

D R A F T

FOR DISCUSSION ONLY

# **ROLE OF ATTORNEYS REPRESENTING CHILDREN IN CUSTODY DISPUTES**

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NATIONAL CONFERENCE OF COMMISSIONERS

ON UNIFORM STATE LAWS

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For Drafting Committee Meeting, October 22-24, 2004

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# **ROLE OF ATTORNEYS REPRESENTING CHILDREN IN CUSTODY DISPUTES**

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# ROLE OF ATTORNEYS REPRESENTING CHILDREN IN CUSTODY DISPUTES

## Prefatory Note

The role of lawyers representing children in court proceedings affecting their interests has been the subject of intense debate within the last decade among academics, practicing attorneys, and courts. 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 children who lack that capacity, and whether a lawyer may both represent a child as the child's lawyer and also participate as guardian ad litem for the child.<sup>1</sup>

Several competing proposals have emerged to address the important question of representation of children. In 1995, the American Academy of Matrimonial Lawyers adopted a set of standards under which lawyers were to advocate the wishes of the "unimpaired" child but could act only as a conduit of information for the "impaired" child.<sup>2</sup> At the same time, the Family

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<sup>1</sup>For thoughtful explorations of all of these issues, see JEAN KOH PETERS, REPRESENTING CHILDREN IN CHILD PROTECTIVE PROCEEDINGS: ETHICAL AND PRACTICAL DIMENSIONS (2d ed. 2001). Professor Peters recommends that an attorney should develop a relationship with a child over time and interpret the child's wishes in context 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 unreasonable. She also notes that ethical dilemmas can be minimized or eliminated if children's attorneys spend significant time advising their clients. Haralambie urges lawyers to explain to children why their positions are unreasonable 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 (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).

<sup>2</sup>*American Academy of Matrimonial Lawyers Standards for Attorneys and Guardians Ad Litem in Custody or Visitation Proceedings*, 13 J. AM. ACAD. MATRIM. LAW 1 (1995). For a critique of the AAML approach, see Ann M. Haralambie & Deborah L. Glaser, *Practical and Theoretical Problems with the AAML Standards for Representing "Impaired" Children*, 13 J.

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”),<sup>3</sup> 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 from immaturity is incremental and issue-specific.

A major conference on the representation of children was held at Fordham Law School in 1996 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 proposed various refinements.<sup>4</sup> Recently, the ABA addressed the same questions in the context of child custody proceedings and adopted Standards of Practice for Lawyers Representing Children in Custody Cases (ABA Custody Standards).<sup>5</sup>

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.<sup>6</sup> In the abuse and neglect context, the federal Child Abuse Prevention and Treatment Act (CAPTA) requires the appointment of a

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Am Acad. Matrim. Law. 57 (1995).

<sup>3</sup>American 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).

<sup>4</sup>*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).

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

<sup>6</sup>See 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).

guardian ad litem for a child, but the role and identity of that GAL are largely undefined.<sup>7</sup> Many states routinely appoint lawyers to function as GALs, without careful delineation of the distinctions between the ethical responsibilities of a lawyer toward the client and the professional obligations of the GAL 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 as a matter of judicial discretion.<sup>8</sup>

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 [or model] law. The Conference concluded that a uniform Act would enhance the quality and professionalism of children’s counsel and would offer an objective model to clarify and distinguish the roles of various categories of children’s representatives.

The proposed Act integrates the two sets of standards promulgated by the ABA – the Abuse and Neglect Standards and the Custody Standards—in an effort to devise guidelines governing all custody proceedings, including abuse and neglect cases. A major goal of the Act is to improve the representation of children in proceedings directly affecting their interests by providing a clear definition of roles for courts and counsel. That objective is implemented through the definitions set out in section 101, standards for the appointment of counsel and guardians ad litem under Article 2, the qualifications of counsel and guardians ad litem under Article 3, and the description of powers and responsibilities under Article 4. Fees and expenses are addressed in Article 5.

The Act provides for two categories of lawyers for children—the child’s attorney and the

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<sup>7</sup>See 42 U.S.C. § 5106a(b)(2)(A)(xiii)[requiring states to have “provisions and procedures in every case involving an abused or neglected child which results in a judicial proceeding, a guardian ad litem, who has received training appropriate to the role, and who may be an attorney or a court appointed special advocate who has received training appropriate to that role (or both), shall be appointed to represent the child in such proceedings—(I) to obtain first-hand, a clear understanding of the situation and needs of the child; and (II) to make recommendations to the court concerning the best interests of the child.”].

<sup>8</sup>Section 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.”

best interests attorney—but does not endorse the dual role category of attorney/guardian ad litem.<sup>9</sup> The child’s attorney is in a traditional attorney/client relationship with the child and is therefore under traditional ethical limitations governing that relationship. The Act authorizes, however, a limited exercise of “substituted judgment” by the child’s attorney under section 402 where the child is incapable of reasonable judgment and meaningful communication as to a particular issue. In that circumstance, the child’s attorney may pursue the child’s “legal interests” in the proceeding and request appointment of a best interests attorney or guardian ad litem. Similarly, if a child’s expressed goals would put the child at risk of harm, the child’s attorney should again request the appointment of a best interests attorney or guardian ad litem but may continue to present the child’s expressed goals to the court, unless the child’s position is prohibited by law or lacking in factual foundation. The design of the Act is to keep the child’s attorney within the appointed role and not to permit a more subjective pursuit of the child’s best interests.

In contrast, the best interests attorney under the Act, while remaining in the professional role of an attorney, has the substantive responsibility of assisting the court in determining the child’s best interests. Thus, under section 402, the best interests attorney is not bound by the client’s expressed objectives and may use client’s confidences where necessary to protect the child’s interests in the proceeding.

Finally, the Act treats the guardian ad litem as a non-attorney representative of the child, with responsibilities that include making a recommendation to the court and testifying in court, where necessary. See section 404. As such, the Act makes clear in section 302 that the guardian ad litem may not perform acts that would be restricted to a licensed attorney, even if the person appointed to be guardian holds a license to practice law. The Act also endorses the widespread use of Court Appointed Special Advocates (CASAs) to fulfill the role of guardian.

Under section 201, a court must appoint either a child’s attorney or a best interests attorney for children in abuse and neglect proceedings. The best interests attorney by definition should satisfy CAPTA’s requirement that a guardian ad litem be appointed for children in abuse and neglect proceedings. If a best interests attorney has not been appointed, then section 202 directs the court to appoint a guardian ad litem in order to meet the CAPTA requirement. In custody proceedings other than abuse and neglect cases, the Act leaves to judicial discretion the question of appointing a child’s representative. Section 203 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

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<sup>9</sup>The Act rejects the dual role 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. In addition, problems have arisen with the dual role approach because of ethical constraints that are inherent in the attorney/client relationship, including in particular the confidentiality of client communications. For 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).



appointed, which category of representative is appropriate.

While the Act sets out basic guidelines for the appointment and role of attorneys and guardians ad litem, 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.

## ROLE OF ATTORNEYS REPRESENTING CHILDREN IN CUSTODY DISPUTES

## [ARTICLE] 1

## GENERAL PROVISIONS

**SECTION 101. SHORT TITLE.** This [act] may be cited as the Role of Attorneys Representing Children in Custody Disputes.

**SECTION 102. DEFINITIONS.** In this [act]:

(1) “Abuse and neglect proceeding” means a court proceeding, whether instituted by the state or a private party, based on a petition filed for protection of a child, a motion to a court to change legal custody, visitation, or guardianship based on substantial allegations of child abuse or neglect, or an action to terminate parental rights.

(2) “Best interests attorney” means an attorney appointed by the court in a custody proceeding to assist the court in determining a child’s best interests:

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

(4) “Custody proceeding” means a court proceeding in which legal or physical custody of a child, parenting time, access, or visitation is adjudicated, including a proceeding relating to divorce, separation, determination of parentage, contested adoption, contested private guardianship, and protection from domestic violence. The term does not include juvenile delinquency proceedings, status offense adjudications, or other quasi-criminal proceedings initiated against a child because of the conduct of the child; or an action brought solely to determine or enforce child support.

(5) “Developmentally appropriate” means structured in a way that will enable a

child to understand and communicate, taking into account such factors as the child’s age, level of education, cultural background, and degree of language acquisition.

(6) “Guardian ad litem” means a person appointed as an assistant to the court to investigate and present the best interests of a child.

### **Comment**

The definitions reflect the range of court-appointed representatives for children that are encompassed by the ABA Custody Standards: child’s attorney, best interests attorney, and guardian ad litem. The definitions do not include the dual role attorney/guardian ad litem found in the ABA Abuse and Neglect Standards. Because of widespread disagreement and confusion about the functioning of the attorney/guardian ad litem for children, this Act does not authorize that hybrid category.

Courts and commentators agree that state law should clearly define the roles of such representatives and should distinguish among the various roles in the terms of the appointment. For purposes of this Act, court appointment means a formal order of the court directing the representative to act on behalf of the child in a designated proceeding or with respect to a designated issue. Although a representative may be court appointed without receiving compensation from the court or other government sources, the order of appointment should clearly delineate the source of any compensation and the method for determining fees. A best interests attorney may only serve under the authority of a court appointment, while a privately retained attorney may function as the child’s attorney without a court appointment. This act, however, governs only court-appointed representatives for children.

The act governs custody proceedings, including abuse and neglect proceedings, but does not extend to juvenile delinquency or other related governmental actions arising from conduct of the child. In the latter category, the quasi-criminal nature of the proceedings triggers constitutional concerns that are not applicable to the abuse and neglect and custody context. See *In re Gault*, 387 U.S. 1 (1967).

### **SECTION 103. SCOPE.**

(a) This [act] governs the powers and duties of court-appointed attorneys and guardians ad litem for children in child custody proceedings, including abuse and neglect proceedings.

1 (b) This [act] does not create, enlarge, or diminish parents' or children's rights  
2 under laws other than this [act].

### 3 **Comment**

4 The act does not govern privately-retained counsel for children since a child or parent  
5 remains free to independently hire a lawyer to represent the child. While it is hoped that  
6 privately retained counsel will adhere voluntarily to the standards announced in the act, the act by  
7 its own force applies only to court appointed counsel and guardians ad litem. At the same time, a  
8 court may formally appoint a lawyer who was initially privately retained, and once such an  
9 appointment occurs, the act's terms apply.

10  
11 The act is not intended to enlarge or diminish children's or parents' rights recognized  
12 under other federal or state laws, except to the extent necessary to implement the act. For  
13 example, the Indian Child Welfare Act authorizes courts to appoint counsel for Indian children in  
14 proceedings governed by the ICWA when such appointment is in the best interest of the child.  
15 See 25 U.S.C. § 1912(b). While the ICWA establishes the federal right to court-appointed  
16 counsel in Indian child welfare proceedings, this act would supplement that right by clarifying  
17 the role of the attorney or guardian ad litem for the child. At the same time, ICWA provides a set  
18 of priorities for the placement of Indian children to promote the goal of maintaining Indian  
19 children within Indian families. See 25 U.S.C. § 1915. That federal goal would necessarily  
20 govern the attorney's representation of an Indian child governed by the federal Act.

21  
22 Similarly, this act does not diminish state laws that afford children standing or the right to  
23 broader participation in custody cases than provided under the act. In a few state, for example, a  
24 child who is the subject of a custody dispute is viewed as an indispensable party to the  
25 proceeding. See, e.g., *In re J.W.F. v. Schoolcraft*, 763 P.2d 1217 (Utah App. 1988). In most  
26 states that have considered the issue, however, courts have concluded that the child does not  
27 occupy formal party status in a custody proceeding. See, e.g., *Auclair v. Auclair*, 730 A.2d 1260  
28 (Md. App. 1999); *J.A.R. v. Superior Court*, 877 P.2d 1323 (Ariz. App. 1994); *In re Marriage of*  
29 *Hartley*, 886 P.2d 665 (Col. 1994). This act establishes guidelines for the appointment of  
30 representatives for children, without regard to a state's position on whether the child should be  
31 recognized as a separate party to a custody proceeding.

1 [ARTICLE] 2

2 APPOINTMENT OF CHILD’S ATTORNEY, BEST INTERESTS ATTORNEY OR  
3 GUARDIAN AD LITEM.

4 SECTION 201. APPOINTMENT OF CHILD’S ATTORNEY OR BEST  
5 INTERESTS ATTORNEY IN ABUSE AND NEGLECT PROCEEDING. In an abuse and  
6 neglect proceeding, the court [may][shall] appoint a child’s attorney or best interests attorney  
7 immediately after the filing of the petition and before the full adversary hearing, to ensure  
8 adequate representation of the child.

9 Comment

10 [In support of a mandatory appointment:] The ABA has long advocated the mandatory  
11 appointment of attorneys for children in abuse and neglect proceedings in addition to the  
12 appointment of guardians ad litem, but federal law does not currently require appointment of  
13 attorneys. As a matter of practice, almost half of the states require the appointment of an  
14 attorney/guardian ad litem for a child in an abuse and neglect proceeding. This section endorses  
15 the ABA position and requires the appointment of counsel for children but leaves the choice  
16 between a best interests attorney or a child’s attorney to judicial discretion. The court should  
17 consider such factors as the age and emotional maturity of the child, the value of an independent  
18 advocate for the child’s best interests, the child’s expressed desire for an attorney, the child’s  
19 expressed objectives in the proceeding, and other circumstances relevant to the child’s case. The  
20 nature of the appointment—whether child’s attorney or best interests attorney--should reflect the  
21 court’s individualized assessment of the child’s interests and the court’s needs in the particular  
22 proceeding.  
23

24 SECTION 202. MANDATORY APPOINTMENT OF GUARDIAN AD LITEM IN  
25 ABUSE AND NEGLECT PROCEEDING.

26 (a) Unless a best interests attorney has been appointed by the court, the court shall  
27 appoint a guardian ad litem to represent the best interests of the child in an abuse and neglect  
28 proceeding immediately after the filing of the petition and before the full adversary hearing.

1 (b) The court may appoint an attorney to serve as a guardian ad litem for a child if  
2 the attorney is appointed to serve solely in that role. An attorney appointed as a guardian ad  
3 litem:

4 (1) may take only those actions that may be taken by a non-attorney  
5 guardian ad litem; and

6 \_\_\_\_\_(2) may not:

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

8 (B) take any action that is restricted to a licensed attorney,  
9 including engaging in discovery other than as a witness, making opening and closing statements,  
10 and examining witnesses.

#### 11 **Comment**

12 This section is consistent with requirements of current federal law regarding the  
13 appointment of guardians ad litem. The Child Abuse Prevention and Treatment Act, 42 U.S.C. §  
14 5106a(b)(2)(A)(xiii), requires that a guardian ad litem be appointed in every judicial proceeding  
15 involving an abused or neglected child. The only exception in this act to the requirement of the  
16 appointment of a guardian ad litem is where a best interests attorney has been appointed to assist  
17 the court in determining the child's best interests. In that situation, the best interests attorney will  
18 satisfy the requirements of CAPTA.

19  
20 This section requires that the terms of the appointment be precise and that it clearly  
21 delineate the powers and duties of the guardian ad litem. CAPTA expressly provides that the  
22 guardian ad litem may be an attorney or a court-appointed special advocate, or both. Although  
23 the federal law may permit an attorney guardian ad litem to serve as an attorney, under this act an  
24 attorney appointed as guardian ad litem is not appointed to serve as an attorney and should  
25 function only as a non-lawyer.  
26

### 27 **SECTION 203. DISCRETIONARY APPOINTMENTS IN CUSTODY** 28 **PROCEEDINGS OTHER THAN ABUSE AND NEGLECT PROCEEDINGS.**

29 (a) In custody proceedings other than abuse and neglect proceedings, the court

1 may appoint one or more of the following :

2 (1) a best interests attorney;

3 (2) a child's attorney; or

4 (3) a guardian ad litem.

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

6 (1) shall:

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

9 (B) balance the child's interests against the cost to the parties that  
10 would result from an appointment, taking into consideration the cost of available alternatives for  
11 resolving issues;

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

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

16 (c) In deciding whether to appoint a best interests attorney or a child's attorney,  
17 the court shall consider the nature and adequacy of the evidence to be presented by the parties  
18 and the court's need for additional information relevant to the best interests of the child.

19 Appointment may be most appropriate in cases that involve ~~or~~ one or more of the following:

20 (1) requests for extraordinary remedies, such as supervised visitation;

21 (2) the possibility of relocation that could substantially reduce the child's  
22 time with a parent or sibling;

(3) the child’s expressed views or concerns, including the child’s request for appointment of a representative;

(4) past or present substance abuse by the child or a party;

(5) disputed paternity;

(6) past or present abduction of the child or risk of abduction;

(7) past or present family violence;

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

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

(10) high level of acrimony between the parties or the parties and the child;

(11) inappropriate adult influence on or manipulation of the child;

(12) interference with custody or parenting time;

(13) the need to minimized harm to the child from the processes of family separation and litigation;

(14) any other factor or circumstance suggesting that the appointment of a child’s attorney or best interests attorney is necessary to protect the child or to enable the court to determine the child’s best interests.

### **Comment**

This section leaves the appointment of attorneys or guardians ad litem for children in custody cases to judicial discretion. In accordance with the ABA Custody Standards, the section enumerates a list of factors for courts to consider in deciding whether the appointment of a child’s attorney, best interests attorney, or guardian ad litem is warranted. The appointment of a lawyer or guardian ad litem for the child in a custody dispute may often be unnecessary and



1 might introduce a potentially intrusive and expensive advocate. On the other hand, in some  
2 circumstances, such as where there are credible allegations of domestic violence, the  
3 appointment of a separate representative for the child may be essential for the court's  
4 determination of the child's best interests.

5  
6 The goal of child representation is not only to advocate a particular outcome but also to  
7 protect children from collateral damage from litigation. A lawyer acting in either role may  
8 ensure that the court is made aware of any views the child wishes to express and that those views  
9 will be given the proper weight under the substantive law. Moreover, the lawyer should select a  
10 method of conveying the child's views that is the least harmful to the child.

11 As noted in the comments to section 201, in deciding whether to appoint a child's  
12 attorney, a best interests attorney, or a guardian ad litem, the court should consider the child's  
13 interests and the court's needs in the particular proceedings. This would include such factors as  
14 the age and emotional maturity of the child, the value of an independent advocate for the child's  
15 best interests, the child's expressed desire for an attorney, the child's expressed objectives in the  
16 proceeding, and other circumstances relevant to the child's case.

17  
18 **SECTION 204. CONTINUED REPRESENTATION.** In abuse and neglect  
19 proceedings, an order appointing the [appropriate state agency] as the child's [custodian,  
20 guardian, or conservator] may provide for continuation of the appointment of a child's attorney,  
21 best interest attorney, or guardian ad litem for a period set by the court.

1 **[ARTICLE] 3**

2 **QUALIFICATIONS.**

3 **SECTION 301. QUALIFICATIONS OF CHILD’S ATTORNEY OR BEST**

4 **INTERESTS ATTORNEY.** A court-appointed child’s attorney or best interests attorney must  
5 be trained in child advocacy in a program determined by the court to meet [statewide] standards  
6 or have experience determined by the court to be equivalent to that training.

7 **Comment**

8 All court-appointed attorneys for children, whether in the role of child’s attorney or best  
9 interests attorney, must have adequate training or experience to discharge their duties with  
10 competence. States are encouraged to adopt state-wide standards of practice for all children’s  
11 attorneys through court rule or rule promulgated by the state bar regulatory agency or otherwise.  
12 Such standards of practice should include a description of required training in applicable  
13 statutory codes, case law and court procedures, the dynamics of child abuse and neglect, child  
14 development and child psychology, treatment issues, communication with children, cultural  
15 awareness, and the impact of separation and long-term consequences to a child of being in  
16 temporary care. Before making an appointment, courts should require lawyers to document their  
17 relevant training and experience. All children’s attorneys and best interests attorneys should  
18 become familiar with the ABA Abuse and Neglect Standards, the suggested amendments to those  
19 standards adopted by the National Association of Counsel for Children, and the ABA Custody  
20 Standards.  
21

22 **SECTION 302. QUALIFICATIONS OF GUARDIAN AD LITEM; ATTORNEY**

23 **AS GUARDIAN AD LITEM.**

24 (a) In a custody proceeding other than an abuse and neglect proceeding the court  
25 may appoint as a guardian ad litem for a child:

26 (1) a non profit organization composed of volunteer advocates whose  
27 training includes the representation of children in private custody disputes; or

28 (2) an individual who has received the court’s approved training regarding

1 the representation of children in private custody disputes and who has been certified by the court  
2 to appear at court hearings as a guardian ad litem for the child.

3 ( b) In an abuse and neglect proceeding, the court may appoint as a guardian ad  
4 litem for the child:

5 (1) a non-profit organization composed of volunteer advocates whose  
6 training includes representation of abused and neglected children; or

7 (2) an individual who has received the court's approved training regarding  
8 the representation of abused and neglected children and who has been certified by the court to  
9 appear at court hearings as a guardian ad litem for the child.

10 (c) The court may appoint an attorney to serve as guardian ad litem for a child if  
11 the attorney meets the qualifications in this section and is specifically appointed to serve solely in  
12 the role of guardian ad litem. An attorney appointed as a guardian ad litem:

13 (1) may take only those actions that may be taken by a non-attorney  
14 guardian ad litem; and

15 (2) may not:  
16 (A) perform legal services in the case; or  
17 (B) take any action that is restricted to a licensed attorney,  
18 including engaging in discovery other than as a witness, making opening and closing statements,  
19 and examining witnesses.

## 20 **Comment**

21 In appointing a guardian ad litem for a child, the court may appoint an individual as  
22 guardian ad litem based on that person's training, ability, and experience in child advocacy. This  
23 section makes clear that if the court appoints an attorney to function as guardian ad litem, that

1 person is not to function as an attorney in the proceeding. Alternatively, the court may identify a  
2 nonprofit organization consisting of volunteer advocates, such as the Court Appointed Special  
3 Advocates (CASA), or a specific volunteer advocate from a list maintained by the court pursuant  
4 to other provisions of state law.

5  
6 As with the training for attorneys for children, the guardian ad litem training should  
7 include instruction on the applicable state and federal law, the dynamics of child abuse and  
8 neglect, child development, treatment issues, communication with children, cultural awareness,  
9 and the impact of separation and long-term consequences to a child of being in temporary care.

1 [ARTICLE] 4

2 POWERS, DUTIES, AND IMMUNITY

3 SECTION 401. DUTIES OF CHILD'S ATTORNEY AND BEST INTERESTS  
4 ATTORNEY.

5 (a) An attorney appointed as a child's attorney or best interests attorney shall,  
6 within a reasonable time after entering an appearance:

7 (1) meet with the child and ascertain the child's needs, circumstances, and  
8 views in a developmentally appropriate manner;

9 (2) investigate the facts of the case to the extent the attorney considers  
10 appropriate, including interviewing persons with significant knowledge of the child's history and  
11 condition;

12 (3) obtain and review copies of relevant records relating to the child as  
13 provided in Section 405 to the extent the attorney considers appropriate;

14 (4) seek to elicit in a developmentally appropriate manner the child's  
15 expressed objectives in the proceeding;

16 (5) present the child's expressed objectives in the proceeding to the court  
17 if the child so desires, using a method that is appropriate in light of the needs of the child's case  
18 and the impact on the child;

19 (6) take any action consistent with the child's best interests that the  
20 attorney considers necessary to expedite the proceedings and the resolution of contested issues;

21 (7) encourage settlement and the use of alternative forms of dispute  
22 resolution when the attorney considers appropriate.

1 **Comment**

2 The general duties of an attorney, whether serving as the child's attorney or as best  
3 interests attorney, include developmentally appropriate communication with the child and  
4 interviews of all parties and persons likely to have significant knowledge of the child's  
5 circumstances. The attorney is in a pivotal position in negotiations and should attempt to resolve  
6 the case in the least adversarial manner possible.  
7

8 In addition, courts must ensure that children's attorneys receive notice and  
9 opportunity to participate in all judicial proceedings affecting the child's welfare. The attorney,  
10 whether child's attorney or best interests attorney, should participate actively in all hearings and  
11 conferences on issues within the scope of the appointment. For a detailed enumeration of the  
12 pretrial and trial responsibilities for children's attorneys, attorneys should refer to Standards III  
13 (F) and (G) of the ABA Custody Standards. Although children's attorneys and best interests  
14 attorneys should diligently investigate the facts, they also must observe all applicable ethical  
15 guidelines governing contacts with represented parties.  
16

17 **SECTION 402. ADDITIONAL DUTIES OF CHILD'S ATTORNEY;**  
18 **SUBSTITUTED JUDGMENT.**

19 (a) A child's attorney owes to the child the duties inherent in the attorney-client  
20 relationship under the laws of this state.

21 (b) A child's attorney shall use the attorney's best efforts to:  
22 (1) provide information to the child about the legal proceedings;  
23 (2) provide advice and counsel to the child; and  
24 (3) explain the nature of the attorney-client relationship to the child,  
25 including the requirements of confidentiality.

26 (c) Subject to subsections (d) and (e), a child's attorney shall follow the child's  
27 expressed objectives of representation during the course of litigation if the child's attorney  
28 determines that the child:

29 (1) is competent to understand the nature of an attorney-client relationship;

1 (2) has formed an attorney-client relationship with the attorney; and  
2 (3) is competent to direct the attorney with respect to the particular issue  
3 involved.

4 (d) If a child's attorney determines that the child cannot meaningfully formulate  
5 the child's objectives of representation in the case or as to a particular issue because the child  
6 lacks sufficient maturity to understand and form an attorney-client relationship or for any other  
7 reason is incapable of making reasonable judgments and engaging in meaningful  
8 communications, the attorney may:

9 (1) request appointment of a guardian ad litem or best interests attorney;  
10 and

11 (2) present to the court a position that the attorney determines will serve  
12 the child's legal interests.

13 (e) If a child's attorney determines that, despite appropriate legal counseling, the  
14 child continues to express objectives of representation that would put the child at risk of  
15 substantial harm, the child's attorney may:

16 (1) request appointment of a guardian ad litem or best interest attorney  
17 without revealing the reason for the request; and

18 (2) continue to represent the child's expressed objectives unless the child's  
19 position is prohibited by law or without factual foundation.

#### 20 **Comment**

21 The child's attorney is in a traditional lawyer/client relationship with the child and, as  
22 such, should explain the meaning and consequences of the child's choices in terms the client can  
23 understand. As in other lawyer/client relationships, the lawyer may express his or her assessment

1 of the case and advise the child of the best goals to pursue. On the other hand, the lawyer must  
2 remain aware that the child may be more vulnerable to manipulation than an adult client. The  
3 lawyer has a duty not to overbear the will of the client. The lawyer may not advocate a position  
4 contrary to the child's expressed position except as permitted by applicable ethical standards.  
5

6 This section reflects the approach of the ABA Abuse and Neglect Standards and the ABA  
7 Custody Standards. A child's attorney is bound by the child's expressed wishes unless pursuing  
8 those wishes would put the child at risk of substantial physical, financial or other harm, and is  
9 not merely contrary to the lawyer's opinion of the child's interests. In most cases, the ethical  
10 conflict involved in asserting a position that would seriously endanger the child can be resolved  
11 through the lawyer's counseling function. If it cannot be resolved, this section permits the  
12 child's attorney to request the appointment of a guardian ad litem or a best interests attorney. A  
13 child's attorney should not reveal the reason for the request unless such disclosure is authorized  
14 by the state's ethics rules on confidentiality. A child's attorney may continue to advocate the  
15 child's expressed wishes unless the child's position is prohibited by law or lacks any factual  
16 foundation. Under ordinary ethical standards, a lawyer may not advocate positions that are not  
17 well grounded in fact and warranted by existing law or a good faith revision of existing law.  
18

19 Under this section, the child's attorney may advocate the legal interests of a child who is  
20 incapable of formulating objectives of representation because of immaturity or other reasons.  
21 "Legal interests," as used here refers to interests that are specifically recognized in law and can  
22 be protected through the courts. These would include, for example, the right of a special needs  
23 child to appropriate educational and medical services, or the right of a child to child support or  
24 governmental benefits. This section does not authorize a lawyer who has been appointed as the  
25 child's attorney to more generally advocate the child's best interests, since that is the province of  
26 the best interests attorney.  
27

### 28 **SECTION 403. ADDITIONAL DUTIES OF BEST INTERESTS ATTORNEY.**

29 (a) A best interests attorney shall advocate for a resolution of the proceeding  
30 consistent with the best interests of the child based on the facts of the case and according to  
31 criteria established by law related to the purposes of the proceeding.

32 (b) A best interests attorney is not bound by the child's expressed objectives but  
33 shall, in a developmentally appropriate manner:

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

35 (2) inform the child that, in providing assistance to the court, the attorney



1 may use information that the child gives; and

2 (3) if the child does not also have a child's attorney:

3 (A) provide information to the child about the legal proceedings;

4 and

5 (B) provide advice and counsel to the child.

6 (c) A child's confidential communications with a best interests attorney are  
7 subject to this state's attorney ethics rules as if the child were the client of the best interests  
8 attorney, except that the attorney may use the child's confidences for the purpose of the  
9 representation without disclosing them.

10 **Comment**

11 The best interests attorney is governed by the state's ethical rules except as dictated by  
12 the absence of a traditional attorney/client relationship with the child and the particular  
13 requirements of the appointment. Under this section, a child's communications with a best  
14 interests attorney are confidential except that *use* of the communications is permitted if necessary  
15 to protect a child's interests. Although some states have permitted the hybrid lawyer/guardian ad  
16 litem to reveal the child's confidential communications to the court where necessary to promote  
17 the child's best interests, *see Clark v. Alexander*, 953 P.2d 145 (Wyo. 1998), this section  
18 provides a more limited exception to the principle of client confidentiality. Thus, a best interests  
19 attorney may use a child's confidential communications for the purpose of the representation  
20 without disclosing them. The distinction between use and disclosure means, for example, that if  
21 a child tells the attorney that a parent uses illegal drugs, the attorney may use that information to  
22 find and present separate evidence of the drug use to the court but may not reveal that the initial  
23 source of information was the child. The best interests attorney should explain to the child that  
24 the child's communications may be used by the attorney in order to achieve the best resolution  
25 for the child in the proceeding.  
26

27 **SECTION 404. DUTIES OF GUARDIAN AD LITEM FOR CHILD.** A guardian ad  
28 litem appointed for a child shall:

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

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

3 (2) investigate the facts of the case to the extent the guardian ad litem  
4 considers appropriate, including interviewing persons with significant knowledge of the child's  
5 history and condition;

6 (3) obtain and review copies of the child's relevant medical,  
7 psychological, and school records as provided by Section 405 to the extent the guardian ad litem  
8 considers appropriate;

9 (b) seek to elicit in a developmentally appropriate manner the child's expressed  
10 objectives in the proceeding;

11 (c) consider the child's expressed objectives in the proceeding without being  
12 bound by them;

13 (d) encourage settlement and the use of alternative forms of dispute when the  
14 guardian ad litem considers appropriate; and

15 (e) perform any specific task directed by the court.

## 16 **Comment**

17 This section describes the traditional function of the guardian ad litem and makes clear  
18 that the guardian ad litem has a duty to conduct an independent investigation in order to ascertain  
19 the facts of the case. That investigation ordinarily would include review of relevant records and  
20 interviews with the people with relevant knowledge of the child. The guardian ad litem also  
21 should advise the child in terms the child can understand about the nature of the proceedings and  
22 the role of the guardian ad litem. Many states have developed more detailed standards governing  
23 the duties of guardians ad litem than those contained in this act. See, e.g., Judicial Council of  
24 Virginia, Standards to Govern the Appointment of Guardians Ad Litem, at  
25 [www.courts.state.va.us/1/cover.htm](http://www.courts.state.va.us/1/cover.htm); There are also numerous sources governing CASA  
26 programs and specifying the duties of CASA volunteers. See, e.g., Office of Juvenile Justice and  
27 Delinquency Prevention, Court Appointed Special Advocates: A Voice for Abused and

1 Neglected Children in Court (1997).  
2

3 **SECTION 405. ACCESS TO CHILD AND INFORMATION RELATING TO**  
4 **CHILD.**

5 (a) Except as otherwise proved in subsection (c), in conjunction with an  
6 appointment under this [act], the court shall issue an order authorizing the child's attorney,  
7 guardian ad litem, or best interests attorney to have immediate access to:

8 (1) the child; and

9 (2) any otherwise privileged or confidential information relating the child.

10 (b) Without requiring a further order or release, the custodian of any relevant  
11 record relating to the child, including records regarding social services, drug and alcohol  
12 treatment, and medical or mental health evaluation or treatment of the child, law enforcement  
13 records, school records, records of a probate or court proceeding, and records of any trust or  
14 account for which the child is a beneficiary, shall provide access to a person authorized pursuant  
15 to subsection (a) to access the records.

16 ( c) A mental health record of a child at least [ ] years of age which is privileged  
17 or confidential under law other than this [act] may be released to a person appointed under this  
18 act only in accordance with that law.

19 **Comment**

20 State law must enable attorneys for children, whether appointed as child's attorney or best  
21 interests attorney, and guardians ad litem to have sufficient information to competently perform  
22 their assigned roles. Relevant files include those concerning child protective services,  
23 developmental disabilities, juvenile delinquency, mental health, and educational agencies. A  
24 lawyer may still need to use subpoenas or other discovery tools to obtain relevant records.  
25

1                   **SECTION 406. PARTICIPATION BY CHILD’S ATTORNEY, BEST**  
2                   **INTERESTS ATTORNEY, OR GUARDIAN AD LITEM IN PROCEEDING.**

3                   (a) A child’s attorney, best interests attorney, and guardian ad litem for a child are  
4                   entitled to:

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

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

8                               (3) participate in any case staffing concerning the child conducted by an  
9                   authorized agency.

10                              (4) review and accept or decline to accept a stipulation for a proposed  
11                   order affecting the child and explain to the court the basis for any opposition.

12                   (b) A guardian ad litem appointed for a child may not call or question a witness or  
13                   otherwise act as an attorney.

14                   (c) The court may compel the guardian ad litem for a child to attend a trial or  
15                   hearing relating to that child and to testify as necessary for the proper disposition of the  
16                   proceeding.

17                   (d) The court shall ensure in a hearing or in a trial on the merits regarding a  
18                   child’s custody that any guardian ad litem for the child has an opportunity to testify or submit a  
19                   report regarding the guardian ad litem’s recommendations regarding:

20                              (1) the best interests of the child; and

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

22                   (e) In a non-jury trial regarding custody of a child, a party may call the guardian ad

1 litem for the child as a witness for the purpose of cross-examination regarding the guardian's  
2 report without the guardian's being listed as a witness by a party. If the guardian is not called as  
3 a witness, the court shall permit the guardian to testify in the narrative.

4 (f) In a contested case regarding a child, a guardian ad litem for the child shall  
5 provide copies of any report by the guardian to the attorneys for the parties as directed by the  
6 court, not later than the earlier of:

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

8 (2) [10] days before commencement of the trial.

9 (g) Disclosure to the jury of the contents of a guardian ad litem's report to the  
10 court is subject to this state's rules of evidence.

#### 11 **Comment**

12 This section makes clear that a child's attorney, a best interests attorney, and a guardian  
13 ad litem are each entitled to receive notice of all hearings and to receive copies of all documents  
14 filed in the case. The right to participate in case staffings will arise in abuse and neglect  
15 proceedings where periodic conferences among court personnel and children's representative are  
16 mandated by state and federal law to assess the child's current placement and future status.  
17 Unlike the child's attorney or the best interests attorney, the guardian ad litem may also testify or  
18 submit a report to the court containing a recommendation as to the child's best interests.  
19

#### 20 **SECTION 407. ATTORNEY WORK PRODUCT AND TESTIMONY.**

21 (a) Except as otherwise provided in subsection (b) and sections 402 and 403, a  
22 child's attorney or a best interests attorney may not:

23 (1) be compelled to produce attorney work product developed during the  
24 appointment as the child's attorney or best interests attorney;

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

1 (3) submit a report into evidence; or

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

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

6 **SECTION 408. IMMUNITY.**

7 (a) A best interests attorney or a guardian ad litem appointed pursuant to this [act]  
8 is not liable for civil damages from an action taken or recommendation or opinion given in the  
9 capacity of best interests attorney or guardian ad litem unless the action, recommendation, or  
10 opinion:

11 (1) was taken or given with conscious indifference or reckless disregard to  
12 the safety of another;

13 (2) was taken or given in bad faith or with malice; or

14 (3) was grossly negligent or wilfully wrongful.

15 (b) Only the child has a right of action in civil damages against the child's  
16 attorney, or the child's best interest attorney, or the child's guardian ad litem.

17 **Comment**

18 This section provides qualified immunity for persons appointed to assist the court as  
19 best interest attorneys or guardians ad litem. The provision of qualified immunity is based on the  
20 recognition that such individuals need protection from civil actions for damages when  
21 performing functions consistent with their appointed roles. Immunity is necessary to ensure that  
22 best attorneys and guardians ad litem can fully investigate and formulate recommendations  
23 without fear of retaliation by the parties. The act does not provide immunity for persons  
24 appointed as a child's attorney, since such lawyers are in a traditional lawyer/client role and  
25 should be held to ordinary standards of care. The act does recognize that only the child has  
26 standing to sue for malpractice or other breach of professional responsibility.

1 [ARTICLE] 5

2 FEES AND EXPENSES.

3 SECTION 501. FEES AND EXPENSES IN ABUSE AND NEGLECT  
4 PROCEEDINGS.

5 (a) In an abuse and neglect proceeding, a child's attorney, best interests attorney,  
6 and guardian ad litem appointed pursuant to this [act], other than a volunteer advocate, are  
7 entitled to reasonable fees and expenses in an amount set by the court.

8 (b) If the court determines that one or more of the parties is able to defray the fees  
9 and expenses set pursuant to subsection (a), the court may:

10 (1) order one or more of those parties to pay the fees and expenses;

11 (2) order one or more of those parties, before final hearing, to deposit the  
12 amount necessary to pay the fees and expenses into the registry of the court or into an account  
13 authorized by the court for the use and benefit of the payee on order of the court; or

14 (3) tax as costs the amount necessary to pay the fees and expenses against  
15 one or more of those parties.

16 (c) If the parents of the child for whom a child's attorney, best interests attorney,  
17 or guardian ad litem is appointed in an abuse or neglect proceeding are found to be indigent, the  
18 fees and expenses set pursuant to subsection (a) must be paid from [designated public funds].

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

21 (d) In order to receive payment of fees and expenses under this section, a person  
22 appointed as a child's attorney, best interests attorney, or guardian ad litem must complete and

1 submit to the court a voucher or claim for payment that lists the fees charged and hours worked.

2 **Comment**

3 Adequate and timely compensation of attorneys and guardians ad litem is essential  
4 throughout the terms of appointment. The child's attorney, best interests attorney, and guardian  
5 ad litem should also have access, where necessary, to reimbursement for experts, investigative  
6 services, research costs, and other activities undertaken to fulfill the obligations of the  
7 appointment. Under the act, state funds should be appropriated and made available to  
8 compensate children's representatives in abuse and neglect proceedings. Under the mandate of  
9 federal law, states are obligated to appoint guardians ad litem for children in abuse and neglect  
10 proceedings. See Child Abuse Prevention and Treatment Act, 42 U.S.C. § 5106a(b)(2)(A)(xiii).  
11 This act supplements the federal requirement by requiring that indigent children receive publicly  
12 funded representation, whether in the form of a child's attorney, best interests attorney, or  
13 guardian ad litem.  
14

15 **SECTION 502. FEES AND EXPENSES IN CUSTODY PROCEEDINGS OTHER**  
16 **THAN ABUSE AND NEGLECT PROCEEDINGS.**

17 (a) In a custody proceeding other than an abuse and neglect proceeding, a child's  
18 attorney, best interests attorney, and guardian ad litem appointed pursuant to this [act], other than  
19 a volunteer advocate, are entitled to reasonable fees and expenses in an amount set by the court.

20 (b) The court shall:

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

24 (2) order a reasonable cost deposit to be made at the time the court makes  
25 the appointment.

26 (c) The court may:

27 (1) allocate the fees and expenses between the parties in proportion to their



1 demonstrated ability to pay;

2 (2) before the final hearing, order an additional amount to be paid to the  
3 credit of a trust account for the use and benefit of the person or persons appointed under this act  
4 as child's child's attorney, best interests attorney, or child's attorney.

5 (d) Except as otherwise authorized by [state law], a court may not award costs,  
6 fees, or expenses under this section to a child's attorney, best interests attorney, or guardian ad  
7 litem against the state, a state agency, or a political subdivision of the state.

#### 8 **Comment**

9 In custody proceedings, courts should make clear to all parties how fees will be  
10 determined and how and by whom the fees are to be paid. Lawyers should be paid in accordance  
11 with prevailing legal standards of reasonableness. This section recognizes that most states do not  
12 have public funds available to compensate children's representatives in custody disputes other  
13 than abuse and neglect proceedings. The ordinary approach will be for the court to assess fees  
14 against the parties, taking into account significant disparities in ability to pay and awarding fees  
15 in proportion to ability to pay. This section recognizes, however, that in some cases public funds  
16 will be available under other provisions of state law for fees and expenses in private custody  
17 disputes.

18  
19 The award of fees and expenses in all cases should include reasonable expenses for expert  
20 witnesses where the attorney or guardian ad litem demonstrates to the court that such expenses  
21 are necessary to accomplish the objective of the proceeding.

1 **[ARTICLE] 6**

2 **MISCELLANEOUS**

3 **SECTION 601. TRANSITIONAL PROVISION.** This [act] applies to custody  
4 proceedings filed on or after the effective date of this [act]. A proceeding filed before the  
5 effective date of this [act] is governed by the law in effect when the proceeding was filed, and the  
6 former law is continued in effect for that purpose.

7 **SECTION 602. EFFECTIVE DATE.** This [act] takes effect on \_\_\_\_\_.