

To: Drafting Committee for Uniform Role of Attorneys Representing Children in Custody Disputes Act
From: Barbara Atwood, Reporter
Date: September 10, 2004
Re: Explanation of revised draft, and some lingering questions

The draft statute that you are receiving looks very different from the one we discussed in Chicago last April. I have tried to implement the consensus of the Committee in the changes, but the current draft also reflects some significant reorganization and stylistic improvements, primarily through the contributions of our chair, Rhoda Billings. The last few paragraphs of the expanded Prefatory Note gives an overview of the Act and its new organizational structure, so you should probably glance at that before tackling the Act itself. In this memo I will identify some concerns that we may want to address at the upcoming meeting on October 22-24. I am also sending to you by separate attachment a summary of research that has been done for me by some very able law students. These are charts containing references to various state laws on the topics we're considering. The chart labeled Child Representation Survey is particularly useful since it shows which states require appointments of attorneys for children and which use the attorney/GAL model. I hope that these charts can help the Committee put its recommendations in the context of the national picture.

1. Mandatory appointment of counsel in abuse and neglect proceedings ,and elimination of dual role attorney/guardian ad litem

At our April meeting, the Committee was unable to reach clear agreement on whether to require the appointment of counsel in all abuse and neglect cases, and that is the reason for the "[shall][may]" language under Section 201, even though the comments to that section and the Prefatory Note take the position that appointment of counsel will be mandatory. This is an issue that the Committee needs to resolve, and it implicates questions of the Act's ultimate "enactability."

A survey of state statutes conducted by my research assistants indicates that almost half the states now require the appointment of an attorney for children in abuse and neglect proceedings. In many of those states, however, the attorney functions both as a lawyer and a guardian ad litem. The expense of having two representatives for a child where the same functions are performed by one person in states that authorize the dual role is a factor that may make those states reluctant to adopt the Act. Moreover, there often will be a need to appoint a lawyer for the GAL, especially if that role is filled by a CASA. This means yet another paid representative. (The Act does not address the question of appointing a lawyer to represent a guardian ad litem, but perhaps it should, at least in comments.) In short, we need to consider the fiscal implications of any recommendations that might double the number of attorneys needed to comply with the standards. Indeed, the NCCUSL Committee on Scope and Program has urged the drafting committee to "avoid the creation of new mandatory appointment standards or even the appearance thereof." Minutes of Dc. 19, 2003 meeting.

2. Best interests attorney and client confidentiality

The limited exception to ordinary rules of client confidentiality for the best interests attorney may make the Act unappealing to the judiciary. The ability of a best interests attorney to use but not disclose client confidences will mean that in some cases the court won't learn of certain information relevant to the child's welfare. Does the current draft reflect the consensus of the Committee on this question? See section 403.

3. Standards for deciding between child's attorney and best interests attorney

Do we need a section that sets out a list of factors to guide a judge in choosing between a child's attorney, best interests attorney, and guardian ad litem? I've included an informal list of factors in the comment to section 203. This was a suggestion recently made as to the Texas statute that served as a basis for our Act, in a very insightful student law review article. The article is Mary Hazlewood, *The New Texas Ad Litem Statute: Is It Really Protecting the Best Interests of Minor Children?*, 35 St. Mary's L.J. 1035 (2004). I'll bring a copy with me to the meeting in October.

4. Scope of act

Although entitled "Role of Attorneys Representing Children in Custody Disputes," the Act addresses the non-attorney guardian ad litem fairly extensively. Is this a problem? It seems that either the title should be broadened, or we should tailor the Act to fit the title. Perhaps the major contribution of a uniform act in this area would be to focus more narrowly on the powers, responsibilities, and qualifications of attorneys representing children (including the judicial appointment process) and leave the regulation of guardians ad litem and CASA's to other statutes. Moreover, the January 10, 2004, Resolution of the NCCUSL Executive Committee recommending the creation of a drafting committee for this project explicitly identified the focus as "the role of attorneys representing children in custody disputes." On the other hand, it's almost impossible to create a structure for the representation of children without dealing with both lawyers and guardians ad litem. Ponder this, please.

5. Role of CASA

As written, the Act permits a GAL to review and accept or decline to accept a stipulation for a proposed order affecting the child. Section 406. States often define GAL responsibilities as advising the court rather than formally representing the child, and at least in some jurisdictions, a CASA would not possess the power to accept or decline a proposed stipulation for a child. We need to think about whether the language in the draft would create a problem. Also, we don't address confidentiality for guardians ad litem, but I've noticed that CASA guidelines in many states include directives that the CASA maintain confidentiality as to all matters concerning the represented child. Should we add something along that line, or will that be part of the state's own CASA and guardian training?

6. Expert witness expenses

In the fees and expenses section, Article 5, the question of expert witness expenses is not mentioned. Presenting expert witness testimony, especially testimony from mental health professionals, is often a necessary expenditure in child custody proceedings. Should the Act say explicitly that such expenses are permitted where necessary to the representation? I've included a sentence in the comment to section 501 to that effect.