

DRAFT

FOR DISCUSSION ONLY

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

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

For Drafting Committee Meeting February 3-5, 2006

WITH PREFATORY NOTE AND COMMENTS

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By

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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UNIFORM REPRESENTATION OF CHILDREN IN ABUSE AND 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 welfare, such as abuse and neglect or custody proceedings, remains a subject of intense debate. Disagreements focus on such fundamental questions as whether appointment of counsel should be mandatory, how a lawyer should determine a child's capacity to direct the legal representation, what a lawyer should do for a child who lacks that capacity, and whether a lawyer may both represent a child as the child's lawyer and participate as guardian ad litem for the child.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), with its protection of the child's right of participation under Article 12, has fueled interest in the role of children's representatives in many of the nations that have ratified the Convention.

²The American Bar Association authorized the National Association of Counsel for Children (NACC) to award legal specialty certification in child welfare law in 2004.

³For a thoughtful exploration of these issues, see JEAN KOH PETERS, REPRESENTING CHILDREN IN CHILD PROTECTIVE PROCEEDINGS: ETHICAL AND PRACTICAL DIMENSIONS (2d ed. 2001). In Professor Peters's view, 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*, 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

Several competing proposals have emerged that address the important topic of representation of children in abuse and neglect or custody proceedings. In 1995, the American Academy of Matrimonial Lawyers adopted a set of standards 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 the same year, the Family Law Section of the American Bar Association proposed a contrasting set of Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases (“Abuse and Neglect Standards”),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. 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 emphasizes that the child’s lawyer does not owe “robotic allegiance” to each of the child’s directives.⁶

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

(1996)(advocating mandatory appointment of independent counsel for children in high conflict divorces); Martin Guggenheim, *A Paradigm for Determining the Role of Counsel for Children*, 64 FORDHAM L. REV. 1399 (1996)(advocating that a child’s lawyer 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 direct counsel, 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). 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) (Abuse and Neglect Standards).

⁶Marvin Ventrell, *Legal Representation of Children in Dependency Court: Toward a Better Model—The ABA (NACC Revised) Standards of Practice*, NACC Children’s Law Manual Series (1999). 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).

various refinements.⁷ The American Law Institute added its views with the publication of the Principles of the Law of Family Dissolution.⁸ 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.⁹ 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).¹⁰

State laws vary dramatically on the appointment of representatives for children, with some models emphasizing the unique vulnerability of children and children's need for adult protection and guardianship to determine their interests, while other models affirm a child's right to have his or her wishes presented by a zealous advocate.¹¹ 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.¹² In response to CAPTA, almost all states now require some form of child

⁷*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).

⁸American Law Institute, *Principles of the Law of Family Dissolution: Analysis and Recommendations* (2002).

⁹*Id.* at § 2.13.

¹⁰American Bar Association, *Standards of Practice for Lawyers Representing Children in Custody Cases*, 37 FAM. L. Q. 129 (2003).

¹¹See 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).

¹²See 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.”

representation in abuse and neglect proceedings, but the role of the representative ranges from lay guardian to legal counsel.¹³ 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.¹⁴

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

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 a 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, and the description of powers, responsibilities, and immunity in Sections 11-18. Fees and expenses are addressed in Sections 19 and 20.

An important premise underlying the Act is that an attorney should be appointed for every

¹³See Howard A. Davidson, *Child Protection Policy and Practice at Century's End*, 33 Fam. L. Q. 765, 768-69 (1999).

¹⁴Section 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 roles is to represent the child's interests.”

child who is the subject of an abuse or neglect proceeding.¹⁵ In abuse and neglect cases, as defined in the Act, court orders 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. 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/guardian ad litem, and about three-fourths of the states regularly appoint attorneys for children as a matter of practice whether or not required by state law.¹⁶ Moreover, at least one federal district court has held that appointment of counsel for every child in the state foster care system is required as a matter of procedural due process.¹⁷ Although the mandate of this Act may impose additional financial costs on those 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 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

¹⁵Federal 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).

¹⁶*See* Survey of State Laws on Representation of Children in Abuse and Neglect Cases, Appendix A.

¹⁷*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 federal Constitution in its analysis.

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, A.B.A. 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

The child's attorney is in a traditional attorney-client relationship with the child and is 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 reasoned judgment and meaningful communication 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, the child's 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 ensure that evidence of potential harm to the child will be brought to the attention of the court.

The best interests attorney, on the other hand, has the substantive responsibility of assisting the court in determining 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 subjective bias. Unlike the child's attorney, the best interests attorney is not bound by the client's expressed objectives but should consider those objectives in determining what to advocate. Moreover, the best interests attorney may use (but not disclose) the child's confidences where necessary to protect the child's interests in the proceeding. At the same time, the best interests attorney is a 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.

Finally, according to the Act, the court-appointed advisor is a representative of the child whose role is to assist the court in determining the child's best interests. The court-appointed

inherent in the attorney/client relationship, including in particular the confidentiality of client communications. For a court's recognition of the tensions inherent in the hybrid attorney/guardian ad litem, see *Clark v. Alexander*, 953 P.2d 145 (Wyo. 1998).

¹⁹Model Rule 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).

²⁰See Sections 12 and 13 and Commentary.

advisor's responsibilities include investigation of the case and, where appropriate, making a recommendation to the court. See Section 14. As such, 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

Because of the fundamental importance of the interests at stake in child welfare cases, Section 4 requires the appointment of either a child's attorney or a best interests attorney for children in abuse and neglect proceedings. Under CAPTA, on the other hand, 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.²² Although the CAPTA provision for guardian ad litem may be broad enough to encompass either a best interests attorney or a child's attorney, this Act provides two alternative approaches. See Section 5 and Comment. Under the first alternative in Section 5, states may require the appointment of a court-appointed advisor only if the attorney appointed for a child in an abuse or neglect proceeding is not 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 in an abuse and neglect proceeding.

In custody proceedings, the Act leaves to judicial discretion the question of appointing a child's representative. Although there are significant benefits to appointing a representative for a child under certain circumstances, courts should consider the child's interests, the court's needs, and the parties' resources before making an appointment. Section 6 provides a list of factors to assist the court in deciding whether to appoint a representative at all and, if a representative is to be appointed, which category of representative is appropriate.

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.

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. CASAs generally 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.

²²See 42 U.S.C. § 5106a(b)(2)(A)(xiii), quoted *supra* at note 9.

1 **UNIFORM REPRESENTATION OF CHILDREN IN ABUSE AND 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 and Neglect and Custody Proceedings Act.

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

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

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

13 (3) “Child’s attorney” means an attorney appointed by the court to provide legal
14 representation for a child.

15 (4) “Court-appointed advisor” means an individual appointed to assist the court
16 in determining the best interests of a child.

17 (5) “Custody proceeding” means a court proceeding in which legal or physical
18 custody of, access to, or visitation or parenting time with a child is at issue, including a
19 proceeding relating to divorce, separation, determination of parentage, adoption, private
20 guardianship, or protection from domestic violence. The term does not include a proceeding
21 initiated against a child because of the conduct of the child.

22 (6) “Developmental level” means the ability to understand and communicate,

1 taking into account such factors as age, mental capacity, level of education, cultural background,
2 and degree of language acquisition.

3 **Comment**

4 The definitions in the Act reflect the range of court-appointed representatives for children
5 that are encompassed by the ABA Custody Standards: child's attorney, best interests attorney,
6 and guardian ad litem, except that the Act uses the new term "court-appointed advisor" in order
7 to avoid the widespread disagreement and confusion about the meaning of "guardian ad litem."
8 Under the Act, a "child's attorney" is a client-directed lawyer in a traditional attorney-client
9 relationship with the child, while a "best interests attorney" provides legal services to a child but
10 is not bound by the child's directives.

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

20
21 "Best interests attorney" is a term of art that was introduced by the ABA in developing
22 the Custody Standards and signifies a representative who advocates the child's interests rather
23 than the child's expressed goals. In many respects, however, the best interests attorney performs
24 the same duties of representation that are performed by the child's attorney. *See* Section 11.

25
26 The Act applies to all court-appointed attorneys and court-appointed advisors for children
27 in abuse and neglect and custody proceedings. In states where privately-retained counsel may
28 represent children without a formal appointment, this Act's applicability to those lawyers should
29 be determined under local law. In any event, a lawyer who is initially privately retained may
30 thereafter seek an appointment. Once such a formal appointment occurs, the Act clearly applies.
31 It should be noted that a representative may be court-appointed without receiving compensation
32 from the court or other government sources.

33
34 Under the definitions of this Act, abuse and neglect proceedings include child protection
35 proceedings ordinarily brought in juvenile court, such as dependency actions and foster care
36 placements, as well as actions to terminate parental rights. A custody proceeding, in contrast,
37 includes private custody disputes, adoptions, private guardianships, and other proceedings in
38 which the child's legal or physical custody is at issue. This Act does not apply to proceedings
39 initiated by the state because of the child's conduct, such as proceedings brought to adjudicate
40 the child as delinquent or proceedings charging the child with status offenses.

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 and
3 neglect proceeding (generally entailing a transfer to juvenile court), then this Act's terms
4 regarding abuse and 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 transform the proceeding into an abuse and
7 neglect proceeding unless a dependency petition is filed.
8

9 **SECTION 3. RELATIONSHIP TO OTHER LAW.** This [act] does not affect
10 children's rights under law other than this [act] or create party status or standing not provided
11 under law other than this [act].

12 **Comment**

13 This Act is not intended to affect children's rights recognized under other state or federal
14 laws. State law may impose specialized rules for particular proceedings, such as guardianships
15 or adoptions. In many states, for example, a child of a certain age has a statutory right to veto a
16 proposed adoption. *See, e.g.,* Ariz. Rev. Stat. § 8-106 (2004) (consent of child twelve years of
17 age or older required for adoption); West's Ann. Cal. Fam. Code § 8602 (2004) (same). Several
18 states provide a right to counsel for children in contested adoption proceedings. *See, e.g.,* Okla.
19 Stat. Ann. § 7505-1.2 (2004). Where such specialized rules are in effect, they control the more
20 general provisions of this Act.
21

22 Similarly, this Act does not affect state laws that afford children standing or the right to
23 broader participation in abuse and neglect or custody cases than provided under the Act. The Act
24 establishes guidelines for the appointment of representatives for children, without regard to a
25 state's position on whether the child should be recognized as a separate party to the proceeding.
26 State laws regarding the standing of third parties to initiate abuse and neglect or custody actions
27 also are not affected by this Act. Conversely, the Act does not provide standing where it does not
28 otherwise exist under state law.
29

30 State law varies on children's procedural status in abuse and neglect and custody
31 proceedings. In several states, children are viewed as parties to abuse and neglect proceedings
32 and have the right to participate through their representatives in all stages of the proceedings.
33 *See, e.g.,* Minn. Stat. Ann § 260C.163(2) (child who is subject to petition for protection has right
34 to participate in all proceedings); *In re Williams*, 805 N.E.2d 1110 (Ohio 2004)(child is party to
35 parental rights termination action and has right to legal counsel). In other states, children are
36 non-parties whose rights of participation are more limited. *In re R.S.*, 647 N.Y. Supp. 2d 361
37 (NY Fam. Ct. 1996)(child is not party to child protective proceeding and therefore cannot be
38 deposed as party); *In re Anthony*, 675 N.Y. Supp. 2d 759 (NY Fam. Ct. 1998)(child is not party

1 to termination of parental rights proceeding and therefore cannot seek relief from judgment). In
2 child custody disputes, children typically are not viewed as parties and are not permitted to
3 become parties through intervention. *See, e.g., Auclair v. Auclair*, 730 A.2d 1260 (Md. App.
4 1999); *J.A.R. v. Superior Court*, 877 P.2d 1323 (Ariz. App. 1994); *In re Marriage of Hartley*,
5 886 P.2d 665 (Col. 1994). On the other hand, in at least one state, a child who is the subject of a
6 custody dispute is viewed as an indispensable party to the proceeding. *See, e.g., In re J.W.F. v.*
7 *Schoolcraft*, 763 P.2d 1217 (Utah App. 1988). At the same time, even where children are not
8 viewed as parties they often have many of the rights of parties as a practical matter.
9

10 In addition, this Act may supplement rights already provided by federal law. As a
11 condition of receiving federal child welfare funding, for example, states must appoint a “guardian
12 ad litem” in every judicial proceeding involving an abused or neglected child. *See Child Abuse*
13 *Prevention and Treatment Act*, 42 U.S.C. § 5106a(b)(2)(A)(xiii) (2000). The federal Act does
14 not define the role of the guardian ad litem beyond stating that the guardian, who may be an
15 attorney or court appointed special advocate, shall “(I) obtain first-hand, a clear understanding of
16 the situation and needs of the child; and (II) make recommendations to the court concerning the
17 best interests of the child.” *Id.* This Act goes further by requiring the appointment of either a
18 child’s attorney or a best interests attorney for every child involved in an abuse and neglect
19 proceeding. Similarly, the Indian Child Welfare Act authorizes courts to appoint counsel for
20 Indian children in proceedings governed by the ICWA when such appointment is in the best
21 interests of the child. *See 25 U.S.C. § 1912(b)* (2000). While the ICWA gives courts discretion
22 to appoint counsel in Indian child welfare proceedings, this Act requires appointment of a child’s
23 attorney or best interests attorney if an Indian child is the subject of an abuse and neglect
24 proceeding in state court.
25

26 **SECTION 4. MANDATORY APPOINTMENT OF CHILD’S ATTORNEY OR** 27 **BEST INTERESTS ATTORNEY IN ABUSE AND NEGLECT PROCEEDING.**

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

32 (b) The court shall appoint a [child’s attorney] [best interests attorney] unless the
33 child’s circumstances and the court’s need for information and assistance in the particular
34 proceeding make the appointment of a [best interests attorney] [child’s attorney] appropriate.

1 The court shall consider such factors as the child’s age and developmental level, any desire for an
2 attorney expressed by the child, whether the child has expressed objectives in the proceeding, and
3 the value of an independent advocate for the child’s best interests.

4 _____(c) The court may appoint one attorney to represent siblings if there is no conflict
5 of interest, even if the attorney serves in different capacities with respect to two or more siblings.
6 If a conflict arises, the attorney shall take any action required by [this state’s rules of professional
7 conduct].

8 (d) Neither the child nor the child’s representative, whether or not appointed by
9 the court, may waive representation of the child under this Section or Section 5.

10 **Legislative Note:** States that do not wish to mandate the appointment of a child’s attorney or
11 best interests attorney in every abuse and neglect proceeding may revise Section 4 to add “court-
12 appointed advisor” to the appointment alternatives under subsection (a). So revised, the section
13 would require the appointment of a representative for the child in all abuse and neglect
14 proceedings but would leave the choice of representative to the discretion of the court.
15 Conforming amendments to the remainder of Section 4 and to Section 5 would be necessary.

16 **Comment**

17 This section requires the appointment of an attorney for every child who is the subject of
18 an abuse and neglect proceeding because of the fundamental importance of the interests at stake.
19 Although the nature of the attorney’s role may vary from case to case, the child’s right to legal
20 representation is a function of basic procedural justice. Under subsection (d), that right is not
21 subject to waiver by the child or anyone acting on behalf of the child.
22

23 The Act leaves the choice between a best interests attorney or a child’s attorney to
24 legislative direction as well as judicial discretion. The presumptive nature of the initial
25 appointment – whether child’s attorney or best interests attorney – will be a policy choice for the
26 state legislature or rule-making authority. Because of the practical difficulty of providing an
27 individualized determination of the role of the attorney at the outset of every abuse and neglect
28 proceeding, the bracketed categories in subsection (b) provide courts with a presumptive starting
29 point. Nevertheless, courts sometimes will possess sufficient information to determine that the
30 presumptive role is inappropriate for a particular child. In that event, the court may designate a
31 different role for the attorney in light of the child’s circumstances and the court’s needs.
32 Ordinarily, a child’s attorney would be appropriate for an older child capable of exercising

1 considered judgment and directing a lawyer, while a best interests attorney would be appropriate
2 for a preverbal or very young child incapable of expressing a considered choice about issues that
3 are relevant to the proceeding. In determining whether a child is capable of considered
4 judgment, the court should focus on the child's decision-making process rather than the child's
5 choices themselves. The court's determination should be informed by insights drawn from the
6 abundant literature on children's psychological, cognitive, and emotional development. Section
7 9(c) addresses the authority of a court to change the nature of an attorney's appointment from
8 best interests attorney to child's attorney based on new information not available at the time of
9 the original appointment.

10
11 This section permits the appointment of a single lawyer for two or more siblings, even if
12 that lawyer is acting as child's attorney for one sibling and best interests attorney for another. A
13 lawyer for multiple siblings may have a better understanding of the children's family context
14 than would a lawyer for only one sibling. Thus, the presence of a *potential* conflict of interest
15 should not preclude the representation of multiple siblings. On the other hand, if an *actual*
16 conflict of interest arises, common representation would be inappropriate. If the representation
17 of one child is materially limited by the lawyer's responsibilities to another child (where, for
18 example, one child seeks to establish parental unfitness and another opposes the production of
19 such evidence), the attorney must take remedial steps and may be forced to withdraw from some
20 or all representation. See Rule 1.7, ABA Model Rules of Professional Conduct (2002). Key
21 concerns are whether pursuing one client's objectives will prevent the lawyer from pursuing
22 another client's objectives, and whether confidentiality will be compromised. See Jennifer L.
23 Renne, *Legal Ethics in Child Welfare Cases* 47-60 (ABA 2004).

24
25 Ideally, a child will have the same lawyer throughout the pendency of the abuse and
26 neglect proceeding. Continuity in representation is particularly important in building trust in the
27 child, and the lawyer's representation will be more informed if the same lawyer has been on the
28 case from its inception. Nevertheless, a lawyer appointed to represent a child in an abuse and
29 neglect proceeding may need to withdraw from representation due to conflicts or other reasons.
30 If the court grants permission to withdraw, the court should appoint a new lawyer as soon as
31 feasible to continue the representation.

32 It should be noted that a custody proceeding may become an abuse and neglect
33 proceeding because of substantial allegations of abuse or neglect, as explained in the Comment to
34 Section 2. In that event, this section's mandatory appointment of counsel for the child would
35 apply.
36

37 **SECTION 5. APPOINTMENT OF COURT-APPOINTED ADVISOR IN ABUSE** 38 **AND NEGLECT PROCEEDING.**

39 **Alternative A**

1 (a) In an abuse and neglect proceeding:

2 (1) if the court appoints a child's attorney rather than a best interests
3 attorney pursuant to Section 4, the court shall appoint a court-appointed advisor before the first
4 court hearing that substantially affects the interests of the child; or

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

8 **Alternative B**

9 (a) In an abuse and neglect proceeding, whether the attorney appointed pursuant
10 to Section 4 is a child's attorney or a best interests attorney, the court may appoint a court-
11 appointed advisor if the court determines that a court-appointed advisor is necessary to assist the
12 court in determining the child's best interests.

13 **End of Alternatives**

14 (b) In determining whether a court-appointed advisor is necessary under
15 subsection [(a)(2)] [(a)], the court shall consider such factors as the court's need for information
16 regarding the child's circumstances, the value of a court-appointed advisor's expertise, and any
17 request by the best interests attorney for the appointment of a court-appointed advisor.

18 (c) The court shall make an appointment under subsection [(a)(2)] [(a)] as soon as
19 practicable.

20 **Comment**

21 This section permits states to decide whether to require a court-appointed advisor under
22 certain circumstances. Because some states may want to ensure that a best interests advocate will
23 always be participating in the proceeding, Alternative A requires a court-appointed advisor

1 whenever the court has not appointed a best interests lawyer for the child. Alternative B, in
2 contrast, treats the appointment of a court-appointed advisor as a matter of judicial discretion to
3 be determined on a case-by-case basis.
4

5 The options within this section may also have implications for a state's compliance with
6 federal law. As a condition of receiving federal child welfare funding, states must appoint a
7 "guardian ad litem" in every judicial proceeding involving an abused or neglected child. Child
8 Abuse Prevention and Treatment Act, 42 U.S.C. § 5106a(b)(2)(A)(xiii) (2000). *See* Comment to
9 Section 3. While some states view either a best interests attorney or a child's attorney as
10 fulfilling CAPTA's guardian ad litem requirement, other states may interpret CAPTA more
11 narrowly. For those states that interpret CAPTA to always mandate a best interests advocate,
12 Alternative A requires a court-appointed advisor unless the court has already appointed a best
13 interests attorney. Alternative B, on the other hand, would be appropriate for those states that
14 view CAPTA's requirement as fully satisfied by the appointment of either a child's attorney or a
15 best interests attorney.
16

17 The best interests attorney by definition should satisfy CAPTA's requirement, since that
18 attorney's role is to provide legal services to protect a child's best interests. A child's attorney
19 may also satisfy CAPTA, depending on a state's interpretation of federal law. Even a child-
20 directed lawyer functioning in the role of a child's attorney will ultimately facilitate the court's
21 resolution in the child's best interests. Also, the child's attorney may, in situations justifying
22 substituted judgment under Section 12, advocate a position the lawyer believes is in the child's
23 interests. Moreover, the attorney must take remedial action if the child's objectives will subject
24 the child to a risk of substantial harm. *See* Section 12. For these reasons, under the second
25 bracketed option, the appointment of a court-appointed advisor is discretionary when either a
26 child's attorney or a best interests attorney has been appointed in an abuse and neglect
27 proceeding. In support of this more flexible interpretation of the CAPTA guardian ad litem
28 requirement, see U.S. Department of HHS Children's Bureau, *Adoption 2002: The President's*
29 *Initiative on Adoption and Permanence for Children*, Commentary to Guideline 15A.
30

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

32 (a) In a custody proceeding, the court sua sponte or on motion may appoint either
33 a child's attorney or a best interests attorney. Whether or not the court appoints an attorney, the
34 court may appoint a court-appointed advisor. An appointment may be made at any stage of the
35 proceeding and must designate the role of the appointee.

36 (b) In determining whether an appointment is appropriate and, if so, which

1 category of representative should be appointed, the court shall consider the child's age and
2 developmental level; any desire for a representative expressed by the child and whether the child
3 has expressed objectives in the proceeding; the value of an independent advocate for the child's
4 best interests; the need to minimize harm to the child from the processes of family separation and
5 litigation; the nature and adequacy of the evidence presented by the parties and the court's need
6 for additional information; and the financial burden on the parties and the cost of available
7 alternatives for resolving the issues in the proceeding. The court may consider any other factor
8 showing a particularized need for an appointment, including:

9 (1) the presence of a high level of acrimony between the parties or a party
10 and the child;

11 (2) any interference, or threatened interference, with custody or parenting
12 time, including abduction of the child or risk of abduction;

13 (3) any inappropriate adult influence on or manipulation of the child;

14 (4) any need for extraordinary remedies, such as supervised visitation;

15 (5) the likelihood of relocation that could substantially reduce the child's
16 time with a parent or sibling;

17 (6) the likelihood that the child will be called as a witness or be examined
18 by the court in chambers;

19 (7) any past or present substance abuse by the child, a party, or a
20 household member;

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

(9) any dispute as to paternity;

(10) any past or present domestic violence involving the child, a party, or a household member; and

(11) credible allegations of past or present abuse or neglect of the child [or referral of the proceeding to the juvenile court for investigation of allegations of abuse or neglect].

Comment

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

The first paragraph of subsection (b) identifies general considerations that courts should consider in determining whether to appoint a representative and, if a representative is necessary, to decide on the category of representative. The child's circumstances, including his or her developmental level, and the court's needs in the custody determination should inform the court's decision. The numbered items under subsection (b) are factors that may raise special concerns warranting the appointment of a representative for the child in a particular proceeding and should guide the court's discretion. In some circumstances, such as where there are credible allegations of domestic violence, child abuse, or substance abuse, the appointment of a separate representative for the child may be essential for the court's determination of the evidentiary issues in the case. Similarly, in custody proceedings where parentage is at issue or where extraordinary remedies are in dispute, the appointment of counsel for the child may be extremely helpful to the court.

The decision to appoint a particular category of representative will depend in large part on the child's developmental level and the court's sense of how the child's interests can best be protected. In some cases, a mental health professional as court-appointed advisor may be particularly helpful, while in other cases involving older children with defined views, a child's

1 attorney may be appropriate. On the other hand, a preverbal child in the middle of a bitter and
2 protracted custody dispute may need representation through a best interests attorney.

3
4 At the same time, courts must recognize that the appointment of a lawyer or court-
5 appointed advisor for the child in a custody case may be unnecessary and might introduce a
6 potentially intrusive and expensive advocate. This section directs courts to consider the financial
7 burden on parties and the availability of alternative methods of dispute resolution. Section 20
8 provides guidelines for assessing fees against the parties for children's representatives in custody
9 proceedings. Nevertheless, a court's decision whether or not to appoint a representative for a
10 child should not depend solely on the parties' ability to pay. Many family courts have access to
11 low cost or pro bono programs for children's representatives. Ideally, state court systems will set
12 aside funds for the appointment of children's representatives in this important realm.
13

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

15 **INTERESTS ATTORNEY.** The court may appoint as a child's attorney or best interests
16 attorney only an individual who is qualified through training or experience in the type of
17 proceeding in which the appointment is made, according to standards established by [federal
18 law,] law of this state other than this [act][,] or judicial or other rule.

19 **Comment**

20 All court-appointed attorneys for children, whether in the role of child's attorney or best
21 interests attorney, must have adequate training or experience to discharge their duties with
22 competence. States are encouraged to adopt state-wide standards of practice for all children's
23 attorneys through court rule or rule promulgated by the state bar or other regulatory agency.
24 Such standards of practice should include a description of required training in applicable
25 statutory codes, case law and court procedures, including state law relevant to divorce, child
26 custody, child support, adoption, paternity, child welfare, and other regulations of family life.
27 Lawyers representing children should also be familiar with federal law pertaining to family
28 regulation, such as the Child Abuse Prevention and Treatment Act, the Adoption and Safe
29 Families Act, the Family Educational Rights and Privacy Act, and the Indian Child Welfare Act.
30 In addition, children's lawyers should have knowledge of child development and child
31 psychology, the dynamics of child abuse and neglect, the impact of domestic violence, the impact
32 of separation and long-term consequences to a child of being in temporary care, and the central
33 role of culture and ethnicity in family relations. They should be trained in communicating with
34 children and should understand the impact of culture on styles of communication. Moreover,
35 children's attorneys and best interests attorneys should become familiar with the ABA Abuse and
36 Neglect Standards, the suggested amendments to those standards adopted by the National

1 Association of Counsel for Children, and the ABA Custody Standards. Finally, the training of
2 children's lawyers should be conducted on an ongoing basis. Mandatory periodic training
3 requirements exist in many states to ensure that children's counsel continue to meet standards of
4 competence over time.

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

13
14 In making an appointment under this Act, the court should ensure that the attorney's
15 caseload is not so burdensome as to undermine his or her ability to competently serve as the
16 child's representative and to fulfill the duties identified in Sections 11-13. See ABA Abuse and
17 Neglect Standards L-1 (providing duty of trial courts to control size of court-appointed
18 caseloads). For effective representation, a lawyer must be able to engage in certain essential
19 tasks, including meeting with his or her client, interviewing relevant witnesses, conducting
20 investigation and discovery, and reviewing records pertaining to the child. The National
21 Association of Counsel for Children has recommended that a child's lawyer represent no more
22 than 100 clients at a time. See Testimony of Marvin Ventrell, NACC Executive Director, *Kenny*
23 *A. ex rel. Winn v. Perdue*, 356 F. Supp. 2d 1353 (N.D. Ga. 2005).
24

25 **SECTION 8. QUALIFICATIONS OF COURT-APPOINTED ADVISOR .**

26 (a) The court may appoint as court-appointed advisor for a child only an
27 individual who is qualified through training or experience in the type of proceeding in which the
28 appointment is made, according to standards established by [federal law,] law of this state other
29 than this [act][,] or judicial or other rule.

30 (b) The court may appoint an attorney to serve as court-appointed advisor for a
31 child if the attorney meets the qualifications in subsection (a) and is specifically appointed to
32 serve solely in the role of court-appointed advisor. An attorney appointed as court-appointed
33 advisor may take only those actions that may be taken by a court-appointed advisor who is not an

1 attorney.

2 (c) The appointment of a court-appointed advisor does not create a professional
3 relationship between the advisor and the child unless such a relationship is expressly established
4 in the order of appointment.

5 **Comment**

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

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

23
24 This section makes clear that if the court appoints an attorney to function as court-
25 appointed advisor, that person is not to function as an attorney in the proceeding. CAPTA
26 expressly provides that the guardian ad litem may be an attorney or a court-appointed special
27 advocate, or both. *See* Comment to Section 5. Although federal law may permit an attorney
28 guardian ad litem to serve as an attorney, under this Act an attorney appointed as court-appointed
29 advisor is not appointed to serve as an attorney and should function only as a non-lawyer.

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

1 **SECTION 9. ORDER OF APPOINTMENT.**

2 (a) Subject to subsection (b), an order of appointment must be in a record,
3 identify the individual who will act as the child’s representative under Section 4, 5, or 6, and
4 clearly set forth the terms of the appointment, including the grounds for and duration of the
5 appointment, rights of access as provided under Section 15, and applicable terms of
6 compensation.

7 (b) The court may identify in the order of appointment a private organization or
8 governmental program that will provide the representative for the child. The organization or
9 program shall designate an individual who will act as the child’s representative and submit to the
10 court the name of the individual as soon as feasible, at which time the court shall amend the
11 order of appointment to identify the designated individual as the child’s representative.

12 (c) If appropriate in light of changed circumstances or new information not
13 available at the time of the original appointment, an attorney appointed as a best interests
14 attorney may be reappointed as a child’s attorney by a new order of appointment that complies
15 with subsection (a). In deciding whether to make a reappointment, the court shall consider such
16 factors as the child’s developmental level, any desire for an attorney expressed by the child, any
17 objectives in the proceedings expressed by the child, and the value of an independent advocate
18 for the child’s best interests.

19 **Comment**

20 Orders of appointment for children’s representatives have often failed to clearly
21 communicate the expectations for the representative. Lack of clarity in a representative’s role
22 can lead to ineffective representation. Under this section, the order of appointment must be in
23 writing and identify the role of the appointed representative in plain language understandable to
24 non-lawyers. The order should explain the reasons for the appointment and the scope of the

1 representative's responsibilities, and it must state how long the appointment will last. Payment
2 terms should also be expressly set out in the order. Clarity in the order will help all parties
3 understand the role and authority of the appointed representative. Moreover, the court will be
4 better equipped to exercise effective oversight if the appointed representative's powers and duties
5 are clearly described in the order. For a Model Appointment Order, *see* Appendix A, ABA
6 Standards of Practice for Lawyers Representing Children in Custody Cases.

7
8 This section permits a court to designate a private organization or governmental program
9 in making an appointment under the Act, since it may not always be possible for a court to
10 include the name of the representative at the outset of an abuse and neglect proceeding. If this
11 occurs, the designated organization or program must quickly identify the individual who will be
12 taking on the representation.

13
14 A lawyer may not serve both as a child's attorney and a best interests attorney for the
15 same child at the same time. Such a blurring of roles would give rise to the very problems that
16 this Act is designed to avoid. On the other hand, a lawyer's role may change over time. This
17 section recognizes that in some situations, an attorney initially appointed as a best interests
18 attorney may be more appropriately designated as a child's attorney if the child over time has
19 developed the capacity and desire to direct counsel. In that event, a lawyer should seek a
20 reappointment in a new order of appointment from the court. Significantly, this section requires
21 court action and does not permit a lawyer to unilaterally redesignate his or her role.

22
23 It should be noted that this section does not permit a child's attorney to be reappointed as
24 a best interests attorney. In light of ethical restrictions on a child's attorney under Section 12 and
25 the contrasting ability of a best interests attorney to use a child's confidential communications
26 under Section 13, a conversion of a child's attorney into a best interests attorney might
27 compromise the child's confidences.

28 29 **SECTION 10. DURATION OF APPOINTMENT.**

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

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

1 [(c) The appointment of a child’s attorney, best interests attorney, or court-
2 appointed advisor continues through any appeal that may be filed in the proceeding on behalf of
3 the child or other party.]

4 **Comment**

5 It is important to have continuity in representation, both in terms of practical impact and
6 in terms of the child’s emotional perspective. A lawyer or court-appointed advisor who has been
7 representing a child from the beginning of an abuse and neglect or custody proceeding ordinarily
8 will have a fuller understanding of the issues in the case than will a representative who is
9 appointed midstream. Moreover, a child’s sense of trust and confidence in his or her
10 representative will be enhanced if that representative is the same person over time. Of course, a
11 court remains free at any point to terminate the appointment of a representative if the
12 representative’s performance is inadequate.
13

14 Under this section, the appointment of a representative in an abuse and neglect
15 proceeding presumptively lasts until the proceeding is concluded. Although the court can
16 provide otherwise, the appointment ordinarily will continue until the child is no longer under
17 state protection. For example, if a child’s dependency proceeding is dismissed and the child’s
18 case is closed, the proceeding can be deemed concluded. On the other hand, a child in long-term
19 foster care may not have an active case file but the proceeding would not be “concluded” within
20 the meaning of this section. Indeed, in the latter situation, the child’s representative can play an
21 essential role in ensuring that periodic assessments of the child’s placement and services occur as
22 required by law.
23

24 An appointment in a custody case continues for the term provided in the order of
25 appointment, since the child’s need for representation in that context will often be short-term and
26 issue-specific. Nevertheless, subsequent reappointment of the same representative for a child
27 may be appropriate where related custody proceedings arise in the future, such as a relocation
28 dispute arising several years after an initial custody decree.
29

30 The right of a child’s attorney, best interests attorney, or court-appointed advisor to
31 participate in any appeal or to bring an appeal on behalf of the child is determined by state law.
32 State law varies on the question of standing to file an appeal or participate on appeal, just as it
33 varies on whether children have formal party status in abuse and neglect and custody
34 proceedings. See, e.g., *Ihinger v. Ihinger*, 824 A.2d 601 (Vt. 2003)(children were not parties to
35 parent’s divorce and custody dispute and therefore lacked standing to appeal). In states where
36 the child through a representative can participate fully on appeal, the representation of the child
37 extends to any appellate proceeding. To the extent feasible, courts should ensure continuity of
38 counsel on appeal. The child’s representative should take actions that are consistent with the
39 representative’s role in deciding whether to file an appeal on behalf of the child or to participate

1 in an appeal brought by other parties.
2

3 **[SECTION 11. DUTIES OF CHILD’S ATTORNEY AND BEST INTERESTS**
4 **ATTORNEY.**

5 (a) A child’s attorney or best interests attorney shall participate in the conduct of
6 the litigation to the full extent necessary to represent the child.

7 (b) The duties of a child’s attorney or best interests attorney include:

8 (1) meeting with the child and ascertaining, in a manner appropriate to the
9 child’s developmental level, the child’s needs, circumstances, and views;

10 (2) consulting with any court-appointed advisor for the child and
11 arranging for the court-appointed advisor to meet with the child in the attorney’s presence or, if
12 the attorney agrees, outside the attorney’s presence;

13 (3) investigating the facts relevant to the proceeding to the extent the
14 attorney considers appropriate, including interviewing persons with significant knowledge of the
15 child’s history and condition and reviewing copies of relevant records;

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

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

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

22 (7) presenting any expressed objectives of the child in the proceeding to

1 the court, if the child so desires, by a method that is appropriate in light of the purpose of the
2 proceeding and the impact on the child;

3 (8) taking any action that the attorney considers appropriate to expedite
4 the proceedings and the resolution of contested issues; and

5 (9) when the attorney considers appropriate, encouraging settlement and
6 the use of alternative forms of dispute resolution and participating in such proceedings [to the
7 extent permitted under the law of this state].]

8 ***Legislative Note:*** *In states where the duties of attorneys can be prescribed only by rule of court*
9 *or administrative guideline and not by legislative act, the duties listed in Section 11 should be*
10 *adopted by the appropriate measure.*

11 12 **Comment**

13 The general duties of an attorney, whether serving as the child’s attorney or as best
14 interests attorney, include developmentally appropriate communication with the child and
15 interviews of all parties and persons likely to have significant knowledge of the child’s
16 circumstances. The attorney should investigate the case fully while still complying with ethical
17 restrictions on contact with represented parties, and conversely the attorney should ensure that
18 other parties respect the ethical restrictions arising from the fact that the child is represented in
19 the proceeding. The attorney is in a pivotal position in negotiations and should attempt to
20 resolve the case in the least adversarial manner possible. Both the child’s attorney and the best
21 interests attorney have the duty to advise and counsel the child and review proposed settlements
22 on behalf of the child. Similarly, lawyers should be cognizant of children’s sense of time and
23 should expedite the proceedings to achieve a prompt resolution whenever feasible. For a detailed
24 enumeration of the pretrial and trial responsibilities for children’s counsel, attorneys should refer
25 to Standards III (F) and (G) of the ABA Custody Standards.

26
27 In addition, courts must ensure that children and their attorneys receive notice and the
28 opportunity to participate in all judicial proceedings affecting the child’s welfare. The attorney,
29 whether child’s attorney or best interests attorney, should participate actively in all hearings and
30 conferences on issues within the scope of the appointment. Moreover, the child’s attorney and
31 best interests attorney should, when appropriate, inform the child of hearings, settlement
32 conferences, and other proceedings and enable the child to attend. The emotional and
33 psychological value to a child of participating in a proceeding affecting his or her welfare may be
34 of profound significance. In the abuse and neglect context, a recent study concluded that
35 “[c]hildren, parents, and caregivers all benefit when they have the opportunity to actively

1 participate in court proceedings, as does the quality of decisions when judges can see and hear
2 from key parties.” The Pew Commission on Children in Foster Care, *Fostering the Future:
3 Safety, Permanence and Well-Being for Children in Foster Care* 42 (2004), available at
4 www.pewfostercare.org. On the other hand, a child might receive little therapeutic benefit from
5 observing an acrimonious custody dispute. Thus, this section recognizes the potential value of
6 participation by the child and places a corresponding duty on both the child’s attorney and best
7 interests attorney in that regard.
8

9 A child’s legal counsel, whether a child’s attorney or best interests attorney, may become
10 aware of needs of the child that go beyond the particular proceeding. In abuse and neglect
11 proceedings in particular, a child may be eligible for specialized educational, medical, or mental
12 health services under federal or state programs. To the extent that a lawyer learns of such needs,
13 the lawyer should request permission from the court to pursue issues on behalf of the child,
14 administratively or judicially, even if those issues do not specifically arise from the court
15 appointment. See Standard D-12, ABA Abuse and Neglect Standards.
16

17 **SECTION 12. DUTIES UNIQUE TO CHILD’S ATTORNEY.**

18 [(a)] A child’s attorney owes to the child the duties imposed by the law of this
19 state in an attorney-client relationship.

20 [(b)] A child’s attorney shall explain the nature of the attorney-client relationship
21 to the child, including the requirements of confidentiality.

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

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

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

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

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

2 (e) If, despite appropriate legal counseling, the child expresses objectives of
3 representation that the child's attorney determines would expose the child to an unacceptable risk
4 of substantial harm, the attorney shall request the appointment of a court-appointed advisor if a
5 court-appointed advisor has not been appointed, or withdraw from representation and request the
6 appointment of a best interests attorney. The child's attorney shall not disclose the reasons for
7 requesting a court-appointed advisor or best interests attorney except as permitted by [this state's
8 rules of professional conduct].

9 ***Legislative Note:*** *In states where the duties of attorneys can be prescribed only by rule of court*
10 *or administrative guideline and not by legislative act, the duties listed in the bracketed*
11 *provisions should be adopted by the appropriate measure. In states that enact only subsection*
12 *(a), the text of subsection (a) should immediately follow the heading of the section.*
13

14 **Comment**

15 The child's attorney is in a traditional lawyer/client relationship with the child and, as
16 such, is in a unique position to ensure that the child has a legal voice in the proceeding. The
17 child's attorney should explain the meaning and consequences of the child's choices in terms the
18 client can understand. As in other lawyer/client relationships, the lawyer may express his or her
19 assessment of the case and advise the child of the best goals to pursue. On the other hand, the
20 lawyer must remain aware that the child may be more vulnerable to manipulation than an adult
21 client. The lawyer has a duty not to overbear the will of the client. As a client-directed lawyer,
22 the lawyer may not advocate a position contrary to the child's expressed position except as
23 permitted by applicable ethical standards.
24

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

1 Finally, the child's attorney may request the appointment of a court-appointed advisor.
2

3 This section reflects the approach of the ABA Abuse and Neglect Standards and the ABA
4 Custody Standards as to the dilemma that can arise when the child's expressed goals in the
5 proceeding may place the child at risk of harm. These guidelines are also consistent with
6 prevailing ethical standards. *See* Rules 1.14 and 1.6, ABA Model Rules of Professional Conduct
7 (2002). A child's attorney may not refuse to advocate the child's wishes simply because the
8 attorney disagrees with the child's view or believes the child's objectives will not further the
9 child's best interests. On the other hand, the child's attorney is not bound by the child's
10 expressed wishes if pursuing those wishes would put the child at unacceptable risk of substantial
11 physical, emotional, psychological or other harm and is not merely contrary to the lawyer's
12 opinion of the child's interests. In most cases, the ethical conflict involved in asserting a position
13 that would seriously endanger the child can be resolved through the lawyer's counseling
14 function. If it cannot be resolved, this section directs the child's attorney to either request the
15 appointment of a court-appointed advisor or to withdraw and request the appointment of a best
16 interests attorney.
17

18 A child's attorney should not reveal the reason for requesting a court-appointed advisor or
19 withdrawing except as permitted by the state's ethics rules on confidentiality. Under Model Rule
20 1.14, lawyers are impliedly authorized to reveal information about a client with diminished
21 capacity when taking protective action on behalf of the client, but only to the extent reasonably
22 necessary to protect the client's interests. Ethical rules also typically permit attorneys to disclose
23 confidential information where necessary to prevent reasonably certain death or bodily harm. *See*
24 Rule 1.6(b). Thus, if information about the risk of harm is not otherwise available, a child's
25 attorney may reveal the reasons for requesting a court-appointed advisor or best interests attorney
26 in order to protect the child from harm.
27

28 Often a court-appointed advisor can satisfactorily assist the court in determining the
29 child's best interests through appropriate investigation and submission of reports. In unusual
30 cases, however, a court may need to appoint a court-appointed advisor as well as a lawyer to
31 represent the court-appointed advisor to ensure a full presentation of the evidence.
32

33 Even where the child's expressed objectives may place the child at risk of substantial
34 harm, the child has a right to have his or her views made known to the court. Under ordinary
35 ethical standards and court rules, however, a lawyer may not advocate positions that are not well
36 grounded in fact and warranted by existing law or a nonfrivolous argument for modification of
37 existing law. *See* ABA Model Rule 3.1; Rule 11, Fed. R. Civ. Pro. Thus, the child's attorney
38 may not advocate the child's wishes if the child's position is prohibited by law or lacks any
39 factual foundation. Where the child persists in wanting the attorney to advocate a position
40 unsupportable under the law, the attorney may seek to withdraw from the representation.
41

42 If a court grants permission to withdraw from representation in an abuse and neglect
43 proceeding, the court must ensure that the child continues to have legal representation in

1 compliance with Section 4. In general, the court has discretion to appoint either a best interests
2 attorney or child's attorney, and the court should decide on the nature of the appointment in light
3 of the child's wishes, the court's needs, the circumstances of the prior attorney's withdrawal, and
4 other factors in the case. If, for example, a child's attorney has withdrawn under the
5 circumstances described in the preceding paragraph, the court presumably would appoint a best
6 interests attorney. A request from an older child for a child's attorney should be given special
7 consideration by the court, since the child's voice may be effectively silenced without such an
8 appointment. In a custody proceeding, on the other hand, the appointment of a lawyer is always
9 discretionary. In the event of withdrawal of a child's attorney in that context, the court retains
10 discretion to decide whether to appoint another representative for the child and to decide on the
11 role of that representative.
12

13 **SECTION 13. DUTIES UNIQUE TO BEST INTERESTS ATTORNEY.**

14 [(a)] A best interests attorney shall advocate for a resolution of the proceeding
15 consistent with the best interests of the child based on the facts relevant to the proceeding and
16 according to criteria established by law related to the purposes of the proceeding.

17 [(b)] A best interests attorney, in a manner appropriate to the child's
18 developmental level, shall:

19 (1) explain the role of the best interests attorney to the child; and
20 (2) inform the child that, in providing assistance to the court, the attorney
21 may use information that the child gives to the attorney.

22 (c) A best interests attorney is not bound by the child's expressed objectives but
23 shall consider the child's objectives with due regard to the child's developmental level in
24 determining what to advocate.

25 (d) A best interests attorney may not disclose or be compelled to disclose
26 information relating to the representation of the child except as permitted by [this state's rules of
27 professional conduct], but the attorney may use such information, including communications

received from the child in confidence, for the purpose of performing the duties of a best interests attorney without disclosing that the child was the source of the information.]

Legislative Note: *In states where the duties of attorneys can be prescribed only by rule of court or administrative guideline and not by legislative act, the duties listed in the bracketed provisions should be adopted by the appropriate measure. In states that enact only subsection (a), the text of subsection (a) should immediately follow the heading of the section. A conforming amendment to a state’s rules of professional conduct may be necessary to authorize the performance of the duties of the best interests attorney as described in this Section.*

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 and 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. Moreover, the 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.

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* Model Rule 1.6 (barring disclosure of information relating to representation); Model 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. Model Rule 1.14(c). Under ordinary ethical guidelines, the best interests attorney, like the child’s attorney, may reveal the child’s confidences if necessary to protect the child from harm under ordinary ethical guidelines. *See* Comment to Section 12. The best interests attorney, however, has greater latitude than the child’s attorney in one key respect: to use information received from the child for purposes of the representation without revealing the source of the information. This section recognizes that a limited inroad on the principle of confidentiality may be necessary to enable the best interests attorney to carry out the purposes of the representation. Under this section, information received from the child is protected by ordinary rules of professional conduct except that *use* of such information, including confidential communications, is permitted to enable the best interests attorney to perform his or her role. Although some states have permitted the hybrid

1 lawyer/guardian ad litem to reveal the child's confidential communications to the court where
2 necessary to promote the child's best interests, *see Clark v. Alexander*, 953 P.2d 145 (Wyo.
3 1998), this section provides a more limited exception to the principle of client confidentiality.
4

5 Under the use exception, a best interests attorney may use a child's confidential
6 communications for the purpose of the representation without disclosing them. The distinction
7 between use and disclosure means, for example, that if a child tells the attorney that a parent
8 abuses alcohol, the attorney may use that information to find an independent source of evidence
9 of the parent's alcohol abuse. The attorney may present that separate evidence of alcohol abuse
10 but may not reveal that the initial source of information was the child. The best interests attorney
11 should explain to the child that the child's communications may be used by the attorney in order
12 to achieve the best resolution for the child in the proceeding.
13

14 The prohibition on disclosure is intended to provide a measure of confidentiality for the
15 child's relationship with the best interests attorney. It may also diminish the child's feelings of
16 responsibility or guilt for the presentation of negative evidence about his or her parents or care-
17 givers. Although this section does modify the ethical obligations ordinarily inherent in the
18 attorney-client relationship, it is designed to accommodate competing concerns: the child's need
19 to trust his or her lawyer and to speak freely in confidence versus the court's need for a full
20 presentation of evidence in order to reach a disposition in the child's best interests.
21

22 **SECTION 14. DUTIES OF COURT-APPOINTED ADVISOR.** A court-appointed
23 advisor appointed for a child shall:

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

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

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

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

32 (D) meet and consult with the child's attorney or the best interests

1 attorney, if any, regarding the issues in the proceeding;

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

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

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

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

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

13 (7) provide copies of any report or other document submitted to the court by the
14 advisor to any child's attorney or best interests attorney appointed for the child and to the parties;

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

18 (9) perform any specific task directed by the court not inconsistent with the role
19 of court-appointed advisor.

20 **Comment**

21 This section describes the general function of the court-appointed advisor and makes
22 clear that the court-appointed advisor should explain his or her role to the child in terms the child
23 can understand. The court-appointed advisor has a duty to conduct an independent investigation

1 in order to ascertain the facts of the case. In carrying out that duty, the court-appointed advisor
2 must have access to the child and a reasonable opportunity to interview persons with relevant
3 knowledge of the child, including the parties. If the child is represented by counsel, whether
4 child's attorney or best interests attorney, the court-appointed advisor must notify counsel and
5 permit counsel to be present during any interview. In addition, the court-appointed advisor's
6 investigation ordinarily should include a review of relevant records. To ensure that the court-
7 appointed advisor has the ability to carry out his or her responsibilities under this section, the
8 order of appointment should expressly provide for such rights of access.
9

10 In abuse and neglect and custody proceedings, the court-appointed advisor's obligations
11 to the court may include the duty to make recommendations concerning the child's best interests.
12 State law varies as to whether mental health experts should or must make recommendations to
13 the court on the ultimate disposition of the case. Disagreement also exists within the mental
14 health profession about whether mental health professionals are qualified to offer opinions on the
15 ultimate question of the child's best interests. Some commentators argue that the determination
16 of a child's best interests is the prerogative of the court and not within the expertise of the mental
17 health profession. *See generally* Gary B. Melton, et al., *Psychological Evaluations for the*
18 *Courts: A Handbook for Mental Health Professionals* (Guilford Press 2d ed. 1997). In any
19 event, the court-appointed advisor should be prepared to make such recommendations if
20 requested by the court, always ensuring that the recommendation or opinion is based on the
21 advisor's thorough and unbiased investigation of the case.
22

23 Court-appointed advisors, including CASA's, must observe all statutes and court rules
24 concerning confidentiality and should not disclose information about the appointed case to non-
25 parties other than the court and court-authorized personnel. Although attorney-client
26 confidentiality rules do not govern the court-appointed advisor's communications with the child,
27 the advisor should protect the child's privacy and should reveal the child's statements only when
28 necessary to fulfill the advisor's duties to the court. For guidelines governing the duty of
29 confidentiality for guardians ad litem, see Minnesota Rule 908, General Responsibilities of
30 Guardians Ad Litem; Standard 7.0, Standards for Guardians Ad Litem in Missouri Juvenile and
31 Family Court Matters.
32

33 Many states have developed more detailed standards governing the duties of court-
34 appointed advisors, generally under the rubric of "guardian ad litem," than those contained in this
35 Act. *See, e.g.,* Judicial Council of Virginia, Standards to Govern the Appointment of Guardians
36 Ad Litem, at www.courts.state.va.us/1/cover.htm; There are also numerous sources governing
37 CASA programs and specifying the duties of CASA volunteers. *See, e.g.,* Nat'l CASA
38 Association, Standards for National CASA Association Member Programs (2002), available at
39 www.nationalcasa.org; Office of Juvenile Justice and Delinquency Prevention, Court Appointed
40 Special Advocates: A Voice for Abused and Neglected Children in Court (1997).
41
42

1 **SECTION 15. ACCESS TO CHILD AND INFORMATION RELATING TO**
2 **CHILD.**

3 (a) Subject to subsection (c), the court shall issue an order of access at the time of
4 an order of appointment under this [act], authorizing the child's attorney, best interests attorney,
5 or court-appointed advisor to have immediate access to:

- 6 (1) the child; and
7 (2) any confidential information relating to the child as to which the child
8 may otherwise have a privilege of nondisclosure.

9 (b) The custodian of any relevant record relating to a child shall provide access to
10 a person authorized by order issued pursuant to subsection (a) to access the records.

11 (c) The court may impose conditions or limitations on an order of access which
12 are required by law, rules of professional conduct, the child's needs, or the circumstances of the
13 proceeding, and a child's record that is privileged or confidential under law other than this [act]
14 may be released to a person appointed under this [act] only in accordance with that law.

15 **Comment**

16 Persons appointed to represent children under this Act must have access to information
17 regarding the child in order to competently perform their assigned roles. Relevant files include
18 those concerning child protective services, developmental disabilities, juvenile delinquency,
19 mental health, and educational programs. Access should also be provided to records of a probate
20 or other court proceeding as well as records of any trust or account for which the child is a
21 beneficiary.
22

23 Under subsection (c), a court may impose conditions on access that are required by law,
24 ethical rules, the child's needs, or the circumstances of the case. A lawyer may need to use
25 subpoenas or other discovery tools to obtain relevant records, for example. Moreover, if a
26 child's parent is represented by counsel, a child's attorney or best interests attorney would need
27 to comply with applicable rules of professional conduct governing contact with represented
28 parties. Similarly, a child's attorney or best interests attorney may have the right to be present

1 when the child is interviewed by others. To the extent feasible, the order of appointment should
2 explain the relevant limitations on access in detail.

3
4 Subsection (c) also recognizes that federal or state law, such as the Family Educational
5 Rights and Privacy Act, 20 U.S.C. § 1232g (the “Buckley Amendment”), and the Health
6 Insurance Portability and Accountability Act of 1996, 42 U.S.C. § 201, may impose independent
7 requirements for access that a child’s representative must observe. *See* 34 C.F.R. § 99.31-39
8 (requirements for access to educational records under Buckley Amendment); 45 C.F.R. §
9 164.512 (requirements for access to health records under HIPAA). In some circumstances, the
10 order of appointment will need to contain qualifying language to enable the appointed
11 representative to gain access to the protected records.
12

13 **SECTION 16. PARTICIPATION IN PROCEEDING BY CHILD’S ATTORNEY,**
14 **BEST INTERESTS ATTORNEY, AND COURT-APPOINTED ADVISOR.**

15 (a) A child’s attorney, best interests attorney, and court-appointed advisor for a
16 child are each entitled to:

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

19 (2) receive notice of and attend each hearing in the proceeding; and

20 (3) participate in any case staffing or case management conference
21 concerning the child in an abuse and neglect proceeding.

22 (b) A child’s attorney, best interests attorney, and court-appointed advisor may
23 not engage in ex parte contact with the court except as authorized by law other than this [act].

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

27 (d) The court, a child’s attorney, or a best interests attorney may compel any

1 court-appointed advisor for a child to attend a trial or hearing relating to the child and to testify as
2 necessary for the proper disposition of the proceeding.

3 (e) The court shall ensure that any court-appointed advisor for a child has an
4 opportunity to testify or submit a report setting forth:

5 (1) the court-appointed advisor's recommendations regarding the best
6 interests of the child; and

7 (2) the bases for the court-appointed advisor's recommendations.

8 (f) In a [nonjury] proceeding, a party may call any court-appointed advisor for the
9 child as a witness for the purpose of cross-examination regarding the advisor's report without the
10 advisor's being listed as a witness by a party.

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

13 **Comment**

14 This section makes clear that a child's attorney, a best interests attorney, and a court-
15 appointed advisor are each entitled to receive notice of all hearings and to receive copies of all
16 documents filed in the case. The right to participate in case staffings will arise in abuse and
17 neglect proceedings where periodic conferences among court personnel and a child's
18 representative are mandated by state and federal law to assess the child's current placement and
19 future status. Unlike the child's attorney or the best interests attorney, the court-appointed
20 advisor may also testify or submit a report to the court regarding recommendations as to the
21 child's best interests. Indeed, under Section 14, the court-appointed advisor may have a duty to
22 submit such recommendations in certain cases.

23
24 Under this section, the court-appointed advisor is subject to cross-examination regarding
25 the advisor's recommendations to the court. Although the court-appointed advisor is appointed
26 to assist the court in determining the child's best interests, ex parte communications with the
27 court are not permitted. The due process rights of the parties require the court-appointed advisor
28 to observe ordinary procedural rules in making recommendations to the court, including giving
29 notice to other participants and affording parties an opportunity to be heard and an opportunity
30 for cross examination. *See, e.g., In re Marriage of Bates*, 2004 WL 2403721 (Ill. 2004) (failure

1 to provide copy of guardian ad litem report to mother in custody proceeding was violation of due
2 process); Leinenbach v. Leinenbach, 634 So.2d 252 (Fla. App. 1994) (trial court erred in relying
3 on report of guardian ad litem where father was not afforded opportunity to rebut contents of
4 report). Likewise, neither the child's attorney nor the best interests attorney may engage in ex
5 parte communication with the court except as otherwise authorized by law. Although this
6 prohibition is rooted in the rules of professional conduct governing all lawyers, experience has
7 shown that lawyers for children sometimes bend the rules in their desire to protect the interests of
8 their clients. Thus, the principle is restated in the Act.
9

10 **SECTION 17. ATTORNEY WORK PRODUCT AND TESTIMONY.**

11 (a) Subject to subsection (b) and except as authorized by [this state's rules of
12 professional conduct or] court rule, an attorney appointed as child's attorney or best interests
13 attorney may not:

14 (1) be compelled to produce the attorney's work product developed during
15 the appointment;

16 (2) be required to disclose the source of information obtained as a result
17 of the appointment;

18 (3) submit a report authored by the attorney into evidence; or
19 (4) testify in court.

20 (b) Subsection (a) does not alter any duty of an attorney to report child abuse or
21 neglect under [applicable law].

22 **Comment**

23 There is widespread disagreement about the proper function of children's lawyers in
24 abuse and neglect and custody proceedings, particularly as a result of the attorney/guardian ad
25 litem model. *See generally* Ann M. Haralambie, *The Child's Attorney* 1-23 (ABA 1993). In
26 several states, the attorney/guardian ad litem may testify and be cross-examined. *See, e.g.,*
27 *Jacobsen v. Thomas*, 100 P.3d 106 (Mt. 2004). This section clarifies that the child's attorney and
28 the best interests attorney are to stay within their professional role as lawyers. Thus, the work
29 product of both the child's attorney and the best interests attorney is presumptively shielded from

1 disclosure. Likewise, neither category of attorney ordinarily should testify as a witness in a
2 proceeding in which the attorney is representing a child.
3

4 **SECTION 18. IMMUNITY.**

5 (a) Only the child has a right of action in civil damages against a child's attorney,
6 best interest attorney, or court-appointed advisor for inaction or action taken, including any
7 recommendation or opinion given, in the capacity of child's attorney, best interests attorney or
8 court-appointed advisor.

9 (b) A best interests attorney or court-appointed advisor appointed pursuant to this
10 [act] is not liable for civil damages because of inaction or action taken, including any
11 recommendation or opinion given, in the capacity of best interests attorney or court-appointed
12 advisor unless the inaction or action taken exceeded ordinary negligence.

13 **Comment**

14 Under this section, only the child has standing to sue for malpractice or other breach of
15 professional responsibility. As courts have recognized, the representative owes a duty of
16 professional competence to the child, not to other parties in the litigation. *See In the Interest of*
17 *Z.J.*, 153 S.W.3d 535 (Tex. App. 2004)(mother lacked standing to challenge performance of
18 child's appointed attorney ad litem in parental rights termination proceeding). Children may sue
19 through a next friend or other guardian ad litem, but this section would not permit a parent or
20 care-giver to assert her own challenge to the performance of a child's representative.
21

22 This section provides qualified immunity for persons appointed to assist the court as best
23 interest attorneys or court-appointed advisors. States vary in the standards that plaintiffs are
24 required to meet to overcome the defense of qualified immunity, ranging from gross negligence
25 to intentional misconduct and bad faith. For that reason, this section does not attempt to define
26 the precise standard necessary to surmount the immunity. Instead, the section makes clear that
27 conduct more egregious than ordinary negligence must be shown in order for the child to recover.
28

29 The provision of qualified immunity is based on the recognition that best interest
30 attorneys and court-appointed advisors need protection from civil actions for damages when
31 performing functions consistent with their appointed roles. Immunity is necessary to ensure that
32 they can fully investigate and formulate recommendations without fear of retaliation. The threat

1 of litigation from a child client, often fueled by an unhappy parent in the wings, might interfere
2 with the representative's decision-making and might deter qualified individuals from accepting
3 appointment in the first place. Although in some states children's representatives have absolute
4 immunity, *see, e.g.,* Paige K.B. by Peterson v. Molepske, 580 N.W. 2d 289 (Wis.
5 1998)(recognizing absolute immunity for guardian ad litem in custody dispute for actions within
6 scope of authority); Billups v. Scott, 571 N.W. 2d 603 (Neb. 1997)(recognizing absolute
7 immunity for guardian ad litem in abuse and neglect proceeding for actions within scope of
8 authority), the qualified immunity provided in this section gives the best interests attorney and
9 court-appointed advisor adequate protection from suit while still holding them accountable for
10 egregious misconduct. *See* Ore. Rev. Stat. § 419A170 (providing qualified immunity to court
11 appointed special advocate).
12

13 On the other hand, the Act does not provide immunity for persons appointed as a child's
14 attorney. Although a few states have extended immunity to children's attorneys, *e.g.,* Vernon's
15 Texas Code Ann. Family Code § 107.009 (2004), the premise of this section is that such lawyers
16 are in a traditional lawyer/client role and should be held to ordinary standards of care. Rather
17 than independently formulating the child's best interests, the child's attorney for the most part is
18 a client-directed lawyer in a traditional mode of client representation. It should be noted,
19 however, that in some circumstances children's attorneys may function as best interests
20 attorneys. If a child's attorney receives no direction from a child on a particular issue, for
21 example, the attorney may take an action under Section 12(d) that the attorney has determined
22 will serve the child's best interests. In that circumstance, courts may wish to extend qualified
23 immunity to cover the action taken. Similarly, if a child's attorney takes protective action under
24 Section 12(e) because the child's objectives place the child at risk of harm, the attorney's action
25 should fall within the qualified immunity. In other words, courts are encouraged to take a
26 functional approach to the question of immunity. *See* Carrubba v. Moskowitz, 877 A.2d 773
27 (Conn. 2005)(recognizing absolute immunity for child's attorney whose primary duty was to
28 protect child's best interests); Marquez v. Presbyterian Hospital, 608 N.Y.S.2d 1012 (Sup. Ct.
29 1994)(holding that law guardian is entitled to qualified immunity when functioning primarily as
30 child's guardian ad litem but would be liable for ordinary negligence when functioning as child's
31 attorney).
32

33 **SECTION 19. FEES AND EXPENSES IN ABUSE AND NEGLECT**

34 **PROCEEDING.**

35 (a) In an abuse and neglect proceeding, an individual appointed pursuant to this
36 [act], other than a volunteer advocate, is entitled to reasonable fees and expenses in an amount
37 set by the court.

(b) If the court determines that a parent or other responsible party is able to defray all or part of the fees and expenses set pursuant to subsection (a), the court shall:

(1) order one or more of those persons to pay all or part of the fees and expenses; or

(2) order one or more of those persons, before final hearing, to deposit the amount necessary to pay all or part of the fees and expenses into court or into an account authorized by the court for the use and benefit of the individual or organization appointed under this [act].

(c) Any fees and expenses set pursuant to subsection (a) that cannot be paid by a parent or responsible party because of indigency must be paid from [designated public funds].

The court may not award fees under this [act] against the state, a state agency, or a political subdivision of the state except as provided in this subsection.

(d) In order to receive payment of fees and expenses under this section, the payee must complete and submit to the court a voucher or claim for payment, listing the fees charged, actions taken, and hours worked.

Comment

This section requires that attorneys and court-appointed advisors receive adequate and timely compensation in abuse and neglect proceedings throughout the terms of appointment, unless the appointee is a volunteer advocate. States should ensure that adequate funds are appropriated and made available to compensate children's representatives. Under the mandate of federal law, states are obligated to appoint guardians ad litem for children in abuse and neglect proceedings. *See* Child Abuse Prevention and Treatment Act, 42 U.S.C. § 5106a(b)(2)(A)(xiii) (2000). As a matter of state law, this Act supplements the federal requirement by requiring that indigent children receive publicly-funded legal representation, whether in the form of child's attorney or best interests attorney. *See* Section 4. When a court-appointed advisor is also required under Section 5, that appointment will likewise be at public expense for indigent children. The child's attorney, best interests attorney, and court-appointed advisor should also

1 have access, where necessary, to reimbursement for experts, investigative services, research
2 costs, and other activities undertaken to fulfill the obligations of the appointment.
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4 **SECTION 20. FEES AND EXPENSES IN CUSTODY PROCEEDING.**

5 (a) In a custody proceeding, an individual appointed pursuant to this [act], other
6 than a volunteer advocate, is entitled to reasonable fees and expenses in an amount set by the
7 court by reference to the reasonable and customary fees and expenses for similar services in the
8 county of jurisdiction.

9 (b) The court may:

10 (1) allocate fees and expenses between the parties in proportion to their
11 ability to pay;

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

14 (3) before the final hearing, order an amount in addition to the amount
15 ordered deposited under paragraph (2) to be paid into an account authorized by the court for the
16 use and benefit of the individual appointed under this [act].

17 (c) [Except as otherwise authorized by [cite state law], a] [A] court may not
18 award costs, fees, or expenses under this section against the state, a state agency, or a political
19 subdivision of the state.

20 **Comment**

21 In custody proceedings, courts should make clear to all parties how fees will be
22 determined and how and by whom the fees are to be paid. Lawyers and court-appointed advisors,
23 unless functioning as volunteer advocates, should be paid in accordance with prevailing legal
24 standards of reasonableness. This section recognizes that most states do not have public funds
25 available to compensate children's representatives in custody disputes other than abuse and

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. 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. Courts may also require periodic reporting from appointed representatives regarding their services and fees.

The award of fees and expenses in all cases should include reasonable costs for expert witnesses, investigative services, research, and other activities where the attorney or court-appointed advisor demonstrates to the court that such expenses are necessary to accomplish the objective of the proceeding.

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

SECTION 22. TRANSITIONAL PROVISION. This [act] applies to proceedings filed on or after [the effective date of this [act]]. A proceeding filed before [the effective date of this [act]] is governed by the law in effect when the proceeding was filed, and the former law is continued in effect for that purpose.

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