

D R A F T
FOR APPROVAL

**UNIFORM REPRESENTATION OF CHILDREN IN
ABUSE, NEGLECT, AND CUSTODY
PROCEEDINGS ACT**

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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WITH PREFATORY NOTE AND PRELIMINARY COMMENTS

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NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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UNIFORM REPRESENTATION OF CHILDREN IN ABUSE, NEGLECT, AND CUSTODY PROCEEDINGS ACT

Prefatory Note

The legal representation of children is a rapidly developing professional field, one that has received increased attention in the United States and elsewhere in the last several decades.¹ It has become a recognized area of practice, and child welfare law has been designated by the American Bar Association as a legal specialty.² Nevertheless, the role of lawyers representing children in court proceedings directly affecting their lives, such as abuse and neglect or custody proceedings, remains a subject of intense debate. Disagreements focus on such fundamental questions as when courts should appoint counsel for children, how a lawyer should represent a child who lacks capacity to direct counsel, and, for children who do have such capacity, whether a lawyer should advocate the child's wishes even if the lawyer believes the child's goals are not in the child's best interests.³

¹See Marvin Ventrell, *The Practice of Law for Children*, 66 MONT. L. REV. 1 (2005); Barbara Ann Atwood, *Representing Children: The Ongoing Search for Clear and Workable Standards*, 19 J. AM. ACAD. MATRIM. LAW. 801 (2005). The United Nations Convention on the Rights of the Child, available at 28 I.L.M. 1448 (1989), recognizes the child's right of participation, either directly or through a representative, in proceedings affecting the child's interests. See Article 12. That right of participation has fueled interest in the role of children's representatives in many of the nations that have ratified the Convention. For a detailed survey of different approaches to child representation throughout the world, see *Yale Representing Children Worldwide Project*, available at www.law.yale.edu/rcw (current through 2005).

²The American Bar Association authorized the National Association of Counsel for Children (NACC) to award legal specialty certification in child welfare law in 2004. See Ventrell, *supra* note 1, at 18.

³For a thoughtful exploration of these issues, see JEAN KOH PETERS, REPRESENTING CHILDREN IN CHILD PROTECTIVE PROCEEDINGS: ETHICAL AND PRACTICAL DIMENSIONS (2d ed. 2001). According to Professor Peters, an attorney should develop a relationship with a child over time and interpret the child's wishes in the 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 dangerous. She also emphasizes that ethical dilemmas can be minimized or eliminated if children's attorneys spend significant time advising their clients. If children's positions are deemed unreasonable, Haralambie urges lawyers to explain the situation to the children 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*,

Several competing proposals have emerged that address the important topic of representation of children in abuse and neglect proceedings and in custody proceedings. In 1994, the American Academy of Matrimonial Lawyers adopted a set of standards primarily for the divorce context under which lawyers are to advocate the wishes of the “unimpaired” child but can act only as a conduit of information for the “impaired” child.⁴ In 1995, 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 (“ABA Abuse and Neglect Standards”),⁵ 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.⁶ The ABA Abuse and Neglect Standards take the position that a child’s disability as a result of immaturity is incremental and issue-specific. The National Association of Counsel for Children issued its own revised version of the ABA Standards in which it endorsed most of the ABA guidelines but proposed an exception to traditional representation where the child’s wishes may be seriously injurious to the child. Emphasizing the counseling function of the child’s lawyer, the NACC Revised Standards caution that the child’s lawyer does not owe “robotic allegiance” to each of the child’s directives.⁷

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)(examining unique importance of counsel for children when children’s liberty interests are at stake or when interests of children and parents diverge); Martin Guggenheim, *A Paradigm for Determining the Role of Counsel for Children*, 64 FORDHAM L. REV. 1399 (1996)(advocating that a lawyer for a young child 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 understand the lawyer-client relationship, see Emily Buss, *Confronting Developmental Barriers to the Empowerment of Child Clients*, 84 CORNELL L. REV. 895 (1999).

⁴American Academy of Matrimonial Lawyers *Standards for Attorneys and Guardians Ad Litem in Custody or Visitation Proceedings*, 13 J. AM. ACAD. MATRIM. LAW. 1 (1995)(Standards 2.2, 2.12). 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).

⁵American Bar Association, *Proposed Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases*, 29 FAM. L. Q. 375 (1995) (ABA Abuse and Neglect Standards).

⁶*Id.* at Standard B-4(1), (2).

⁷Marvin Ventrell, *Legal Representation of Children in Dependency Court: Toward a Better Model—The ABA (NACC Revised) Standards of Practice*, NACC Children’s Law Manual

A conference on the representation of children was held at Fordham Law School in 1995 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 recommended various refinements that derive from the contextual nature of the relationship between an attorney and a child client.⁸ The Fordham recommendations direct lawyers to ascertain the child's perspective by understanding the child's world. The American Law Institute added its views in 2002 with the publication of the Principles of the Law of Family Dissolution.⁹ The ALI recommends that courts be given broad discretion in private custody disputes 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.¹⁰ Most recently, the ABA returned to the same questions in the context of child custody proceedings and in 2003 adopted Standards of Practice for Lawyers Representing Children in Custody Cases (ABA Custody Standards).¹¹ The ABA Custody Standards identify two distinct roles for attorneys who represent children: the "child's attorney," who is in a traditional attorney-client relationship, and the "best interests attorney," who advocates a position that the attorney determines to be in the child's best interests.¹² The Custody Standards explicitly reject the hybrid attorney/guardian ad litem model because of the confusion and ethical tensions inherent in the blended professional roles.

State laws vary dramatically on the appointment of representatives for children, with some states emphasizing the unique vulnerability of children and children's need for adult protection and guardianship to determine their interests, while other states affirm a child's right

Series (1999)(Standard B-4(2)). The NACC has also developed a list of overarching duties of all children's lawyers, regardless of the precise role of the lawyer. *See NACC Recommendations for Representation of Children in Abuse and Neglect Cases* (2001).

⁸*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).

⁹AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS (2002).

¹⁰*Id.* at § 2.13.

¹¹American Bar Association, *Standards of Practice for Lawyers Representing Children in Custody Cases*, 37 FAM. L. Q. 129 (2003).

¹²*Id.* at Standard II .B.

to have his or her wishes presented by a zealous advocate.¹³ 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 representative are largely undefined.¹⁴ In response to CAPTA, almost all states now require some form of child representation in abuse and neglect proceedings, but the role of the representative ranges from lay guardian to legal counsel.¹⁵ Many states routinely appoint lawyers to function as guardians ad litem, without careful delineation of the distinctions between the ethical responsibilities of a lawyer to the client and the professional obligations of the lay guardian ad litem 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 or guardian ad litem as a matter of judicial discretion.¹⁶

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 significantly from a uniform law. The Conference concluded that a uniform act would enhance the quality and professionalism of children's representatives in the areas of abuse and

¹³See 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).

¹⁴See 42 U.S.C. § 5106a(b)(2)(A)(xiii) (2000), which requires 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.”

¹⁵See Atwood, *supra* note 1, at 188-91; Howard A. Davidson, *Child Protection Policy and Practice at Century's End*, 33 FAM. L. Q. 765, 768-69 (1999).

¹⁶Section 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 role is to represent the child's interests.” UNIF. MARRIAGE & DIV. ACT § 310 Comment, 9A U.L.A. 13 (1998).

neglect and custody and ultimately would protect the interests of children nationwide.¹⁷

The proposed Act seeks to improve the representation of children in proceedings directly affecting their custody by clearly defining the roles and responsibilities of children’s representatives and by providing guidelines to courts in appointing representatives. The Act not only integrates the two sets of standards promulgated by the ABA – the Abuse and Neglect Standards and the Custody Standards – but it also addresses the role of the non-lawyer representative, denominated a “court-appointed advisor” under the Act in order to avoid the confusion generated by the term “guardian ad litem.” The new term, however, applies only in the proceedings governed by this Act and is not intended to alter the practice of appointing guardians ad litem in other contexts. By its inclusive nature, the Act provides standards that differentiate among the various representatives while indicating where certain core duties are shared by all categories of children’s representatives. These objectives are implemented through the definitions set out in Section 2, the standards for the appointment of counsel and court-appointed advisors in Sections 4-6, the qualifications of counsel and court-appointed advisors in Sections 7 and 8, the provisions governing orders of appointment in Sections 9 and 10, the description of core duties and powers in Sections 12-17, and the recognition of qualified immunity for certain representatives under Section 18. Finally, fees and expenses are addressed in Sections 19 and 20.

The Act provides for two categories of lawyers for children—the child’s attorney and the best interests attorney—and does not endorse the hybrid category of attorney/guardian ad litem.¹⁸ The child’s attorney is in a traditional attorney-client relationship with the child and is

¹⁷While this Act is designed for state enactment, American Indian tribes may also find its guidelines useful in administering tribal abuse and neglect proceedings and adjudicating custody disputes that involve Indian children. At least one tribal court has held that a child has a “right to be heard” in a custody dispute, either directly or through a court-appointed representative, as a matter of tribal common law. *See In the Matter of Custody of T.M.*, 28 Indian L. Rep. 6044 (Navajo Nation 2001).

¹⁸The Act rejects the hybrid 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. *See* Rule 3.7, American Bar Association Model Rules of Professional Conduct (2002) (generally prohibiting attorney from acting as advocate and witness in same 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 judicial recognition of the tensions inherent in the hybrid attorney/guardian ad litem, see *Jacobsen v. Thomas*, 100 P.3d 106 (Mont. 2004); *Clark v. Alexander*, 953 P.2d 145 (Wyo. 1998).

therefore under traditional ethical limitations governing that relationship.¹⁹ Under the Act, the child's attorney remains a client-directed representative and should function within that role rather than advocating for what the lawyer believes to be in the child's best interests. The Act authorizes, however, a limited exercise of substituted judgment by the child's attorney. Under Section 12, when the child is incapable of directing or refuses to direct representation as to a particular issue, the child's attorney may take a position that is in the child's best interests so long as the position is not in conflict with the child's expressed objectives. The child's attorney may also request appointment of a court-appointed advisor.²⁰ In contrast, if a child's expressed goals would put the child at risk of substantial harm and the child persists in that position despite the attorney's advice and counsel, the attorney *must* request a court-appointed advisor for the child or withdraw from representation and request the appointment of a best interests attorney. Thus, the Act provides mechanisms to protect the attorney-client relationship while still ensuring that evidence of potential harm to the child will be brought to the attention of the court.

The best interests attorney, in contrast, has the substantive responsibility of advocating for the child's best interests while still remaining in the professional role of an attorney. Under Section 13, the best interests attorney is expected to advocate for a resolution of the proceeding that is consistent with the child's best interests "according to criteria established by law." In other words, the best interests attorney should adhere to established legal standards rather than the attorney's subjective bias. Unlike the child's attorney, the best interests attorney is not bound by the client's expressed objectives, but neither should the best interests attorney disregard the child's preferences. Instead, the best interests attorney has a duty to take into account the child's objectives and the reasoning underlying those objectives, in light of the child's developmental level, in determining what to advocate. In other respects, the best interests attorney is a traditional lawyer for the child and remains under the general duties of representation spelled out in Section 11, including the presentation of the child's expressed objectives to the court if the child so desires. Under the Act, the ethical precepts governing a lawyer-client relationship apply to the best interests attorney's relationship with the child unless the Act provides an express exception. Thus, the best interests attorney may not disclose the child's confidential communications unless otherwise permitted to do so under applicable ethical standards. The best interests attorney, however, may use the child's confidences for purposes of the representation.

The third category of representative addressed in the Act is the court-appointed advisor whose role is to assist the court in determining the child's best interests. The court-appointed advisor's responsibilities include investigation of the case and, where appropriate, making a

¹⁹Rule 1.14 of the ABA Model Rules of Professional Conduct provides useful guidance in representing a client with diminished capacity. A helpful exploration of ethical issues facing a child's attorney can be found in JENNIFER L. RENNE, *LEGAL ETHICS IN CHILD WELFARE CASES* (ABA 2004).

²⁰*See* Sections 12 and 13 and Commentary.

recommendation to the court. *See* Section 14. The Act makes clear that the court-appointed advisor may not perform acts that would be restricted to a licensed attorney, even if the person functioning as court-appointed advisor holds a license to practice law. The Act also endorses the widespread use of Court Appointed Special Advocates (CASAs) to fulfill the role of court-appointed advisor.²¹

An important premise underlying the Act is that an attorney should be appointed for every child who is the subject of an abuse or neglect proceeding, and Section 4 requires the appointment of either a child's attorney or a best interests attorney in such cases.²² In abuse or neglect cases, as defined in the Act, court orders may effectively determine a child's future, including whether the child will remain in his or her home, the nature and duration of any placement outside the home, the child's contact with parents and other relatives, and the child's access to social services. The requirement of appointed counsel rests on the recognition that children's interests in these proceedings are of fundamental importance. The ABA has long advocated the mandatory appointment of attorneys for children in abuse and neglect proceedings whether or not a guardian ad litem has been appointed.²³ Although the role of counsel may vary depending on the developmental level of the child and other factors, legal representation for children can ensure that court orders are based on an accurate, informed, and sensitive assessment of the child's circumstances.

The mandate for appointment of an attorney for every child in an abuse or neglect proceeding is consistent with trends across the United States. Currently, more than half the states require the appointment of an attorney or an attorney/guardian ad litem, and more than three-

²¹The 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. Volunteers are screened and trained at the local level, but all CASA programs that are affiliated with the National Court Appointed Special Advocate Association must comply with the standards issued by that organization. *See* www.nationalcasa.org. In addition, many states have established their own standards to ensure that the volunteers representing children are competent and possess relevant training and experience. *See generally* Michael S. Piraino, *Lay Representation of Abused and Neglected Children: Variations on Court Appointed Special Advocate Programs and Their Relationship to Quality Advocacy*, 1 JOURNAL OF CENTER FOR CHILDREN AND THE COURTS 63 (1999). The Office of Juvenile Justice and Delinquency of the United States Department of Justice is authorized to enter into cooperative agreements with the National CASA Association to expand CASA programs nationally. *See* 42 U.S.C. § 13013. One of the key strengths of the CASA program is that a CASA generally represents only one child at a time.

²²Federal law has long authorized the discretionary appointment of counsel for Indian children subject to the Indian Child Welfare Act. *See* 25 U.S.C. § 1912(b).

²³ *See* ABA/IJA Joint Commission on Juvenile Justice Standards, STANDARDS RELATED TO COUNSEL FOR PRIVATE PARTIES (1976).

fourths of the states regularly appoint attorneys for children as a matter of practice whether or not required by state law.²⁴ Moreover, at least one federal district court has held that appointment of counsel for every child in the state foster care system is constitutionally required as a matter of procedural due process.²⁵ Although the mandate of this Act may impose additional financial costs on those few states that do not currently provide for legal representation for children in abuse and neglect cases, the drafters of the Act believe that the profound benefit to children and overall society of an improved child welfare system outweighs those monetary costs.

The mandate for appointment of an attorney for a child also has implications for a state's compliance with federal law. Under CAPTA, states must appoint a "guardian ad litem" for children in abuse and neglect proceedings as a condition of receiving federal CAPTA funding, and the statute expressly permits the guardian to be a lawyer.²⁶ The statutory role of that appointed representative is to carry out a thorough investigation and "to make recommendations to the court concerning the best interests of the child."²⁷ The appointment of a best interests attorney presumably would satisfy the CAPTA requirement in light of the best interest attorney's role as defined in Section 13. A child's attorney might also satisfy the CAPTA mandate, since representation by a child's attorney will promote the child's best interests. Nevertheless, some states may choose to require a court-appointed advisor if the attorney appointed for the child is not a best interests attorney. For that reason, the Act provides two alternative approaches to permit states to choose whether to mandate such an additional appointment. *See* Section 5 and Comment. Under the first alternative in Section 5, the appointment of a court-appointed advisor is required unless the attorney appointed for the child is a best interests attorney. In contrast, under the second alternative, the appointment of a court-appointed advisor is discretionary when either a child's attorney or a best interests attorney has been appointed for the child in an abuse or neglect proceeding.

In custody proceedings, the Act leaves to judicial discretion the question of appointing a

²⁴*See* U.S. State by State Chart, compiled by the Yale Representing Children Worldwide Project, available at www.law.yale.edu/rcw. According to that 2005 Survey, 30 states currently require the appointment of an attorney or an attorney/guardian ad litem, and an additional 10 states routinely appoint lawyers for children as a matter of practice even though not required by law to do so.

²⁵*See* *Kenny A. ex rel. Winn v. Perdue*, 356 F. Supp. 2d 1353 (N.D. Ga. 2005) (every child in foster care entitled to appointed counsel as matter of procedural due process under Georgia state constitution.). Significantly, the Georgia constitutional provision tracks the federal Due Process Clause, and the court relied on interpretations of the Due Process Clause in the federal Constitution in its analysis.

²⁶*See* 42 U.S.C. § 5106a(b)(2)(A)(xiii), quoted *supra* at note 14.

²⁷*Id.*

child's representative. There are significant benefits to appointing a representative for a child when the court has a special need for assistance and information in determining the child's best interests. Moreover, when a child has expressed a viewpoint and desires an advocate, the appointment of counsel may be particularly appropriate. At the same time, the appointment of a representative for the child in some circumstances may exacerbate acrimony between the parties and might unduly burden the parties' financial resources. Thus, the court should consider the child's interests, the court's needs, and the financial burden on the parties before making an appointment. Section 6 provides a list of factors that may suggest a particularized need for the appointment of a representative, but the decision of whether to appoint a representative in any given context remains within the court's discretion.²⁸

While the Act sets out basic guidelines for the appointment and role of attorneys and court-appointed advisors, 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.²⁹

²⁸For a summary of state laws governing representation of children in custody cases, see Linda D. Elrod, *Raising the Bar for Lawyers Who Represent Children: ABA Standards of Practice for Custody Cases*, 37 FAM. L. Q. 105, 126 (2003)(Appendix).

²⁹For a comprehensive set of standards for "law guardians" in New York, see Committee on Children and the Law, New York State Bar Association, LAW GUARDIAN REPRESENTATION STANDARDS (2005).

1 **UNIFORM REPRESENTATION OF CHILDREN IN ABUSE, NEGLECT, AND**
2 **CUSTODY PROCEEDINGS ACT**

3
4 **SECTION 1. SHORT TITLE.** This [act] may be cited as the Uniform Representation
5 of Children in Abuse, Neglect, and Custody Proceedings Act.

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

7 (1) “Abuse or neglect proceeding” means a court proceeding under [cite state statute] for
8 protection of a child from abuse or neglect or a court proceeding under [cite state statute] in
9 which termination of parental rights is at issue.

10 (2) “Best interests attorney” means an attorney who provides legal representation for a
11 child to protect the child’s best interests without being bound by the child’s directives or
12 objectives.

13 (3) “Child’s attorney” means an attorney who provides legal representation for a child.

14 (4) “Court-appointed advisor” means an individual, not functioning as an attorney,
15 appointed to assist the court in determining the best interests of a child.

16 (5) “Custody proceeding” means a court proceeding other than an abuse or neglect
17 proceeding in which legal or physical custody of, access to, or visitation or parenting time with a
18 child is at issue. The term does not include a proceeding initiated against a child for
19 [adjudication of delinquency or status offense under [cite statute]].

20 (6) “Developmental level” means the ability to understand and communicate, taking into
21 account such factors as age, mental capacity, level of education, cultural background, and degree
22 of language acquisition.

1 **Comment**

2 The definitions in the Act parallel the categories of attorneys for children that are set forth
3 in the ABA Custody Standards: child's attorney and best interests attorney. This Act also
4 recognizes a representative in the nature of a guardian ad litem, but the Act uses the new term
5 "court-appointed advisor" in order to avoid the widespread disagreement and confusion about
6 the meaning of "guardian ad litem." Under the Act, a "child's attorney" is a client-directed
7 lawyer in a traditional attorney-client relationship with the child, while a "best interests attorney"
8 provides legal representation to a child but is not bound by the child's directives.
9

10 The "court-appointed advisor" assists the court in determining the best interests of a child
11 and will therefore perform many of the functions formerly attributable to guardians ad litem, but
12 the Act makes clear that court-appointed advisors are not to function as attorneys. Instead, a
13 court-appointed advisor will independently investigate the child's circumstances and may
14 sometimes testify in the case about the child's best interests. *See* Section 14. Similarly, because
15 the role of attorney, whether child's attorney or best interests attorney, is functionally and
16 ethically inconsistent with that of a guardian ad litem, the Act does not endorse the hybrid role of
17 attorney/guardian ad litem employed in numerous states.
18

19 "Best interests attorney" is a term of art that was introduced by the ABA in developing
20 the Custody Standards and signifies a representative who advocates the child's interests rather
21 than the child's expressed goals. In many respects, however, the best interests attorney performs
22 the same duties of representation that are performed by the child's attorney. *See* Sections 11 and
23 13. Some jurisdictions have authorized attorneys functioning in the same capacity as best
24 interest attorneys but have denominated them differently. *See, e.g.,* VERNON'S TEX. CODE ANN.
25 FAMILY CODE § 107.021 (amicus attorney).
26

27 While the attorney definitions are broadly framed in this section, the Act's requirements
28 expressly apply to court-appointed attorneys and court-appointed advisors for children in abuse
29 or neglect and custody proceedings. In states where privately-retained counsel may represent
30 children without a formal appointment, this Act's applicability to those lawyers should be
31 determined under local law. In any event, a lawyer who is initially privately retained may
32 thereafter seek an appointment. Once such a formal appointment occurs, the Act applies. It
33 should be noted that a representative may be court-appointed without receiving compensation
34 from the court or other government sources.
35

36 Under the definitions of this Act, abuse or neglect proceedings include child protection
37 proceedings ordinarily brought in juvenile court, such as dependency actions and foster care
38 placements, as well as actions to terminate parental rights. A custody proceeding, in contrast,
39 includes court proceedings in which the child's legal or physical custody is at issue, such as
40 divorce or dissolution, separation, determination of parentage, adoption, private guardianship, or
41 protection from domestic violence or harassment. Mental health civil commitment proceedings
42 that affect the child's physical and legal custody may also qualify as custody proceedings.

1 In some circumstances, credible and serious allegations of abuse or neglect will surface
2 in a custody proceeding. If the court determines that the case should go forward as an abuse or
3 neglect proceeding (ordinarily entailing a transfer to juvenile court), then this Act's terms
4 regarding abuse or neglect proceedings—including, in particular, the mandatory appointment of
5 counsel for the child—will govern. In some states a custody case can be referred to juvenile court
6 for investigative purposes. Such a referral would not in itself transform the proceeding into an
7 abuse or neglect proceeding unless a dependency petition were filed as a result of the referral.
8

9 **SECTION 3. APPLICABILITY AND RELATIONSHIP TO OTHER LAW.**

10 (a) This [act] applies to an abuse or neglect or custody proceeding [pending on or]
11 commenced on or after [the effective date of this [act]].

12 (b) This [act] does not affect children's rights or standing under law other than this [act]
13 or give standing or party status not provided under law other than this [act].

14 **Comment**

15 This Act applies to all abuse or neglect and custody proceedings filed on or after the
16 effective date. A state may wish to apply the Act to proceedings that are pending on the effective
17 date as well, in order to make the benefits of the Act immediately available to children who are
18 the subject of ongoing abuse, neglect, or custody proceedings. In that event, the state should
19 adopt the bracketed reference to pending proceedings.
20

21 The Act is not intended to affect children's rights recognized under other state or federal
22 laws. State law may impose specialized rules for particular proceedings, such as guardianships
23 or adoptions. In many states, for example, a child of a certain age has a statutory right to veto a
24 proposed adoption. *See, e.g.,* ARIZ. REV. STAT. § 8-106 (2004) (consent of child twelve years of
25 age or older required for adoption); WEST'S ANN. CAL. FAM. CODE § 8602 (2004) (consent of
26 child older than twelve required for adoption). Several states provide a right to counsel for
27 children in contested adoption proceedings. *See, e.g.,* OKLA. STAT. ANN. § 7505-1.2 (2004).
28 Where such specialized rules are in effect, they control the more general provisions of this Act.
29

30 Similarly, this Act does not affect state laws that afford children standing or the right to
31 broader participation in abuse or neglect or custody cases than provided under the Act. The Act
32 establishes guidelines for the appointment of representatives for children, without regard to a
33 state's position on whether the child should be recognized as a separate party to the proceeding.
34 State laws regarding the standing of third parties to initiate abuse or neglect or custody actions
35 also are not affected by this Act. Conversely, the Act does not provide standing where it does not
36 otherwise exist under state law.

1 State law varies on children's procedural status in abuse or neglect and custody
2 proceedings. In several states, children are viewed as parties to abuse or neglect proceedings and
3 have the right to participate through their representatives in all stages of the proceedings. *See*,
4 *e.g.*, MINN. STAT. ANN § 260C.163(2) (child who is subject to petition for protection has right to
5 participate in all proceedings); *In re Williams*, 805 N.E.2d 1110 (Ohio 2004)(child is party to
6 parental rights termination action and has right to legal counsel). In other states, children are
7 non-parties whose rights of participation are more limited. In the Matter of Comm'r of Soc.
8 Serv's on Behalf of R.S., 647 N.Y. Supp. 2d 361 (NY Fam. Ct. 1996)(child is not party to child
9 protective proceeding and therefore cannot be deposed as party); *In re Anthony S., Jr.*, 675 N.Y.
10 Supp. 2d 759 (NY Fam. Ct. 1998)(child is not party to termination of parental rights proceeding
11 and therefore cannot seek relief from judgment). In child custody disputes, children typically are
12 not viewed as parties and are not permitted to become parties through intervention. *See, e.g.*,
13 *Auclair v. Auclair*, 730 A.2d 1260 (Md. App. 1999); *J.A.R. v. Superior Court*, 877 P.2d 1323
14 (Ariz. App. 1994); *In re Marriage of Hartley*, 886 P.2d 665 (Col. 1994). On the other hand, in at
15 least one state, a child who is the subject of a custody dispute is viewed as an indispensable party
16 to the proceeding. *See, e.g.*, *In re J.W.F. v. Schoolcraft*, 763 P.2d 1217 (Utah App. 1988). At
17 the same time, even where children are not viewed as parties they often have many of the rights
18 of parties as a practical matter.

19
20 In addition, this Act may supplement rights already provided by federal law. The Indian
21 Child Welfare Act, for example, authorizes courts to appoint counsel for Indian children in
22 proceedings governed by the ICWA when such appointment is in the best interests of the child.
23 *See* 25 U.S.C. § 1912(b) (2000). While the ICWA gives courts discretion to appoint counsel in
24 Indian child welfare proceedings, this Act requires appointment of a child's attorney or best
25 interests attorney if an Indian child is the subject of an abuse or neglect proceeding in state court.
26

27 **SECTION 4. MANDATORY APPOINTMENT IN ABUSE OR NEGLECT** 28 **PROCEEDING.**

29 (a) In an abuse or neglect proceeding, the court shall appoint either a child's attorney or a
30 best interests attorney. The appointment must be made as soon as practicable to ensure adequate
31 representation of the child and, in any event, before the first court hearing that may substantially
32 affect the interests of the child.

33 (b) In determining whether to appoint a child's attorney or a best interests attorney, the
34 court may consider such factors as the child's age and developmental level, any desire for an

1 attorney expressed by the child, whether the child has expressed objectives in the proceeding, and
2 the value of an independent advocate for the child’s best interests.

3 (c) The court may appoint one attorney to represent siblings if there is no conflict of
4 interest, even if the attorney serves in different capacities with respect to two or more siblings.

5 (d) Neither the child nor a representative of the child, whether or not appointed by the
6 court, may waive representation of the child under this section or Section 5.

7 **Comment**

8 This section requires the appointment of an attorney for every child who is the subject of
9 an abuse or neglect proceeding because of the fundamental importance of the interests at stake.
10 Although the nature of the attorney’s role may vary from case to case, the child’s right to legal
11 representation is a function of basic procedural justice. In abuse or neglect cases, court orders
12 may effectively determine a child’s future life, including family contact and family identity. The
13 appointment of an attorney for the child protects the dignity of the child and helps ensure that the
14 court will make an informed and sensitive decision based on a full understanding of the child’s
15 circumstances. Under subsection (d), the child’s right of representation is not subject to waiver
16 by the child or anyone acting on behalf of the child.

17
18 As a condition of receiving federal child welfare funding, states must appoint a “guardian
19 ad litem” in every judicial proceeding involving an abused or neglected child. *See* Child Abuse
20 Prevention and Treatment Act, 42 U.S.C. § 5106a(b)(2)(A)(xiii) (2000)(“CAPTA”). This Act, in
21 contrast, requires the appointment of either a child’s attorney or a best interests attorney for every
22 child involved in an abuse or neglect proceeding. For discussion of how the appointment of a
23 child’s attorney or best interests attorney may meet the requirements of CAPTA, see Comment to
24 Section 5.

25
26 The disjunctive in subsection (a) makes clear that the court may not appoint a child’s
27 attorney and a best interests attorney for the same child at the same time. Dual representation by
28 two lawyers functioning in different roles would likely be confusing to the child and could result
29 in the lawyers taking different positions in court for the same child client. Although the same
30 child may have both an attorney and a court-appointed advisor, that form of dual representation
31 does not pose the same tensions as would representation by two competing lawyers.

32
33 The Act leaves the choice between a best interests attorney or a child’s attorney to judicial
34 discretion. Because of the exigencies of many abuse and neglect proceedings, courts often must
35 act quickly in appointing attorneys for children. For practical purposes, judges who lack detailed
36 information about a child’s circumstances may need to use the child’s age as a rough measure for

1 purposes of the initial designation of an attorney's role. Ordinarily, a child's attorney would be
2 appropriate for an older child capable of exercising considered judgment, while a best interests
3 attorney would be appropriate for a nonverbal or very young child incapable of expressing a
4 considered choice about issues that are relevant to the proceeding.
5

6 Nevertheless, a child's capacity to direct counsel is contextual and incremental and is not
7 simply a function of chronological age. In determining whether a child is capable of directing an
8 attorney, the court should focus on the child's decision-making process rather than the child's
9 choices themselves, and the court's determination should be informed by insights drawn from
10 child development science. Moreover, because of the evolving nature of children's
11 competencies, a child for whom a best interests lawyer is appropriate in one proceeding may
12 have matured sufficiently to warrant the appointment of a child's attorney at a later proceeding.
13 Section 9(c) addresses the authority of a court to change the nature of an attorney's appointment
14 from best interests attorney to child's attorney based on new information not available at the time
15 of the original appointment.
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, joint representation would be inappropriate. If a conflict arises, the
23 attorney should take action required by the rules of professional conduct. If the representation of
24 one child is materially limited by the lawyer's responsibilities to another child (where, for
25 example, one child seeks to establish parental unfitness and another opposes the production of
26 such evidence), the attorney must take remedial steps and may be forced to withdraw from some
27 or all representation. *See* Rule 1.7, ABA Model Rules of Professional Conduct (2002). Key
28 concerns are whether pursuing one client's objectives will prevent the lawyer from pursuing
29 another client's objectives, and whether confidentiality will be compromised. *See* Jennifer L.
30 Renne, *LEGAL ETHICS IN CHILD WELFARE CASES* 47-60 (ABA 2004).
31

32 Ideally, a child will have the same lawyer throughout the pendency of the abuse or neglect
33 proceeding. Continuity in representation is particularly important in building the child's trust,
34 and the lawyer's representation will be more informed if the same lawyer has been on the case
35 from its inception. Nevertheless, a lawyer appointed to represent a child in an abuse or neglect
36 proceeding may need to withdraw from representation due to conflicts or other reasons. If the
37 court grants permission to withdraw, the court should appoint a new lawyer as soon as feasible to
38 continue the representation.

39 It should be noted that a custody proceeding may become an abuse or neglect proceeding
40 because of substantial allegations of abuse or neglect, as explained in the Comment to Section 2.
41 In that event, this section's mandatory appointment of counsel for the child would apply.
42

1 **SECTION 5. APPOINTMENT OF COURT-APPOINTED ADVISOR IN ABUSE**
2 **OR NEGLECT PROCEEDING.**

3 **Alternative A**

4 (a) In an abuse or neglect proceeding:

5 (1) if the court does not appoint a best interests attorney, the court shall appoint a
6 court-appointed advisor before the first court hearing that may substantially affect the interests of
7 the child; or

8 (2) if the court appoints a best interests attorney, the court may appoint a court-
9 appointed advisor if the court determines that a court-appointed advisor is necessary to assist the
10 court in determining the best interests of the child.

11 (b) In determining whether a court-appointed advisor is necessary under subsection
12 (a)(2), the court shall consider such factors as the court's need for information and assistance, the
13 value of a court-appointed advisor's expertise, and any request by the best interests attorney for
14 the appointment of a court-appointed advisor.

15 (c) If the court determines to make an appointment under subsection (a)(2), the court
16 shall make the appointment as soon as practicable.

17 **Alternative B**

18 (a) In an abuse or neglect proceeding, whether the court appoints a child's attorney or a
19 best interests attorney, the court may appoint a court-appointed advisor if the court determines
20 that a court-appointed advisor is necessary to assist the court in determining the child's best
21 interests.

22 (b) In determining whether a court-appointed advisor is necessary under subsection (a),

1 the court shall consider such factors as the court’s need for information and assistance, the value
2 of a court-appointed advisor’s expertise, and any request by the child’s attorney or best interests
3 attorney for the appointment of a court-appointed advisor.

4 (c) If the court determines to make an appointment under subsection (a), the court shall
5 make the appointment as soon as practicable.

6 **End of Alternatives**

7 ***Legislative Note:*** States that want to mandate a court-appointed advisor when a best interests
8 attorney has not been appointed under Section 4 should adopt Alternative A of this section.
9 States wanting to leave the matter to judicial discretion should adopt Alternative B.

10 **Comment**

11
12 This section permits states to decide whether to require a court-appointed advisor under
13 certain circumstances. Because some states may want to ensure that a best interests advocate will
14 always be participating in the proceeding, Alternative A requires a court-appointed advisor
15 whenever the court has not appointed a best interests lawyer for the child. Alternative B, in
16 contrast, treats the appointment of a court-appointed advisor as a matter of judicial discretion to
17 be determined on a case-by-case basis.

18
19 The options within this section may also have implications for a state’s compliance with
20 federal law. As a condition of receiving federal child welfare funding, states must appoint a
21 “guardian ad litem” in every judicial proceeding involving an abused or neglected child. Child
22 Abuse Prevention and Treatment Act, 42 U.S.C. § 5106a(b)(2)(A)(xiii) (2000)(“CAPTA”). See
23 Comment to Section 4. The federal Act does not define the role of the guardian ad litem beyond
24 stating that the guardian, who may be an attorney or court appointed special advocate, shall “(I)
25 obtain first-hand, a clear understanding of the situation and needs of the child; and (II) make
26 recommendations to the court concerning the best interests of the child.” Id. While some states
27 view either a best interests attorney or a child’s attorney as fulfilling CAPTA’s guardian ad litem
28 requirement, other states may interpret CAPTA more narrowly. For those states that interpret
29 CAPTA to always mandate a best interests advocate, Alternative A requires a court-appointed
30 advisor unless the court has already appointed a best interests attorney. Alternative B, on the
31 other hand, would be appropriate for those states that view CAPTA’s requirement as fully
32 satisfied by the appointment of either a child’s attorney or a best interests attorney.

33
34 The best interests attorney by definition should satisfy CAPTA’s requirement, since that
35 attorney’s role is to provide legal services to protect a child’s best interests. A child’s attorney
36 may also satisfy CAPTA: even a child-directed lawyer functioning in the role of a child’s

1 attorney will ultimately facilitate the court's resolution in the child's best interests. Also, the
2 child's attorney may, in situations justifying substituted judgment under Section 12, advocate a
3 position the lawyer believes is in the child's interests. Moreover, the attorney must take remedial
4 action if the child's expressed objectives will subject the child to a risk of substantial harm. *See*
5 Section 12. For these reasons, under the second bracketed option, the appointment of a court-
6 appointed advisor is discretionary when either a child's attorney or a best interests attorney has
7 been appointed in an abuse or neglect proceeding. In support of this more flexible interpretation
8 of the CAPTA guardian ad litem requirement, see U.S. Department of HHS Children's Bureau,
9 *Adoption 2002: The President's Initiative on Adoption and Permanence for Children*,
10 Commentary to Guideline 15A.
11

12 **SECTION 6. DISCRETIONARY APPOINTMENT IN CUSTODY PROCEEDING.**

13 (a) In a custody proceeding, the court, on its own or on motion, may appoint either a
14 child's attorney or a best interests attorney. Whether or not the court appoints an attorney, the
15 court may appoint a court-appointed advisor. An appointment may be made at any stage of the
16 proceeding and must designate the role of the appointee.

17 (b) In determining whether an appointment is appropriate, the court shall consider the
18 circumstances and needs of the child, the court's need for information and assistance, the
19 financial burden on the parties and the cost of available alternatives for resolving the issues in the
20 proceeding, and any factors indicating a particularized need for representation, including:

- 21 (1) any desire for a representative expressed by the child;
- 22 (2) any inappropriate adult influence on or manipulation of the child;
- 23 (3) the likelihood that the child will be called as a witness or be questioned by the
24 court in chambers and the need to minimize harm to the child from the processes of litigation;
- 25 (4) any level of acrimony that indicates a lack of objectivity of the parties
26 regarding the needs of the child;
- 27 (5) any interference, or threatened interference, with custody, access, visitation,

1 or parenting time, including abduction or risk of abduction of the child;

2 (6) the likelihood of a geographic relocation of the child that could substantially
3 reduce the child's time with a parent, sibling, or other individual with whom the child has a close
4 relationship;

5 (7) credible allegations or evidence of conduct by a party or an individual with
6 whom a party associates that raises serious concerns for the safety of the child during periods of
7 custody, visitation, or parenting time with that party;

8 (8) any special physical, educational, or mental-health needs of the child that
9 require investigation or advocacy; and

10 (9) any dispute as to paternity.

11 (c) In determining which category of representative, if any, is appropriate under
12 subsection (a), the court shall consider such factors as the child's age and developmental level,
13 any desire for an attorney expressed by the child, whether the child has expressed objectives in
14 the proceeding, the value of an independent advocate for the child's best interests, and the value
15 of a court-appointed advisor's expertise.

16 **Comment**

17 This section leaves the appointment of an attorney or court-appointed advisor for children
18 in custody cases to judicial discretion, but courts should recognize the significant benefit in
19 having a representative for a child under certain circumstances. If a court anticipates that the
20 evidentiary presentation by the parties will be incomplete, distorted, or otherwise inadequate, the
21 appointment of a representative for the child can be particularly helpful. Moreover, one of the
22 key values of a child's representative is to advocate for evidentiary procedures and methods of
23 dispute resolution that are the least harmful to the child. A child's representative, for example,
24 can assist the court in deciding whether to interview a child in chambers or to involve the child as
25 a participant in mediation between the parents. The goal of child representation is not only to
26 help the court arrive at an outcome that best serves the child's interests but also to protect
27 children from the harmful collateral effects of litigation.

1 The introductory paragraph of subsection (b) identifies general considerations that courts
2 should take into account in determining whether to appoint a representative. The child's
3 circumstances, including his or her developmental level, and the court's needs in the custody
4 determination should inform the court's decision. The numbered items under subsection (b) are
5 factors that may raise special concerns warranting the appointment of a representative for the
6 child in a particular proceeding and should guide the court's discretion. Where issues involving
7 parentage, relocation, or custodial interference are raised, the appointment of a representative for
8 the child may be helpful to the court in resolving the underlying legal and factual questions. In
9 circumstances where a parent's conduct poses a risk of harm to the child, such as evidence of
10 domestic violence, child abuse, or substance abuse, the appointment of an independent
11 representative for the child may be necessary for the court to reliably determine the evidentiary
12 issues in the case. Indeed, in some jurisdictions, family courts may refer custody proceedings to
13 the juvenile court for investigation of allegations of abuse or neglect. In that circumstance, even
14 if the case does not ultimately become an abuse or neglect proceeding, the appointment of a
15 representative for the child could assist the court in determining the accuracy of the allegations.
16

17 The determination of which category of representative to appoint is addressed in
18 subsection (c). The decision to appoint a child's attorney, best interests attorney, or court-
19 appointed advisor will depend in large part on the child's developmental level and the court's
20 sense of how the child's interests can best be protected. In some cases, a mental health
21 professional as court-appointed advisor may be particularly helpful, while in other cases
22 involving older children with defined views, a child's attorney may be appropriate. In contrast, a
23 preverbal child in the middle of a bitter and protracted custody dispute may need representation
24 through a best interests attorney.
25

26 At the same time, courts must recognize that the appointment of a lawyer or court-
27 appointed advisor for the child in a custody case may be unnecessary and might introduce a
28 potentially intrusive and expensive additional voice in the proceeding. This section also directs
29 courts to consider the financial burden on parties and the availability of alternative methods of
30 dispute resolution. Section 20 provides guidelines for assessing fees against the parties for
31 children's representatives in custody proceedings. Nevertheless, a court's decision whether or
32 not to appoint a representative for a child should not depend solely on the parties' ability to pay.
33 Many family courts have access to low cost or pro bono programs for children's representatives.
34 Ideally, state court systems will set aside funds for the appointment of children's representatives
35 in this important realm.
36

37 **SECTION 7. QUALIFICATIONS OF CHILD'S ATTORNEY OR BEST**

38 **INTERESTS ATTORNEY.** The court may appoint as a child's attorney or best interests
39 attorney only an individual who is qualified through training or experience in the type of

proceeding in which the appointment is made [, according to standards established by [insert reference to source of standards]].

Legislative Note: *States that adopt training standards and standards of practice for children’s attorneys and best interests attorneys should insert a reference to the state laws, court rules, or administrative guidelines containing those standards in the bracketed portion of this section.*

Comment

All court-appointed attorneys for children, whether in the role of child’s attorney or best interests attorney, must have adequate training or experience to discharge their duties with competence. States are encouraged to adopt state-wide standards of practice for all children’s attorneys through court rule or rule promulgated by the state bar or other regulatory agency. Standards of practice should include a description of required training in applicable statutory codes, case law and court procedures, including state law relevant to divorce, child custody, child support, adoption, paternity, child welfare, and other regulations of family life. Lawyers representing children should also be familiar with federal law pertaining to family regulation, children’s health care, educational policy, and other pertinent areas. Relevant law includes such statutes as the Child Abuse Prevention and Treatment Act (“CAPTA”), Pub. L. 93-247, 88 Stat. 4 (codified at 42 U.S.C. §§ 5101-5116); the Adoption and Safe Families Act, Pub. L. No. 105-89, 111 Stat. 2115 (codified at scattered sections of 42 U.S.C.); the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232(g) (commonly referred to as “Buckley Amendment”); the Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936 (codified at scattered sections of 29 U.S.C. and 42 U.S.C.); and the Indian Child Welfare Act, Pub. L. No. 95-608, 92 Stat. 3071 (codified at 25 U.S.C. §§ 1901-63). Significantly, in cases involving abused or neglected children, the 2003 amendments to CAPTA require that guardians ad litem, including attorneys and court appointed special advocates, receive training appropriate to their roles. *See* 42 U.S.C. § 5106a(b)(2)(A)(xiii).

In addition, children’s lawyers should have knowledge of child development and child psychology, the dynamics of child abuse or neglect, the impact of domestic violence, the impact of separation and long-term consequences to a child of being in temporary care, and the central role of culture and ethnicity in family relations and children’s identities. They should be trained in communicating with children and should understand the impact of culture on styles of communication. Moreover, children’s attorneys and best interests attorneys should become familiar with the ABA Abuse and Neglect Standards, the revisions of those standards adopted by the National Association of Counsel for Children, and the ABA Custody Standards. Finally, the training of children’s lawyers should be conducted on an ongoing basis. Mandatory periodic training requirements exist in many states to ensure that children’s counsel continue to meet standards of competence over time.

Before making an appointment, courts should be satisfied that the attorney possesses the

1 relevant qualifications established by law or rule. Under Section 9, courts may designate child
2 advocacy organizations or governmental programs in the initial order of appointment when those
3 entities have ensured that their attorney members have appropriate training and experience.
4 Although such programs may be designated in the initial order of appointment on a temporary
5 basis, the program should identify the particular individual who will be the child's representative
6 as soon as feasible.

7
8 In making an appointment under this Act, the court should ensure that the attorney's
9 caseload is not so burdensome as to undermine his or her ability to competently serve as the
10 child's representative and to fulfill the duties identified in Sections 11-13. *See* ABA Abuse and
11 Neglect Standards L-1 (providing duty of trial courts to control size of court-appointed
12 caseloads). For effective representation, a lawyer must be able to engage in certain essential
13 tasks, including meeting with his or her client, interviewing relevant witnesses, conducting
14 investigation and discovery, and reviewing records pertaining to the child. The National
15 Association of Counsel for Children has recommended that a lawyer represent no more than 100
16 children in abuse or neglect proceedings at a time. *See Kenny A. ex rel. Winn v. Perdue*, 356 F.
17 Supp. 2d 1353, 1362 (N.D. Ga. 2005)(citing testimony of Marvin Ventrell, NACC Executive
18 Director).

19
20 **SECTION 8. COURT-APPOINTED ADVISOR: QUALIFICATIONS AND**
21 **LIMITATIONS.**

22 (a) The court may appoint as court-appointed advisor only an individual who is qualified
23 through training or experience in the type of proceeding in which the appointment is made [,
24 according to standards established by [insert reference to standards]].

25 (b) An attorney appointed as court-appointed advisor may take only those actions that
26 may be taken by a court-appointed advisor who is not an attorney.

27 (c) The appointment of a court-appointed advisor does not create an attorney-client,
28 therapist-patient, or other professional relationship between the advisor and the child unless such
29 a relationship is expressly established in the order of appointment.

30 ***Legislative Note:*** *States that adopt training standards and standards of practice for court-*
31 *appointed advisors should insert a reference to the state laws, court rules, or administrative*
32 *guidelines containing those standards in the bracketed portion of this section.*

1 **Comment**

2 In appointing a court-appointed advisor for a child, the court must ensure that the
3 individual is qualified based on training, ability, and experience in child advocacy. As with the
4 training for attorneys for children, the court-appointed advisor training should be required on an
5 ongoing basis. Court-appointed advisors should have knowledge of child development and child
6 psychology, the dynamics of child abuse and neglect, the impact of domestic violence, the impact
7 of separation and the long-term consequences to a child of being in temporary care, and treatment
8 and rehabilitation systems. They should be trained in communication with children and should
9 understand the role of cultural identity in personality formation, family life, and social
10 interaction. Court-appointed advisors should also be familiar with applicable state and federal
11 law relevant to abuse, neglect, and custody proceedings.
12

13 As a practical matter, many courts rely on private or governmental programs for lists of
14 volunteer advocates, such as the Court Appointed Special Advocates (CASA), or a specific
15 volunteer list maintained by the court pursuant to other provisions of state law. Although such
16 programs may be designated in the initial order of appointment on a temporary basis pursuant to
17 Section 9, the program should identify the particular individual who will be the child's
18 representative as soon as feasible.
19

20 This section makes clear that if the court appoints an attorney to function as court-
21 appointed advisor, that person is not to function as an attorney in the proceeding. The Child
22 Abuse Prevention and Treatment Act, 42 U.S.C. § 5106a(b)(2)(A)(xiii) (2000) ("CAPTA"),
23 expressly provides that the guardian ad litem may be an attorney or a court-appointed special
24 advocate, or both. *See* Comment to Section 5. Although CAPTA may permit an attorney
25 guardian ad litem to serve as an attorney, under this Act an attorney appointed as court-appointed
26 advisor is not appointed to serve as an attorney and should function only as a non-lawyer.
27

28 Social workers, counselors, and therapists are often appointed as guardians ad litem for
29 children because of their valuable expertise in mental health, child development, and family
30 dynamics. This section makes clear that the appointment of a court-appointed advisor does not
31 in itself create a therapist-patient relationship or other professional relationship between the
32 court-appointed advisor and the child. Thus, unless the order of appointment expressly states
33 otherwise, a child's communications with a court-appointed advisor appointed under this Act are
34 not privileged.
35

36 **SECTION 9. ORDER OF APPOINTMENT.**

37 (a) Subject to subsection (b), an order of appointment of a child's attorney, best interests
38 attorney, or court-appointed advisor must be in a record, identify the individual who will act as

1 the child's representative, and clearly set forth the terms of the appointment, including the
2 grounds for and duration of the appointment, rights of access as provided under Section 15, and
3 applicable terms of compensation.

4 (b) In the order of appointment under subsection (a), the court may identify a private
5 organization or governmental program through which a representative for the child will be
6 provided. The organization or program shall designate an individual who will act as the child's
7 representative and submit to the court the name of the individual as soon as practicable, at which
8 time the court shall amend the order of appointment to identify the designated individual as the
9 child's representative.

10 (c) If appropriate in light of changed circumstances or new information not available at
11 the time of the original appointment, an attorney appointed as a best interests attorney may be
12 reappointed as a child's attorney by a new order of appointment that complies with subsection
13 (a).

14 **Comment**

15 Orders of appointment for children's representatives have often failed to clearly
16 communicate the expectations for the representative. Lack of clarity in a representative's role
17 can lead to ineffective representation. Under this section, the order of appointment must be in
18 writing and identify the role of the appointed representative in plain language understandable to
19 non-lawyers. The order should explain the reasons for the appointment and the scope of the
20 representative's responsibilities, and it must state how long the appointment will last. Payment
21 terms should also be expressly set out in the order. Clarity in the order will help all parties
22 understand the role and authority of the appointed representative. Moreover, the court will be
23 better equipped to exercise effective oversight if the appointed representative's powers and duties
24 are clearly described in the order. For a Model Appointment Order, *see* Appendix A, ABA
25 Standards of Practice for Lawyers Representing Children in Custody Cases.

26
27 This section permits a court to designate a private organization or governmental program
28 in making an appointment under the Act, since it may not always be possible for a court to
29 include the name of the representative at the outset of an abuse or neglect proceeding. If this

occurs, the designated organization or program must promptly identify the individual who will be taking on the representation.

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 very problems that this Act is designed to avoid. On the other hand, a lawyer's role may change over time. This section recognizes that in some situations, an attorney initially appointed as a best interests attorney may be more appropriately designated as a child's attorney if the child over time has developed the capacity and desire to direct counsel. In that event, a lawyer should seek a reappointment in a new order of appointment from the court. Significantly, this section requires court action and does not permit a lawyer to unilaterally redesignate his or her role.

It should be noted that this section does not permit a child's attorney to be reappointed as a best interests attorney. In light of ethical restrictions on a child's attorney under Section 12 and the contrasting ability of a best interests attorney to use a child's confidential communications for purposes of the representation under Section 13, a conversion of a child's attorney into a best interests attorney might compromise the child's confidences.

SECTION 10. DURATION OF APPOINTMENT.

(a) In an abuse or neglect proceeding, unless otherwise provided by a court order, an appointment of a child's attorney, best interests attorney, or court-appointed advisor continues in effect until the proceeding is concluded.

(b) In a custody proceeding, an appointment of a child's attorney, best interests attorney, or court-appointed advisor continues in effect only for the term provided in the order of appointment or any subsequent order.

Comment

It is important to have continuity in representation, both in terms of practical impact and in terms of the child's emotional perspective. A lawyer or court-appointed advisor who has been representing a child from the beginning of an abuse or neglect or custody proceeding ordinarily will have a fuller understanding of the issues in the case than will a representative who is appointed midstream. Moreover, a child's sense of trust and confidence in his or her representative will be enhanced if that representative is the same person over time. Of course, a court remains free at any point to terminate the appointment of a representative if the representative's performance is inadequate.

1 Under this section, the appointment of a representative in an abuse or neglect proceeding
2 presumptively lasts until the proceeding is concluded. Although the court can provide otherwise,
3 the appointment ordinarily will continue until the child is no longer under state protection. For
4 example, if a child's dependency proceeding is dismissed and the child's case is closed, the
5 proceeding can be deemed concluded. On the other hand, a child in long-term foster care may
6 not have an active case file but the proceeding would not be "concluded" within the meaning of
7 this section. Indeed, in the latter situation, the child's representative can play an essential role in
8 ensuring that periodic assessments of the child's placement and services occur as required by
9 law.

10
11 An appointment in a custody case continues for the term provided in the order of
12 appointment, since the child's need for representation in that context will often be short-term and
13 issue-specific. Nevertheless, subsequent reappointment of the same representative for a child
14 may be appropriate where related custody proceedings arise in the future, such as a relocation
15 dispute arising several years after an initial custody decree.
16

17 **SECTION 11. COMMON DUTIES OF CHILD'S ATTORNEY AND BEST** 18 **INTERESTS ATTORNEY.**

19 **Alternative A**

20 (a) A child's attorney or best interests attorney shall participate in the proceeding to the
21 full extent necessary to represent the child.

22 (b) The duties of a child's attorney or best interests attorney include:

23 (1) meeting with the child and ascertaining, in a manner appropriate to the child's
24 developmental level, the child's needs, circumstances, and views;

25 (2) consulting with any court-appointed advisor for the child;

26 (3) investigating the facts relevant to the proceeding to the extent the attorney
27 considers appropriate, including interviewing persons with significant knowledge of the child's
28 history and condition and reviewing copies of relevant records;

29 (4) providing advice and counsel to the child;

(5) informing the child of the status of the proceeding and the opportunity to participate and, if appropriate, facilitating the child's participation in the proceeding;

(6) reviewing and accepting or declining to accept any proposed stipulation for an order affecting the child and explaining to the court the basis for any opposition;

(7) taking action the attorney considers appropriate to expedite the proceeding and the resolution of contested issues; and

(8) when the attorney considers appropriate, encouraging settlement and the use of alternative forms of dispute resolution and participating in such processes to the extent permitted under the law of this state.

Alternative B

The common duties of the child's attorney and best interests attorney are set forth in [insert reference to court rule or administrative guideline].

End of Alternatives

Legislative Note: *In states where the duties of attorneys can be prescribed only by court rule or administrative guideline and not by legislative act, the duties listed in Section 11 should be adopted by the appropriate measure and identified in the bracketed portion of this section under Alternative B.*

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; conversely, the attorney 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. Both the child's attorney and the best interests attorney have the duty to advise and counsel the child and review proposed settlements on behalf of the child. Similarly, lawyers should be cognizant of children's sense of time and should

1 expedite the proceedings to achieve a prompt resolution whenever feasible.

2
3 The child's attorney and the best interests attorney should encourage settlement and the
4 use of mediation or other alternative dispute resolution mechanisms when the attorney
5 determines that such approaches are appropriate. In weighing such processes, the attorney should
6 consider the child's circumstances and wishes, the parties' positions, and any other factor bearing
7 on the benefits and risks of a non-adversarial method of dispute resolution in the particular
8 proceeding. On this issue as well as others, however, the child's attorney is bound by the child's
9 expressed objectives under the standard of Section 12.

10
11 In addition, courts must ensure that children and their attorneys receive notice and the
12 opportunity to participate in all judicial proceedings affecting the child's welfare. The attorney,
13 whether child's attorney or best interests attorney, should participate actively in all hearings and
14 conferences on issues within the scope of the appointment. Moreover, the child's attorney and
15 best interests attorney should, when appropriate, inform the child of hearings, settlement
16 conferences, and other proceedings and enable the child to attend. The emotional and
17 psychological value to a child of participating in a proceeding affecting his or her welfare may be
18 of profound significance. In the abuse or neglect context, a recent study concluded that
19 "[c]hildren, parents, and caregivers all benefit when they have the opportunity to actively
20 participate in court proceedings, as does the quality of decisions when judges can see and hear
21 from key parties." The Pew Commission on Children in Foster Care, *Fostering the Future:
22 Safety, Permanence and Well-Being for Children in Foster Care* 42 (2004), available at
23 www.pewfostercare.org. On the other hand, a child might receive little therapeutic benefit from
24 observing an acrimonious custody dispute. Thus, this section recognizes the potential value of
25 participation by the child and places a corresponding duty on both the child's attorney and best
26 interests attorney in that regard.

27
28 A child's legal counsel, whether a child's attorney or best interests attorney, may become
29 aware of needs of the child that go beyond the particular proceeding. In abuse or neglect
30 proceedings in particular, a child may be eligible for specialized educational, medical, or mental
31 health services under federal or state programs. To the extent that a lawyer learns of such needs,
32 the lawyer should request permission from the court to pursue issues on behalf of the child,
33 administratively or judicially, even if those issues do not specifically arise from the court
34 appointment. See Standard D-12, ABA Abuse and Neglect Standards. For a detailed
35 enumeration of the pretrial and trial responsibilities for children's counsel, attorneys should refer
36 to Standards III (F) and (G), ABA Custody Standards.

37 38 **SECTION 12. SEPARATE DUTIES OF CHILD'S ATTORNEY.**

39 (a) A child's attorney owes to the child the duties imposed by the law of this state in an
40 attorney-client relationship.

1 **Alternative A**

2 (b) A child's attorney shall explain the nature of the attorney-client relationship to the
3 child, including the requirements of confidentiality.

4 (c) Subject to subsections (d) and (e), once a child has formed an attorney-client
5 relationship with a child's attorney, the attorney shall advocate any objectives of representation
6 expressed by the child unless they are prohibited by law or without factual foundation.

7 (d) If a child's attorney determines that the child lacks the capacity or refuses to direct
8 the attorney with respect to a particular issue, the attorney shall:

9 (1) present to the court a position that the attorney determines will serve the
10 child's best interests if the position is not inconsistent with the child's expressed objectives;

11 (2) take no position as to the issue in question; or

12 (3) request appointment of a court-appointed advisor.

13 (e) If, despite appropriate legal counseling, the child expresses objectives of
14 representation that the child's attorney reasonably believes would place the child at risk of
15 substantial harm, the attorney shall request the appointment of a court-appointed advisor, if a
16 court-appointed advisor has not been appointed, or withdraw from representation and request the
17 appointment of a best interests attorney. The child's attorney shall not disclose the reasons for
18 requesting a court-appointed advisor or best interests attorney except as permitted by [insert
19 reference to this state's rules of professional conduct].

20 **Alternative B**

21 (b) The separate duties of a child's attorney are set forth in [insert reference to court rule
22 or administrative guideline containing the duties].

End of Alternatives

Legislative Note: *In states where the duties of attorneys can be prescribed only by court rule or administrative guideline and not by legislative act, the duties listed in Alternative A should be adopted by the appropriate measure and identified in the bracketed portion of this section under Alternative B.*

Comment

The child's attorney is in a traditional lawyer/client relationship with the child and, as such, is in a unique position to ensure that the child has a legal voice in the proceeding. The child's attorney 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. As a client-directed lawyer, the lawyer may not advocate a position contrary to the child's expressed position except as permitted by applicable ethical standards.

Consistent with Rule 1.14, ABA Model Rules of Professional Conduct (2002), the child's attorney should determine whether the child has sufficient maturity to understand and form an attorney-client relationship and whether the child is capable of making reasoned judgments and engaging in meaningful communication. A determination of incapacity may be incremental and issue-specific, thus enabling the child's attorney to continue to function as a client-directed lawyer as to major questions in the proceeding. When a child does lack capacity to formulate objectives of representation as to a particular matter, this section permits the child's attorney to advocate the best interests of the child as to that matter. In so doing, however, the child's attorney may not take a position that is contrary to an expressed objective of the child in the proceeding. For cases of such incremental lack of capacity, the child's attorney may also simply take no position on the matter in question. Finally, the child's attorney may request the appointment of a court-appointed advisor.

This section reflects the approach of the ABA Abuse and Neglect Standards and the ABA Custody Standards as to the dilemma that can arise when the child's expressed goals in the proceeding may place the child at risk of harm. These guidelines are also consistent with prevailing ethical standards. *See* Rules 1.14 and 1.6, ABA Model Rules of Professional Conduct (2002). A child's attorney may not refuse to advocate the child's wishes simply because the attorney disagrees with the child's view or believes the child's objectives will not further the child's best interests. On the other hand, the child's attorney is not bound by the child's expressed wishes if pursuing those wishes would put the child at risk of substantial physical, emotional, psychological or other harm and is not merely contrary to the lawyer's opinion of the child's interests. In most cases, the ethical conflict involved in asserting a position that would seriously endanger the child can be resolved through the lawyer's counseling function. If it

1 cannot be resolved, this section directs the child's attorney to either request the appointment of a
2 court-appointed advisor or to withdraw and request the appointment of a best interests attorney.
3

4 A child's attorney should not reveal the reason for requesting a court-appointed advisor or
5 withdrawing except as permitted by the state's ethics rules on confidentiality. Under Model Rule
6 1.14, lawyers are impliedly authorized to reveal information about a client with diminished
7 capacity when taking protective action on behalf of the client, but only to the extent reasonably
8 necessary to protect the client's interests. Ethical rules also typically permit attorneys to disclose
9 confidential information where necessary to prevent reasonably certain death or bodily harm. *See*
10 Model Rule 1.6(b). Thus, a child's attorney may reveal the reasons for requesting a court-
11 appointed advisor or best interests attorney only in rare situations where disclosure is necessary
12 to protect the child from harm.
13

14 Often a court-appointed advisor can satisfactorily assist the court in determining the
15 child's best interests through appropriate investigation and submission of reports. In unusual
16 cases, however, a court may need to appoint a court-appointed advisor as well as a lawyer to
17 represent the court-appointed advisor to ensure a full presentation of the evidence.
18

19 Even where the child's expressed objectives may place the child at risk of substantial
20 harm, the child has a right to have his or her views made known to the court. Under ordinary
21 ethical standards and court rules, however, a lawyer may not advocate positions that are not well
22 grounded in fact and warranted by existing law or a nonfrivolous argument for modification of
23 existing law. *See* Model Rule 3.1; Rule 11, Federal Rules of Civil Procedure. Thus, the child's
24 attorney may not advocate the child's wishes if the child's position is prohibited by law or lacks
25 any factual foundation. Where the child persists in wanting the attorney to advocate a position
26 unsupportable under the law, the attorney may seek to withdraw from the representation.
27

28 If a court grants permission to withdraw from representation in an abuse or neglect
29 proceeding, the court must ensure that the child continues to have legal representation in
30 compliance with Section 4. In general, the court has discretion to appoint either a best interests
31 attorney or child's attorney, and the court should decide on the nature of the appointment in light
32 of the child's wishes, the court's needs, the circumstances of the prior attorney's withdrawal, and
33 other factors in the case. A request from an older child for a child's attorney should be given
34 special consideration by the court, since the child's voice may be effectively silenced without
35 such an appointment. Nevertheless, if a child's attorney has withdrawn under the circumstances
36 described in the preceding paragraph, the court presumably would appoint a best interests
37 attorney.
38

39 In a custody proceeding, on the other hand, the appointment of a lawyer is always
40 discretionary. In the event of withdrawal of a child's attorney or best interests attorney in that
41 context, the court retains discretion to decide whether to appoint another representative for the
42 child and to decide on the role of that representative.
43

1 **SECTION 13. SEPARATE DUTIES OF BEST INTERESTS ATTORNEY.**

2 (a) A best interests attorney shall advocate for a resolution of the proceeding consistent
3 with the best interests of the child based on the facts relevant to the proceeding and according to
4 criteria established by law related to the purposes of the proceeding.

5 **Alternative A**

6 (b) A best interests attorney, in a manner appropriate to the child's developmental level,
7 shall:

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

9 (2) inform the child that, in providing assistance to the court, the attorney may
10 use information that the child gives to the attorney.

11 (c) If the child desires, the best interests attorney shall present any expressed objectives
12 of the child in the proceeding to the court by a method that is appropriate in light of the purpose
13 of the proceeding and the impact on the child.

14 (d) A best interests attorney is not bound by the child's expressed objectives but shall
15 consider the child's objectives, the reasons underlying those objectives, and the child's
16 developmental level, in determining what to advocate.

17 (e) A best interests attorney may not disclose or be compelled to disclose information
18 relating to the representation of the child except as permitted by [insert reference to this state's
19 rules of professional conduct], but the attorney may use such information, including
20 communications received from the child in confidence, for the purpose of performing the duties
21 of a best interests attorney without disclosing that the child was the source of the information.

22 **Alternative B**

(b) The separate duties of the best interests attorney are set forth in [insert reference to rule of court or administrative guideline].

End of Alternatives

Legislative Note: *In states where the duties of attorneys can be prescribed only by court rule or administrative guideline and not by legislative act, the duties listed in Alternative A should be adopted by the appropriate measure and identified in this section in the bracketed portion of Alternative B.*

Comment

The best interests attorney provides legal services for the purpose of protecting the child's best interests. Although the best interest attorney is not client-directed, the attorney is nevertheless providing legal representation to the child as a lawyer. 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 or 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, 9A U.L.A. 282 (1998).

The best interests attorney's legal representation should be informed by an understanding of the child's individual circumstances and needs, including the child's developmental level, unique family relationships, and cultural background. The best interests attorney not only has the duty to inform the court of the child's expressed wishes if the child so desires, but the attorney must also consider those wishes in determining what to advocate. In other words, the child's viewpoints are highly relevant to the lawyer's determination of the child's best interests. In some cases, the value to the child of having a lawyer champion his or her wishes is itself in the child's best interests. Often, the attorney's assessment of the child's interests will coincide with the child's wishes, but sometimes they will diverge. When they do diverge, the attorney should help the child understand the attorney's reasoning through counseling.

Confidentiality of attorney-client communications is fundamental to the traditional attorney-client relationship in order to encourage openness by the client and to enable the attorney to render effective representation. In general, the rule of confidentiality extends to unauthorized use as well as disclosure of client information. *See* ABA Model Rules of Professional Conduct (2002), Rule 1.6 (barring disclosure of information relating to representation); Rule 1.8(b) (barring use of information relating to representation to disadvantage of client). Nevertheless, ethical rules permit disclosure of client information to the extent necessary to protect a client's interests when a lawyer is taking protective action on behalf of a client with diminished capacity. For example, when a client of diminished capacity is at risk of

1 substantial harm, a lawyer is impliedly authorized “to reveal information about the client, but
2 only to the extent reasonably necessary to protect the client’s interests.” Model Rule 1.14(c).
3 Thus, under ordinary ethical guidelines, the best interests attorney, like the child’s attorney, may
4 reveal the child’s confidences if necessary to protect the child from harm. See Comment to
5 Section 12.
6

7 The best interests attorney, however, has greater latitude than the child’s attorney in one
8 key respect: to use information received from the child for purposes of the representation without
9 revealing the source of the information. This section recognizes that a limited inroad on the
10 principle of confidentiality may be necessary to enable the best interests attorney to carry out the
11 purposes of the representation. Under this section, information received from the child is
12 protected by ordinary rules of professional conduct except that *use* of such information, including
13 confidential communications, is permitted to enable the best interests attorney to perform his or
14 her role. Although some states have permitted the hybrid lawyer/guardian ad litem to reveal the
15 child’s confidential communications to the court where necessary to promote the child’s best
16 interests, *see Clark v. Alexander*, 953 P.2d 145 (Wyo. 1998), this section provides a more limited
17 exception to the principle of client confidentiality.
18

19 Under the use exception, a best interests attorney may use a child’s confidential
20 communications for the purpose of the representation without disclosing them. The distinction
21 between use and disclosure means, for example, that if a child tells the attorney that a parent
22 abuses alcohol, the attorney may use that information to determine from independent evidence
23 whether the parent is indeed engaged in alcohol abuse. If the child’s information is corroborated,
24 the attorney may present that separate evidence to the court but may not reveal that the initial
25 source of information was the child. The best interests attorney should explain to the child that
26 the child’s communications will remain confidential. At the same time, the attorney should make
27 clear that he or she will advocate for the child’s best interests based on the information available
28 to the attorney.
29

30 The prohibition on disclosure provides a cloak of confidentiality for the child’s
31 communications with the best interests attorney. It may also diminish the child’s feelings of
32 responsibility or guilt for the presentation of negative evidence about his or her parents or care-
33 givers. Although this section does modify the ethical obligations ordinarily inherent in the
34 attorney-client relationship, it is designed to accommodate competing concerns: the child’s need
35 to trust his or her lawyer and to speak freely in confidence, on the one hand, and the court’s need
36 for a full presentation of evidence in order to reach a disposition in the child’s best interests, on
37 the other.
38

39 **SECTION 14. DUTIES OF COURT-APPOINTED ADVISOR.** A court-appointed
40 advisor shall:

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

2 (A) meet with the child and, in a manner appropriate to the child's developmental
3 level, ascertain the child's needs, circumstances, and views;

4 (B) investigate the facts relevant to the proceeding to the extent the advisor
5 considers appropriate, including interviewing persons with significant knowledge of the child's
6 history and condition;

7 (C) obtain and review copies of relevant records relating to the child to the extent
8 the advisor considers appropriate; and

9 (D) consult with the child's attorney or the best interests attorney, if any,
10 regarding the issues in the proceeding;

11 (2) determine, in a manner appropriate to the child's developmental level, the child's
12 expressed objectives in the proceeding;

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

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

17 (5) maintain the confidentiality of information relating to the proceeding except as
18 necessary to perform the duties of court-appointed advisor or as may be specifically provided by
19 law of this state other than this [act];

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

22 (7) provide to the parties and to any attorney for the child copies of any report or other

document submitted to the court by the advisor;

(8) when the advisor considers appropriate, encourage settlement and the use of any alternative forms of dispute resolution and participate in such processes to the extent permitted under the law of this state; and

(9) perform any specific task directed by the court consistent with the role of court-appointed advisor.

Comment

This section describes the general function of the court-appointed advisor and makes clear that the court-appointed advisor should explain his or her role to the child in terms the child can understand. The court-appointed advisor has a duty to conduct an independent investigation in order to ascertain the facts of the case. In carrying out that duty, the court-appointed advisor must have access to the child and a reasonable opportunity to interview persons with relevant knowledge of the child, including the parties. In addition, the court-appointed advisor's investigation ordinarily should include a review of relevant records. To ensure that the court-appointed advisor 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 the unusual case where the child has both a court-appointed advisor and a lawyer, whether a child's attorney or a best interests attorney, the court-appointed advisor should make reasonable efforts to notify the lawyer before contacting the child. The lawyer, as the child's legal representative, has the right to be present during any interview.

A court-appointed advisor should encourage settlement and the use of mediation or other alternative dispute resolution mechanisms when the advisor determines that such approaches are in the child's best interests. In weighing such processes, the advisor should consider the child's circumstances and wishes, the parties' positions, and any other factor bearing on the benefits and risks of a non-adversarial method of dispute resolution in the particular proceeding.

In abuse or neglect and custody proceedings, the court-appointed advisor's obligations to the court may include the duty to make recommendations concerning the child's best interests. State law varies as to whether guardians ad litem should or must make recommendations to the court on the ultimate disposition of the case. Disagreement also exists within the mental health profession about whether mental health professionals are qualified to offer opinions on the ultimate question of the child's best interests. Some commentators argue that the determination of a child's best interests is the prerogative of the court and not within the expertise of the mental health profession. *See generally* Gary B. Melton, et al., *PSYCHOLOGICAL EVALUATIONS FOR THE COURTS: A HANDBOOK FOR MENTAL HEALTH PROFESSIONALS* (Guilford Press 2d ed. 1997). In

1 any event, the court-appointed advisor should be prepared to make such recommendations if
2 requested by the court, always ensuring that the recommendation or opinion is based on the
3 advisor's thorough and unbiased investigation of the case.
4

5 Court-appointed advisors, including CASA's, must observe all statutes and court rules
6 concerning confidentiality and should not disclose information about the appointed case to non-
7 parties other than the court and court-authorized personnel. Although attorney-client
8 confidentiality rules do not govern the court-appointed advisor's communications with the child,
9 the advisor should protect the child's privacy and should reveal the child's statements only when
10 necessary to fulfill the advisor's duties to the court. For guidelines governing the duty of
11 confidentiality for guardians ad litem, see 51 MINN. STAT. ANN, GUARDIAN AD LITEM, RULE
12 905(c) (2006); WEST'S MISSOURI COURT RULES, RULES OF CIRCUIT CT. OF ELEVENTH JUDICIAL
13 CIRCUIT, RULE 22.4 (2006).
14

15 Many states have developed more detailed standards governing the duties of court-
16 appointed advisors, generally under the rubric of "guardian ad litem," than those contained in this
17 Act. See, e.g., Judicial Council of Virginia, *Standards to Govern the Appointment of Guardians*
18 *Ad Litem*, at www.courts.state.va.us/1/cover.htm; There are also numerous sources governing
19 CASA programs and specifying the duties of CASA volunteers. See, e.g., Nat'l CASA
20 Association, *Standards for National CASA Association Member Programs* (2002), available at
21 www.nationalcasa.org; Office of Juvenile Justice and Delinquency Prevention, *Court Appointed*
22 *Special Advocates: A Voice for Abused and Neglected Children in Court* (1997).
23

24 **SECTION 15. ACCESS TO CHILD AND INFORMATION RELATING TO** 25 **CHILD.**

26 (a) Subject to subsections (b) and (c), when the court makes an appointment under this
27 [act], it shall issue an order, with notice to all parties, authorizing the individual appointed to
28 have access to:

- 29 (1) the child; and
30 (2) confidential information regarding the child, including the child's educational,
31 medical, and mental health records, any agency or court files involving allegations of abuse or
32 neglect of the child, any delinquency records involving the child, and other similar information.

33 (b) A child's record that is privileged or confidential under law other than this [act] may

1 be released to an individual appointed under this [act] only in accordance with that law, including
2 any requirements in that law for notice and opportunity to object to release of records.
3 Information that is privileged under the attorney-client relationship may not be disclosed except
4 as otherwise permitted by law of this state other than this [act].

5 (c) An order issued pursuant to subsection (a) must require that a child's representative
6 maintain the confidentiality of information released except as necessary for the resolution of the
7 issues in the proceeding, and the court may impose any other condition or limitation on an order
8 of access which is required by law, rules of professional conduct, the child's needs, or the
9 circumstances of the proceeding.

10 (d) The custodian of any record regarding the child shall provide access to the record to
11 an individual authorized access by order issued pursuant to subsection (a).

12 **Alternative A**

13 (e) Subject to subsection (b), an order issued pursuant to subsection (a) takes effect upon
14 issuance.

15 **Alternative B**

16 (e) An order issued pursuant to subsection (a)(1) takes effect upon issuance. Except as
17 otherwise provided in subsection (g), an order issued pursuant to subsection (a)(2) does not take
18 effect until [10] days after notice of the order has been sent to all parties. The notice must inform
19 the individual to whom it is sent that any objection to the release of records must be filed with
20 the court by a specified date.

21 (f) If no objection to an order issued pursuant to subsection (a)(2) is filed with the court
22 by the date specified in the notice, the order takes effect the day after the specified date. If an

1 objection is filed with the court, the court shall conduct a hearing on a priority basis. Any appeal
2 from the court's order granting or denying access must be processed in accordance with
3 [expedited appellate procedures in other civil cases].

4 (g) Subject to subsection (b), if the court finds that immediate access to a specific record
5 is necessary to protect the child from harm, the court shall specify the record in the order issued
6 pursuant to subsection (a)(2) and, as to that record, the order takes effect upon issuance.

7 **End of Alternatives**

8 **Comment**

9 Individuals appointed to represent children under this Act must have access to
10 information regarding the child in order to competently perform their assigned roles. A court
11 order is necessary because the child, as a minor, in general lacks the legal right to grant access to
12 his or her own records. Thus, unlike the lawyer for an adult client, the child's representative
13 needs the court's authorization to gain access to the client's confidential files. Relevant files
14 include those concerning child protective services, juvenile delinquency, medical treatment and
15 mental health care, developmental disabilities, and educational programs. Access should also be
16 provided to records of a probate or other court proceeding as well as records of any trust or
17 account for which the child is a beneficiary.

18
19 In general, the court's authority to grant the child's representative access to information
20 about the child, notwithstanding a potential parental objection, derives from the court's necessary
21 *parens patriae* role in abuse or neglect and custody proceedings. In these contexts, courts have
22 determined that parents have an inherent conflict of interest and do not have the right to bar
23 access to a child's confidential records or to block testimony by a child's doctor based solely on
24 parental authority. *See* In the Matter of Berg, 886 A.2d 980 (N.H. 2005)(visitation dispute);
25 Attorney Ad Litem for D.K. v. Parents of DK, 780 So.2d 301 (Fla. App. 2001)(custody dispute);
26 In re M.P.S., 342 S.W.2d 277 (Mo. App. 1961)(neglect proceeding).

27
28 Nevertheless, under subsections (b), a child's records that are privileged or otherwise
29 protected under other state or federal law may be released only if legal requirements are met. For
30 example, the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g (the "Buckley
31 Amendment"), and the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"),
32 codified at scattered sections of 29 U.S.C. and 42 U.S.C., impose independent requirements for
33 access that a child's representative must observe. *See* 34 C.F.R. § 99.31-39 (requirements for
34 access to educational records under Buckley Amendment); 45 C.F.R. § 164.502 (requirements
35 for access to health records under HIPAA). In some circumstances, the order of appointment

1 will need to contain qualifying language to enable the appointed representative to gain access to
2 the protected records. Similarly, if a parent, guardian or other party has the right to object to
3 release of records under other provisions of state or federal law, the order of access must provide
4 for notice and an opportunity to be heard consistent with that law. In some states, older children
5 themselves have standing to object to the disclosure of certain records, such as records of
6 psychiatric counseling, drug treatment, or treatment for sexually transmitted diseases. *See, e.g.,*
7 *In the Matter of Berg*, 886 A.2d 980 (N. H. 2005); *Attorney ad Litem for D.K. v. Parents of D.K.*,
8 780 So.2d 301 (Fla. App. 2001). In that circumstance, the custodian of the records may refuse to
9 release the records until the child consents or a court otherwise orders the release consistent with
10 state law. Finally, subsection (b) makes clear that information protected by the attorney-client
11 privilege is not subject to disclosure unless otherwise permitted by applicable law.
12

13 Any order of access must require that the child's representative maintain the
14 confidentiality of information relating to the child, and the court may impose other conditions on
15 access that are required by law, ethical rules, the child's needs, or the circumstances of the case.
16 *See* subsection (c). A lawyer may need to use subpoenas or other discovery tools to obtain
17 relevant records, for example. Moreover, if a child's parent is represented by counsel, a child's
18 attorney or best interests attorney would need to comply with applicable rules of professional
19 conduct governing contact with represented parties. Conversely, a child's attorney or best
20 interests attorney has the right to be present when the child is interviewed by others. To the
21 extent feasible, the order of appointment should explain the relevant limitations on access in
22 detail.
23

24 This section provide two alternatives for determining the effectiveness of orders of
25 access. Under Alternative A, the order is effective immediately, subject to the requirements of
26 subsection (b). For states selecting Alternative A, children's representatives will be entitled to
27 prompt access to the child's confidential records. Under Alternative B, in contrast, this section
28 creates an optional procedure for staying the effectiveness of an order of access to provide an
29 opportunity for parties to object to the release of records. The bracketed option creates a
30 procedure for expedited consideration of objections so as not to unduly delay the representative's
31 investigation. The time period for filing objections should be as short as is feasible while
32 remaining consistent with local practice, and a suggested time period is 10 days. Under
33 subsection (g), moreover, a court may specify that the order is to take effect upon issuance where
34 there is a showing that immediate access is necessary to protect the child from harm. In states
35 that already have streamlined procedures in place for the prompt release of records, the adoption
36 of the procedures in Alternative B would be unnecessary.
37

38 **SECTION 16. PARTICIPATION IN PROCEEDING.**

39 (a) A child's attorney, best interests attorney, or court-appointed advisor appointed under
40 this [act] is entitled to:

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

3 (2) receive notice of and attend each hearing in the proceeding [and participate in
4 any appeal that may be filed in the proceeding]; and

5 (3) participate in any case staffing or case management conference regarding the
6 child in an abuse or neglect proceeding.

7 (b) A child's attorney, best interests attorney, or court-appointed advisor appointed under
8 this [act] may not engage in ex parte contact with the court except as authorized by law other
9 than this [act].

10 (c) A court-appointed advisor may not take any action that may be taken only by a
11 licensed attorney, including making opening and closing statements, examining witnesses in
12 court, and engaging in discovery other than as a witness.

13 (d) The court, a child's attorney, or a best interests attorney may compel any court-
14 appointed advisor for a child to attend a trial or hearing relating to the child and to testify as
15 necessary for the proper disposition of the proceeding.

16 (e) The court shall ensure that any court-appointed advisor for a child has an opportunity
17 to testify or, if present at the hearing and available for cross-examination, submit a report setting
18 forth:

19 (1) the advisor's recommendations regarding the best interests of the child; and

20 (2) the reasons for the advisor's recommendations.

21 (f) A party may call any court-appointed advisor for the child as a witness for the purpose
22 of cross-examination regarding the advisor's report even if the advisor is not listed as a witness

1 by a party.

2 [(g) In a jury trial, disclosure to the jury of the contents of a court-appointed advisor's
3 report is subject to this state's rules of evidence.]

4 **Comment**

5 This section makes clear that a child's attorney, a best interests attorney, and a court-
6 appointed advisor are each entitled to receive notice of all hearings and to receive copies of all
7 documents filed in the case. The right to participate in case staffings will arise in abuse or neglect
8 proceedings where periodic conferences among court personnel and a child's representative are
9 mandated by state and federal law to assess the child's current placement and future status.
10 Unlike the child's attorney or the best interests attorney, the court-appointed advisor may also
11 testify or submit a report to the court regarding recommendations as to the child's best interests.
12 Indeed, under Section 14, the court-appointed advisor may have a duty to submit such
13 recommendations in certain cases. Under this section, however, the advisor's submission of a
14 report to the court is conditioned on the advisor's availability for cross-examination.

15
16 The right of a child's attorney, best interests attorney, or court-appointed advisor to
17 participate in any appeal or to bring an appeal on behalf of the child is determined by state law.
18 State law varies on the question of standing to file an appeal or participate on appeal, just as it
19 varies on whether children have formal party status in abuse or neglect and custody proceedings.
20 *See, e.g., Ihinger v. Ihinger*, 824 A.2d 601 (Vt. 2003)(children were not parties to parent's
21 divorce and custody dispute and therefore lacked standing to appeal). The bracketed provision
22 under subsection (a)(2) would be appropriate for states that permit the child through a
23 representative to participate fully on appeal. In such states, the appointed representative should
24 take actions that are consistent with the representative's role in deciding whether to file an appeal
25 on behalf of the child or to participate in an appeal brought by other parties. To the extent
26 feasible, courts should ensure continuity of representative on appeal.

27
28 Subsection (c) affirms the principle that court-appointed advisors are not to function as
29 attorneys, even if the person appointed by the court happens to be an attorney. As made clear in
30 Section 2, that limitation has been incorporated in the definition of court-appointed advisor and is
31 integral to this Act's goal of eliminating the hybrid attorney/guardian ad litem model. On the
32 other hand, under the law of a few states, children's appointed representatives themselves have
33 party status. *See, e.g., 29 DEL. CODE ANN. § 9007A(b)(3)* (attorney guardian ad litem shall be
34 party to child welfare proceeding and shall possess all procedural and substantive rights of a
35 party). If the court-appointed advisor has party status, then that person could engage in
36 courtroom activities as any other unrepresented party, consistent with the law of the particular
37 state. This section is not intended to change such practices. Moreover, this section imposes no
38 limitation on the activities of any attorney appointed or retained to represent a court-appointed
39 advisor.

Under this section, the court-appointed advisor is subject to cross-examination regarding the advisor's recommendations to the court. Although the court-appointed advisor is appointed to assist the court in determining the child's best interests, ex parte communications with the court are not permitted. In some states, a guardian ad litem is viewed as an arm of the court and may submit a report to the court in a method not governed by the ordinary rules of evidence. Under subsection (e), the court-appointed advisor may give a report to the court but only if the advisor is present and available for cross examination. The due process rights of the parties require that they receive notice of a court-appointed advisor's recommendations and opportunity to be heard and to engage in cross examination. *See, e.g., In re Marriage of Bates*, 819 N.E.2d 714 (Ill. 2004) (failure to provide copy of guardian ad litem report to mother in custody proceeding was violation of due process); *Leinenbach v. Leinenbach*, 634 So.2d 252 (Fla. App. 1994) (trial court erred in relying on report of guardian ad litem where father was not afforded opportunity to rebut contents of report). Likewise, neither the child's attorney nor the best interests attorney may engage in ex parte communication with the court except as otherwise authorized by law. Although this prohibition is rooted in the rules of professional conduct governing all lawyers, experience has shown that lawyers for children sometimes bend the rules in their desire to protect the interests of their clients. Thus, the principle is restated in the Act.

SECTION 17. ATTORNEY WORK PRODUCT AND TESTIMONY.

[(a)] Except as authorized by [insert reference to this state's rules of professional conduct] or court rule, a child's attorney or best interests attorney may not:

- (1) be compelled to produce the attorney's work product developed during the appointment;
- (2) be required to disclose the source of information obtained as a result of the appointment;
- (3) introduce into evidence a report prepared by the attorney; or
- (4) testify in court.

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

Legislative Note: *Those states that impose a duty on attorneys to report child abuse or neglect should enact subsection (b) to ensure that the reporting duty is not affected by this section's*

1 *protection of attorney work product.*

2
3 **Comment**

4 There is widespread disagreement about the proper function of children's lawyers in
5 abuse or neglect and custody proceedings, particularly as a result of the attorney/guardian ad
6 litem model. *See generally* Ann M. Haralambie, *The Child's Attorney* 1-23 (ABA 1993). In
7 several states, the attorney/guardian ad litem may testify and be cross-examined. *See, e.g.,*
8 *Jacobsen v. Thomas*, 100 P.3d 106 (Mt. 2004). This section clarifies that the child's attorney and
9 the best interests attorney are to stay within their professional role as lawyers. Thus, the work
10 product of both the child's attorney and the best interests attorney is presumptively shielded from
11 disclosure. Likewise, neither category of attorney ordinarily should testify as a witness in a
12 proceeding in which the attorney is representing a child.

13
14 States are split on whether the duty to report child abuse or neglect should apply to
15 attorneys. While most states do not impose the duty to report on attorneys, a substantial minority
16 of states do include attorneys under their reporting statutes. *See Maryann Zavez, The Ethical and*
17 *Moral Considerations Presented by Lawyer/Social Worker Interdisciplinary Collaborations*, 5
18 WHITTIER J. CHILD & FAM. ADVOC. 191 (2005). For states that do impose such a duty on
19 attorneys, subsection (b) makes clear that the duty to report applies, notwithstanding the other
20 provisions of this section.

21
22 **SECTION 18. CHILD'S RIGHT OF ACTION.**

23 (a) Only the child has a right of action for money damages against a child's attorney, best
24 interest attorney, or court-appointed advisor for inaction or action taken, including any
25 recommendation or opinion given, in the capacity of child's attorney, best interests attorney, or
26 court-appointed advisor.

27 (b) Subject to subsection (a), a [best interests attorney or] court-appointed advisor
28 appointed pursuant to this [act] is not liable for money damages because of inaction or action
29 taken, including any recommendation or opinion given, in the capacity of [best interests attorney
30 or] court-appointed advisor unless the inaction or action taken constituted willful misconduct or
31 gross negligence.

Comment

Under this section, only the child has standing to sue for malpractice or other breach of professional responsibility. As courts have recognized, the representative owes a duty of professional competence to the child, not to other parties in the litigation. *See In the Interest of Z.J.*, 153 S.W.3d 535 (Tex. App. 2004)(mother lacked standing to challenge performance of child's appointed attorney ad litem in parental rights termination proceeding). Children may sue through a next friend or other guardian ad litem, but this section would not permit a parent or care-giver to assert her own challenge to the performance of a child's representative.

This section provides qualified immunity for court-appointed advisors. The provision of qualified immunity is based on the recognition that court-appointed advisors need protection from civil actions for damages when performing functions consistent with their appointed role. Immunity is necessary to ensure that they can fully investigate and formulate opinions and recommendations without fear of retaliation. The threat of litigation from a child client, often fueled by an unhappy parent in the wings, might interfere with the representative's exercise of judgment and might deter qualified individuals from accepting appointment in the first place. Since courts will often view the court appointed advisor as a source of unbiased and independent assessments of a child's circumstances, the law should protect such persons from the threat of vindictive lawsuits.

States vary in the immunity standards provided for persons functioning as court-appointed advisors, most often referred to as "guardians ad litem." In some states children's representatives functioning as court-appointed advisors have absolute quasi-judicial immunity, *see, e.g., Paige K.B. by Peterson v. Molepske*, 580 N.W. 2d 289 (Wis. 1998)(recognizing absolute immunity for guardian ad litem in custody dispute for actions within scope of authority); *Billups v. Scott*, 571 N.W. 2d 603 (Neb. 1997)(recognizing absolute immunity for guardian ad litem in dependency proceeding for actions within scope of authority). In other states, guardians ad litem enjoy a qualified immunity and can be held liable for acts that exceed ordinary negligence. The terminology varies, ranging from gross negligence to intentional misconduct and bad faith. The qualified immunity provided in this section gives the best interests attorney and court-appointed advisor adequate protection from suit while still holding them accountable for egregious misconduct. *See ORE. REV. STAT. § 419A.170* (providing qualified immunity to court appointed special advocate for acts in good faith within scope of duties).

On the other hand, the Act does not provide immunity for persons appointed as a child's attorney or a best interests attorney. Although a few states have extended qualified immunity to children's attorneys, *e.g., VERNON'S TEXAS CODE ANN. FAMILY CODE § 107.009* (2004), the premise of this section is that such lawyers are in a traditional lawyer/client role and should be held to ordinary standards of care. Rather than independently formulating the child's best interests, the child's attorney for the most part is a client-directed lawyer in a traditional mode of client representation. It should be noted, however, that some courts have taken a functional approach to the question of immunity and have extended immunity to children's lawyers where

1 the conduct at issue occurred when the lawyer was functioning as a best interests representative.
2 *See Carrubba v. Moskowitz*, 877 A.2d 773 (Conn. 2005)(recognizing absolute immunity for
3 child’s attorney whose primary duty was to protect child’s best interests); *Marquez v.*
4 *Presbyterian Hospital*, 608 N.Y.S.2d 1012 (Sup. Ct. 1994)(holding that law guardian is entitled
5 to qualified immunity when functioning primarily as child’s guardian ad litem but would be
6 liable for ordinary negligence when functioning as child’s attorney).

7
8 The best interests attorney in some ways combines the functions of a child’s attorney and
9 of a court-appointed advisor. While the best interests attorney may advocate a position that is
10 contrary to the child’s expressed objective, the attorney must perform many aspects of traditional
11 legal representation for the child. These include communicating the child’s wishes to the court
12 and representing the child’s legal rights in the litigation. In light of the attorney-client
13 relationship that does exist between the best interests attorney and the child, this section holds
14 that attorney to ordinary professional standards of care. Thus, the two categories of lawyers that
15 can be appointed for a child are treated similarly for purposes of immunity. Nevertheless, there
16 are arguments for extending immunity to best interests attorneys since that category of lawyer is
17 charged with advocating positions that the attorney has independently determined are in the
18 child’s best interests. Without such immunity, attorneys may be unwilling to accept
19 appointments, particularly in the context of acrimonious divorces. By bracketing “best interests
20 attorney” in subsection (b), this permits states to choose to provide qualified immunity to that
21 category of representative in addition to the court-appointed advisor.
22

23 **SECTION 19. FEES AND EXPENSES IN ABUSE OR NEGLECT PROCEEDING.**

24 (a) In an abuse or neglect proceeding, an individual appointed pursuant to this [act], other
25 than a volunteer, is entitled to reasonable and timely fees and expenses in an amount set by the
26 court to be paid from [authorized public funds].

27 (b) If the court, after hearing, determines that a party whose conduct gave rise to a
28 finding of abuse or neglect is able to defray all or part of the fees and expenses set pursuant to
29 subsection (a), the court shall enter a judgment in favor of [the state, state agency, or political
30 subdivision] against the party in an amount the court determines is reasonable.

31 (c) To receive payment under this section, the payee must complete and submit to the
32 court a written claim for payment, whether interim or final, justifying the fees and expenses

1 charged.

2 (d) The court may award fees and expenses under this [act] against the state, a state
3 agency, or a political subdivision of the state only as provided in this section.

4 **Comment**

5 This section requires that attorneys and court-appointed advisors receive adequate and
6 timely compensation in abuse or neglect proceedings throughout the terms of appointment,
7 unless the appointee is a volunteer advocate. States should ensure that adequate funds are
8 appropriated and made available to compensate children's representatives. Because courts have
9 individualized procedures for paying fees and costs for representation of indigent children, often
10 determined on a county-by-county basis, this section is framed in general terms to provide
11 flexibility. In many jurisdictions, fee schedules have been developed to standardize the
12 compensation for children's representatives.

13
14 The structure of the section envisions that children's representatives will be compensated
15 as a matter of course from public funds. At the same time, the section permits courts to require
16 parties with financial ability to reimburse the state for fees and expenses where appropriate, i.e.
17 where the party's conduct was the basis for a finding of abuse or neglect. A judgment for
18 payment of fees and expenses under this section would be enforceable according to each state's
19 procedures for enforcement of civil judgments.

20
21 Under the mandate of federal law, states are obligated to appoint guardians ad litem for
22 children in abuse and neglect proceedings. *See* Child Abuse Prevention and Treatment Act, 42
23 U.S.C. § 5106a(b)(2)(A)(xiii) (2000). As a matter of state law, this Act supplements the federal
24 requirement by requiring that indigent children receive publicly-funded legal representation,
25 whether in the form of a child's attorney or best interests attorney. *See* Section 4. As a practical
26 matter, a majority of states already appoint attorneys as children's representatives in abuse and
27 neglect cases. When a court-appointed advisor is also required under Section 5, that appointment
28 will likewise be at public expense for indigent children. A child's attorney, best interests
29 attorney, or court-appointed advisor should also have access, where necessary, to reimbursement
30 for experts, investigative services, and other activities undertaken to fulfill the obligations of the
31 appointment.

32 33 **SECTION 20. FEES AND EXPENSES IN CUSTODY PROCEEDING.**

34 (a) In a custody proceeding, an individual appointed pursuant to this [act], other than a
35 volunteer, is entitled to reasonable and timely fees and expenses in an amount set by the court by

reference to the reasonable and customary fees and expenses for similar services in the jurisdiction.

(b) The court may:

(1) allocate fees and expenses among the parties;

(2) order a deposit to be made into an account designated by the court for the use and benefit of the individual appointed under this [act]; and

(3) before the final hearing, order an amount in addition to the amount ordered deposited under paragraph (2) to be paid into the account.

(c) To receive payment under this section, the payee must complete and submit to the court a written claim for payment, whether interim or final, justifying the fees and expenses charged.

(d) [Except as otherwise authorized by [insert reference to state law authorizing payment of fees or expenses], a] [A] court may not award fees or expenses under this section against the state, a state agency, or a political subdivision of the state.

Comment

In custody proceedings, courts should make clear to all parties how fees will be determined and how and by whom the fees are to be paid. Lawyers and court-appointed advisors, unless functioning as volunteer advocates, should be paid in accordance with prevailing legal standards of reasonableness. This section recognizes that most states do not have public funds available to compensate children's representatives in custody disputes other than abuse or neglect proceedings. The ordinary approach will be for the court to assess fees against the parties, taking into account significant disparities in ability to pay and awarding fees in proportion to ability to pay. Payment from the parties may be made into an account administered by the court for such purposes or into an attorney's trust account designated by the court. This section recognizes, however, that in some cases public funds will be available under other provisions of state law for fees and expenses in private custody disputes. In any event, fee requests must be in writing and in sufficient detail to enable courts to make a determination that the request is reasonable. Courts may also require periodic reporting from appointed representatives regarding their services and

1 fees.

2
3 The award of fees and expenses in appropriate cases may include reasonable costs for
4 expert witnesses, investigative services, research, and other activities where the attorney or court-
5 appointed advisor demonstrates to the court that such expenses are necessary to accomplish the
6 objective of the proceeding.
7

8 **SECTION 21. UNIFORMITY OF APPLICATION AND CONSTRUCTION.** In
9 applying and construing this uniform act, consideration must be given to the need to promote
10 uniformity of the law with respect to its subject matter among states that enact it.

11 **SECTION 22. REPEALS.** The following acts and parts of acts are repealed:

12 (1)

13 (2)

14 (3)]

15 **SECTION 23. EFFECTIVE DATE.** This [act] takes effect on _____.