communication.

15 (b) Except as provided by Subsection (c), a child's attorney or an attorney
16 appointed in the dual role who determines that the child cannot meaningfully formulate the
17 child's expressed objectives of representation under Subsection (a) may present to the court a
18 position that the attorney determines will serve the child's legal interests or may request the
19 appointment of a separate guardian ad litem or best interests attorney without revealing the
20 reason for the request.

21 (c) A child's attorney or attorney appointed in the dual role who determines that
22 the child cannot meaningfully formulate the child's expressed objectives of representation under

1 Subsection (a) shall, if a guardian ad litem has been appointed for the child:

2 (1) consult with the guardian ad litem; and

3 (2) present the child's objectives of representation to the court based on the
4 guardian ad litem's opinion regarding the best interests of the child.

5 **Comments**

6
7 This section reflects the approach of the ABA Abuse and Neglect Standards and the more
8 recent ABA Custody Standards. A child's attorney or attorney appointed in the dual role is
9 bound by the child expressed wishes unless pursuing those wishes would put the child at risk of
10 substantial physical, financial or other harm, and is not merely contrary to the lawyer's opinion of
11 the child's interests. At the same time, a lawyer may not advocate positions that are not well
12 grounded in fact and warranted by existing law or a good faith extension, modification, or
13 reversal of existing law. In most cases, the ethical conflict involved in asserting a position that
14 would seriously endanger the child can be resolved through the lawyer's counseling function. If
15 it cannot be resolved, this section permits the child's attorney to advocate the child's legal
16 interests and to request the appointment of a guardian ad litem or a best interests attorney. It
17 should be noted, however, that under the structure of the Act, the appointment of a dual role
18 attorney is permitted only in government-initiated abuse and neglect proceedings, and the
19 appointment of a best interests attorney is permitted only in custody proceedings that are not
20 government-initiated.

21 **SECTION 10. IMMUNITY.**

22
23
24 (a) A guardian ad litem, a best interests attorney, or an attorney appointed in the
25 dual role under this Act is not liable for civil damages arising from a recommendation made or an
26 opinion given in the capacity of guardian ad litem, best interests attorney, or attorney appointed
27 in the dual role.

28 (b) Subsection (a) does not apply to an action taken or a recommendation or
29 opinion given:

30 (1) with conscious indifference or reckless disregard to the safety of
31 another;

1 (2) in bad faith or with malice; or

2 (3) that is grossly negligent or wilfully wrongful.

3 (c) Only the child has a right of action in civil damages against a guardian ad
4 litem, a best interests attorney, an attorney appointed in the dual role, or a child's attorney.

5 **Comments**

6
7 This section provides qualified immunity for persons appointed to assist the court as
8 guardians ad litem, best interests attorneys, or attorneys appointed in the dual role. The provision
9 of qualified immunity is based on the recognition that such individuals need protection from civil
10 actions for damages when performing functions consistent with their appointed roles. The Act
11 does not provide immunity for persons appointed as a child's attorney, since such lawyers are in
12 a traditional lawyer/client role and should be held to ordinary standards of care. The Act does
13 recognize that only the child has standing to sue for malpractice or other breach of professional
14 responsibility.
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16
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18

1 **PART 3. APPOINTMENTS IN CERTAIN SUITS**

2
3 **SUBPART A. APPOINTMENTS IN SUITS BY GOVERNMENTAL ENTITY**

4
5
6 **SECTION 11. MANDATORY APPOINTMENT OF GUARDIAN AD LITEM.**

7 (a) Except as otherwise provided by this Act, in a suit filed by a governmental
8 entity seeking termination of the parent-child relationship or the declaration of dependent status
9 of a child, the court shall appoint a guardian ad litem to represent the best interests of the child
10 immediately after the filing of the petition but before the full adversary hearing.

11 (b) The guardian ad litem appointed for a child under this section may be:

12 (1) a charitable organization composed of volunteer advocates or an
13 individual volunteer advocate appointed under [applicable law];

14 (2) an adult having the competence, training, and expertise determined by
15 the court to be sufficient to represent the best interests of the child; or

16 (3) an attorney appointed in the dual role.

17 (c) The court may not appoint a separate guardian ad litem in a suit filed by a
18 governmental entity if an attorney is appointed in the dual role unless the court alters the
19 appointment of the attorney to that of child's attorney.

20 (d) The court may appoint an attorney to serve as guardian ad litem for a child
21 without appointing the attorney to serve in the dual role only if the attorney is specifically
22 appointed to serve only in the role of guardian ad litem. An attorney appointed solely as a
23 guardian ad litem:

24 (1) may take only those actions that may be taken by a nonattorney

1 guardian ad litem; and

2 (2) may not:

3 (A) perform legal services in the case; or

4 (B) take any action that is restricted to a licensed attorney,

5 including engaging in discovery other than as a witness, making opening and closing statements,

6 or examining witnesses.

7 **Comments**

8
9 This section is consistent with requirements of current federal law regarding the
10 appointment of guardians ad litem and recognizes that attorneys may be appointed in the dual
11 role of attorney and guardian ad litem. This section requires that the terms of the appointment be
12 precise and distinguishes between persons appointed in the dual role and persons appointed as
13 nonattorney guardians ad litem.
14
15

16 **SECTION 12. DISCRETIONARY APPOINTMENT OF CHILD’S ATTORNEY.**

17 In a suit filed by a governmental entity requesting termination of the parent-child relationship or
18 seeking the declaration of dependent status of a child, the court [may] [shall] appoint a child’s
19 attorney immediately after the filing, but before the full adversary hearing, to ensure adequate
20 representation of the child.

21 **Comments**

22
23 The ABA has long advocated the mandatory appointment of attorneys for children in
24 abuse and neglect proceedings in addition to the appointment of guardians ad litem, but federal
25 law does not currently require appointment of attorneys. Similarly, most states require guardians
26 ad litem but leave the appointment of lawyers to the discretion of the dependency courts.
27
28

29 **SECTION 13. APPOINTMENT OF ATTORNEY IN DUAL ROLE.**

30 (a) In order to comply with the mandatory appointment of a guardian ad litem

1 under Section 11 and the [mandatory] [discretionary] appointment of a child's attorney under
2 Section 12, the court may appoint an attorney to serve in the dual role.

3 (b) If the court appoints an attorney to serve in the dual role under this section, the
4 court may at any time during the pendency of the suit appoint another person to serve as guardian
5 ad litem for the child and restrict the attorney to acting as a child's attorney.

6 (c) An attorney appointed to serve in the dual role may request the court to
7 appoint another person to serve as guardian ad litem for the child. If the court grants the
8 attorney's request, the attorney shall serve only as the child's attorney.

9 (d) Unless the court appoints another person as guardian ad litem in a suit filed by
10 a governmental entity, an appointment of an attorney to serve as a child's attorney in a suit filed
11 by a governmental entity is an appointment to serve in the dual role regardless of the terminology
12 used in the appointing order.

13 **Comments**

14
15 An attorney may be appointed in the dual role only for representing the child in abuse and
16 neglect proceedings and not for representation in custody proceedings. If a conflict arises in
17 performing the dual roles because the child's expressed wishes are in conflict with the child's
18 best interests and the child resists the attorney's counseling, the attorney should request that the
19 court appoint a separate guardian ad litem to advocate the child's best interests.
20

21 **SECTION 14. ATTORNEY FEES.**

22
23 (a) An attorney appointed under this chapter to serve as a child's attorney,
24 attorney in the dual role, or guardian ad litem is entitled to reasonable fees and expenses in the
25 amount set by the court to be paid by the parents of the child unless the parents are indigent.

26 (b) If the court determines that one or more of the parties are able to defray the

1 fees and expenses of a child's attorney, attorney appointed in the dual role, or guardian ad litem
2 for the child as determined by the reasonable and customary fees for similar services in the
3 county of jurisdiction, the fees and expenses may be ordered paid by one or more of those parties,
4 or the court may order one or more of those parties, prior to final hearing, to pay the sums into
5 the registry of the court or into an account authorized by the court for the use and benefit of the
6 payee on order of the court. The sums may be taxed as costs to be assessed against one or more
7 of the parties.

8 (c) If indigency of the parents is shown, a child's attorney, attorney appointed in
9 the dual role, or guardian ad litem in a child protective proceeding filed by a governmental entity
10 in which declaration of the child's dependent status or termination of the parent-child
11 relationship is requested shall be paid from [designated public funds]. The court may not award
12 a child's attorney fees under this Act against the state, a state agency, or a political subdivision of
13 the state except as provided by this subsection.

14 (d) A person appointed as child attorney, attorney appointed in the dual role, or
15 guardian ad litem shall complete and submit to the court a voucher or claim for payment that lists
16 the fees charged and hours worked.

17 **Comments**

18
19 Adequate and timely compensation of attorneys and guardians ad litem is essential
20 throughout the terms of appointment. The child's attorney should also have access to
21 reimbursement for experts, investigative services, research costs, and other activities undertaken
22 to fulfill the obligations of the appointment. State funds should be appropriated and made
23 available to compensate children's representatives in child protective proceedings.
24
25

26 **SECTION 15. CONTINUED REPRESENTATION.** In a suit filed by a governmental

entity in which declaration of the child's dependent status or termination of the parent-child relationship is requested, an order appointing the [appropriate state agency] as the child's [custodian, guardian, or conservator] may provide for the continuation of the appointment of the child's attorney, attorney in the dual role, or guardian ad litem for any period set by the court.

SECTION 16. APPOINTMENT OF BEST INTERESTS ATTORNEY

PROHIBITED. The court may not appoint a person to serve as a best interests attorney in a suit filed by a governmental entity under this Act.

SUBPART B .

APPOINTMENTS IN SUITS OTHER THAN SUITS BY GOVERNMENTAL ENTITY

SECTION 17. DISCRETIONARY APPOINTMENTS.

(a) In a suit in which the best interests of a child are at issue, other than a suit filed by a governmental entity, the court may appoint

(1) a best interests attorney;

(2) a child's attorney ; or

(3) a guardian ad litem.

(b) In determining whether to make an appointment under this section, the court:

(1) shall:

(A) give due consideration to the ability of the parties to pay reasonable fees to the appointee; and

1 (B) balance the child's interests against the cost to the parties that
2 would result from an appointment by taking into consideration the cost of available alternatives
3 for resolving issues without making an appointment;

4 (2) may make an appointment only if the court finds that the appointment is
5 necessary to ensure the determination of the best interests of the child; and

6 (3) may not require a person appointed under this section to serve without
7 reasonable compensation for the services rendered by the person.

8 (c) In deciding whether to appoint a best interests attorney or a child's attorney, the
9 court shall consider the nature and adequacy of the evidence to be presented by the parties and the
10 court's need for additional information relevant to the best interests of the child. Appointment may be
11 most appropriate in cases that involve or one or more of the following factors:

12 (1) consideration of extraordinary remedies such as supervised visitation;

13 (2) relocation that could substantially reduce the child's time with a parent or
14 sibling;

15 (3) the child's views or concerns;

16 (4) harm to the child from drug or alcohol abuse by a child or a party;

17 (5) disputed paternity;

18 (6) past or present child abduction or risk of future abductions;

19 (7) past or present family violence;

20 (8) past or present mental health problems of the child or a party;

21 (9) special physical, education, or mental health needs of a child that require
22 investigation or advocacy;

(10) a high level of acrimony between the parties or the parties and the child;
(11) inappropriate adult influence or manipulation;
(12) interference with custody or parenting time;
(13) need to minimize the harm to the child from the processes of family separation and litigation;
(14) any other factor or circumstance suggesting that the appointment of a child's attorney or best interests attorney is necessary to protect the child or to enable the court to determine the child's best interests.

Comments

This section leaves the appointment of attorneys for children in custody cases to judicial discretion. In accordance with the ABA Custody Standards, the section enumerates a list of factors for courts to consider in deciding whether the appointment of a child's attorney or best interests attorney is warranted.

SECTION 18. CERTAIN PROHIBITED APPOINTMENTS. In a suit other than a suit filed by a governmental entity, the court may not appoint:

(1) an attorney to serve in the dual role; or
(2) a volunteer advocate to serve as guardian ad litem for a child unless the training of the volunteer advocate is designed for participation in suits other than suits filed by a governmental entity.

SECTION 19. FEES IN SUITS OTHER THAN SUITS BY GOVERNMENTAL ENTITY.

(a) In a suit other than a suit filed by a governmental entity, in addition to the attorney's fees that may be awarded under [state law or from funds specifically designated for child

1 representation] the following persons are entitled to reasonable fees and expenses in an amount set by
2 the court and ordered to be paid by one or more parties to the suit:

3 (1) an attorney appointed as a child's attorney or a best interests attorney for the
4 child; and

5 (2) a professional who holds a relevant professional license and who is
6 appointed as guardian ad litem for the child, other than a volunteer advocate.

7 (b) The court shall:

8 (1) determine the fees and expenses of a best interests attorney, a child's
9 attorney, or a guardian ad litem by reference to the reasonable and customary fees for similar services
10 in the county of jurisdiction;

11 (2) order a reasonable cost deposit to be made at the time the court makes the
12 appointment; and

13 (3) before the final hearing, order an additional amount to be paid to the credit
14 of a trust account for the use and benefit of the best interests attorney, the child's attorney, or guardian
15 ad litem.

16 (c) Except as otherwise authorized by [state law], a court may not award costs, fees, or
17 expenses to a best interests attorney, a child's attorney, or a guardian ad litem against the State, a state
18 agency, or a political subdivision of the State under this subsection.

19 **Comments**

20
21 In custody proceedings, courts should make clear to all parties how fees will be determined
22 and how and by whom the fees are to be paid. Lawyers should be paid in accordance with prevailing
23 legal standards of reasonableness.
24
25

1 **PART 4. APPOINTMENT OF VOLUNTEER ADVOCATES**
2
3

4 **SECTION 20. VOLUNTEER ADVOCATES.**

5 (a) In a suit filed by a governmental entity, the court may appoint a charitable
6 organization composed of volunteer advocates whose charter mandates the provision of services to
7 allegedly abused and neglected children or an individual who has received the court's approved
8 training regarding abused and neglected children and who has been certified by the court to appear at
9 court hearings as a guardian ad litem for the child or as a volunteer advocate for the child.

10 (b) In a suit other than a suit filed by a governmental entity, the court may appoint a
11 charitable organization composed of volunteer advocates whose training provides for the provision of
12 services in private custody disputes or a person who has received the court's approved training
13 regarding the subject matter of the suit and who has been certified by the court to appear at court
14 hearings as a guardian ad litem for the child or as a volunteer advocate for the child. A person
15 appointed under this subsection is not entitled to fees under Section 18.

16 **SECTION 21.** The changes in law made by this Act apply only to a suit affecting the parent-
17 child relationship filed on or after the effective date of this Act. A suit filed before the effective date
18 of this Act is governed by the law in effect on the date the suit was filed, and the former law is
19 continued in effect for that purpose.

20 **SECTION 22.** This Act takes effect on [...].