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

(Last Revised or Amended in 2007)

drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES

at its

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WITH PREFATORY NOTE AND COMMENTS

October 9, 2007

* The Conference changed the designation of the Representation of Children in Abuse, Neglect, and Custody Proceedings Act from Uniform to Model as approved by the Executive Committee on January 23, 2009.

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Prefatory Note

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

Several competing proposals have emerged that address representation of children in abuse or neglect proceedings and in custody proceedings. In 1994, the American Academy of

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[1] *See* Marvin Ventrell, *The Practice of Law for Children*, 66 MONT. L. REV. 1 (2005); Barbara Ann Atwood, *Representing Children: The Ongoing Search for Clear and Workable Standards*, 19 J. AM. ACAD. MATRIM. LAW. 801 (2005). The United Nations Convention on the Rights of the Child, available at 28 I.L.M. 1448 (1989), recognizes the child's right of participation, either directly or through a representative, in proceedings affecting the child's interests. *See* Article 12. That right of participation has fueled interest in the role of children's representatives in many of the nations that have ratified the Convention. For a detailed survey of different approaches to child representation throughout the world, see *Yale Representing Children Worldwide Project*, available at www.law.yale.edu/rcw (current through 2005). A summary of this research can be found at Jean Koh Peters, *How Children are Heard in Child Protective Proceedings, in the United States and Around the World in 2005: Survey Findings, Initial Observations, and Areas for further Study*, 6 NEV. L.J. 966 (2006).

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

[3] For a thoughtful exploration of these issues, see JEAN KOH PETERS, REPRESENTING CHILDREN IN CHILD PROTECTIVE PROCEEDINGS: ETHICAL AND PRACTICAL DIMENSIONS (2d ed. 2001). According to Professor Peters, an attorney should develop a relationship with a child over time and interpret the child's wishes in the context of the child's individualized circumstances. Another comprehensive analysis of the legal and ethical issues involved in representing children is ANN M. HARALAMBIE, THE CHILD'S ATTORNEY (1993). Haralambie proposes that children's attorneys should advocate the child's wishes unless they are potentially harmful to the child but should request appointment of a guardian ad litem where the child's wishes are deemed dangerous. She also emphasizes that ethical dilemmas can be minimized or eliminated if children's attorneys spend significant time advising their clients. If children's positions are deemed unreasonable, Haralambie urges lawyers to explain the situation to the children and counsel them about alternatives. *See also* Katherine Hunt Federle, *The Ethics of Empowerment: Rethinking the Role of Lawyers in Interviewing and Counseling the Child Client*, 64 FORDHAM L. REV. 1655 (1996) (exploring ways in which lawyers can [illegible] role *vis a vis* the child client); Catherine Ross, *From Vulnerability to Voice*, 64 FORDHAM L. REV. 1579 (1996) (examining unique importance of counsel for children when children's liberty interests are at stake or when interests of children and parents diverge); Martin Guggenheim, *A Paradigm for Determining the Role of Counsel for Children*, 64 FORDHAM L. REV. 1399 (1996) (advocating that lawyer for young child should focus on enforcing child's legal rights rather than on carrying out child's expressed objectives). For an insightful examination of the child's limited capacity to understand the lawyer-client relationship, see Emily Buss, *Confronting Developmental Barriers to the Empowerment of Child Clients*, 84 CORNELL L. REV. 895 (1999).

Matrimonial Lawyers adopted a set of standards primarily for the divorce context under which lawyers are to advocate the wishes of the "unimpaired" child but can act only as a conduit of information for the "impaired" child.[4] In 1995, the Family Law Section of the American Bar Association proposed a contrasting set of Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases ("ABA Abuse and Neglect Standards"),[5] taking a different approach to the question of children's competence to direct representation. Under the ABA Abuse and Neglect Standards, a lawyer should advocate the child's articulated preference, but if a child will not or does not express a preference, the lawyer should advocate the child's legal interests determined by objective criteria.[6] The ABA Abuse and Neglect Standards take the position that a child's disability as a result of immaturity is incremental and issue-specific. Although these Standards state a preference for a client–directed "child's attorney" model, they also provide for the appointment of an attorney as a guardian ad litem to protect the child's interests.[7] The National Association of Counsel for Children ("NACC") issued its own revised version of the ABA Standards in which it endorsed most of the ABA guidelines but also emphasized the counseling function of the child's lawyer. The NACC Revised Standards caution that the child's lawyer does not owe "robotic allegiance" to each of the child's directives.[8] When the child cannot meaningfully participate in the formulation of a position, the NACC Standards direct the attorney to substitute his or her judgment for that of the child to formulate a position that serves the child's interests.[9] Where the child's wishes may be seriously injurious to the child, the NACC Revised Standards require the attorney to request the appointment of a separate guardian ad litem.[10]

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 abuse and neglect standards promulgated by the ABA and recommended various refinements that derive from the contextual nature of the relationship

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[4] *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) (Standards 2.2, 2.12). For a critique of the AAML approach, see Ann M. Haralambie & Deborah L. Glaser, *Practical and Theoretical Problems with the AAML Standards for Representing "Impaired" Children*, 13 J. AM. ACAD. MATRIM. LAW. 57 (1995).

[5] American Bar Association, *Proposed Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases*, 29 FAM. L. Q. 375 (1995). The ABA formally adopted these standards in 1996.

[6] *Id*. at Standard B-4(1), (2).

[7] *Id*. at Standard A-2.

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

[9] *NACC Revised Standards*, B-4(2).

[10] *Id*., Standard B-4(3).

between an attorney and a child client.[11] The Fordham recommendations direct lawyers to ascertain the child's perspective by understanding the child's world.[12] The American Law Institute added its views in 2002 with the publication of the Principles of the Law of Family Dissolution.[13] 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.[14] More 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).[15] The ABA Custody Standards identify two distinct roles for attorneys who represent children: the "child's attorney," who is in a traditional attorney-client relationship with the child, and the "best interests attorney," who provides independent legal services for the purpose of protecting a child's best interests, without being bound by the child's expressed objectives.[16] The ABA Custody Standards explicitly reject the hybrid attorney/guardian ad litem model because of the confusion and ethical tensions inherent in the blended professional roles. To constrain the discretion of best interests attorneys, the Standards require that the attorney conduct a full investigation and base his or her assessment of the child's interests on "objective criteria set forth in the law" relevant to the particular proceeding.[17] The ABA Custody Standards also provide that best interests attorneys should maintain confidentiality of client communications consistent with ethical guidelines, but the Standards permit the attorneys to use the child's confidences for the purposes of the representation without disclosing them.[18]

Finally, a conference at the University of Nevada, Las Vegas, addressed these matters in 2006 and, like the Fordham Conference, produced its own set of recommendations.[19] The UNLV

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[11] *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).

[12] The influential scholarship of Jean Koh Peters formed a centerpiece of the original Fordham Conference and was also pivotal in the follow-up conference in 2006, held at the Boyd School of Law at the University of Nevada at Las Vegas. *See Proceedings of the UNLV Conference on Representing Children in Families: Children's Advocacy and Justice Ten Years after Fordham*, 6 NEV. L. J. 592-687 (2006) (UNLV Recommendations).

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

[14] *Id.* at § 2.13.

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

[16] *Id*. at Standard II .B.

[17] *Id.* at Standard V.E. & F.

[18] *Id*. at Standard V.B.

[19] *See UNLV Recommendations*, *supra* note 11.

Recommendations endorse a multi-disciplinary child-centered representation and direct children's lawyers to respect children's connections with family and community. Under the UNLV approach, lawyers should seek to empower children by helping them develop decision-making capacity. Regarding the role of the attorney, the UNLV Recommendations strongly support client-directed representation for children capable of making considered decisions,[20] but for children who lack that capacity, the Recommendations propose detailed guidelines to guide the lawyer's exercise of substituted judgment.[21]

State laws vary dramatically on the appointment of representatives for children, with some states emphasizing the unique vulnerability of children and children's need for adult protection and guardianship to determine their interests, while other states affirm a child's right to have his or her wishes presented by a zealous advocate.[22] In the abuse and neglect context, 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.[23] In the context of a private custody dispute outside of child protective proceedings, state laws provide 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.[24]

In light of the marked variation in approaches to children's representation across the United States and the resulting confusion as to representatives' roles and duties, the National Conference of Commissioners on Uniform State Laws decided that this important area could benefit significantly from a uniform law. The Conference concluded that a uniform act would enhance the quality and professionalism of children's representatives in the areas of abuse, neglect, and custody and ultimately would protect the interests of children nationwide.[25]

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[20] As stated in the Recommendations, "[c]hildren's attorneys should take their direction from the client and should not substitute for the child's wishes the attorney's own judgment of what is best for children or for that child." *Id*. at 609. Client directives are not to be followed, however, where the child's preferences would be seriously injurious. *Id.*

[21] *Id.* at 610. Although a lawyer should protect the legal interests of a child who lacks capacity to communicate a position, the Recommendations also propose that the lawyer formulate goals that reflect what the child would want if the child could express a position. *Id.*

[22] *See* Ventrell, *supra* note 7 (reporting that attorney/GAL and traditional attorney are models that have dominated representation of children).

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

[24] 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 role is to represent the child's interests." UNIF. MARRIAGE & DIV. ACT § 310 Comment, 9A U.L.A. 13 (1998).

[25] While this Act is designed for state enactment, American Indian tribes may also find its guidelines useful in administering tribal abuse or neglect proceedings and adjudicating custody disputes that involve Indian children. At least one tribal court has held that a child has a "right to be heard" in a custody dispute, either directly or through

The Act seeks to improve the representation of children in proceedings directly affecting their custody by clearly defining the roles and responsibilities of children's representatives and by providing guidelines to courts in appointing representatives. The Act not only integrates the two sets of standards promulgated by the ABA – the Abuse and Neglect Standards and the Custody Standards – but it also addresses the role of the non-lawyer representative, denominated a "best interests advocate" 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, such as the appointment of guardians ad litem with standing to assert the tort claims of minors or incapacitated adults.

By its inclusive nature, the Act provides standards that differentiate among the various categories of individuals appointed under the Act while indicating where certain core duties are shared by all categories. These objectives are implemented through the definitions set out in Section 2, the standards for the appointment of counsel and best interests advocates in Sections 4-6, the qualifications of counsel and best interests advocates in Sections 7 and 8, the provisions governing orders of appointment in Sections 9 and 10, and the description of core duties and powers in Sections 11-17. Section 18 addresses the child's right of action against appointed representatives and the issue of qualified immunity, a question about which substantial disagreement exists across the United States. Finally, Sections 19 and 20 provide guidelines for compensation of persons appointed under the Act.

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.[26] When a court appoints counsel for a child, the assumption under the Act is that the child usually will be represented by only one lawyer. Nevertheless, the Act permits a court to appoint a second attorney for a child at some point after the original appointment when a court determines that dual legal representation is appropriate.[27]

The child's attorney is in a traditional attorney-client relationship with the child and is therefore bound by ordinary ethical obligations governing that relationship.[28] Under the Act, the

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a court-appointed representative, as a matter of tribal common law. *See* In the Matter of Custody of T.M., 28 Indian L. Rep. 6044 (Navajo Nation 2001).

[26] The Act rejects the hybrid category because it has given rise to a blurring of professional roles where, for example, the same individual functions both as an attorney for the child and a witness in the proceeding. *See* Rule 3.7, American Bar Association Model Rules of Professional Conduct (2004) (generally prohibiting attorney from acting as advocate and witness in same proceeding). In addition, problems have arisen with the dual role approach because of ethical constraints that are inherent in the attorney/client relationship, including in particular the confidentiality of client communications. For judicial recognition of the tensions inherent in the hybrid attorney/guardian ad litem, see *Jacobsen v. Thomas*, 100 P.3d 106 (Mont. 2004); *Clark v. Alexander*, 953 P.2d 145 (Wyo. 1998).

[27] *See* Sections 9(c), 12(d) and (e) and Commentary.

[28] Rule 1.14 of the ABA Model Rules of Professional Conduct provides useful guidance in representing a

child's attorney is 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 in taking positions in the proceeding. Under Section 12, when the child is incapable of directing or refuses to direct representation as to a particular issue, the child's attorney may take a position that is in the child's best interests so long as the position is not in conflict with the child's expressed objectives. The child's attorney may also request appointment of a best interests advocate or a best interests attorney. In contrast, if a child's expressed goals would put the child at risk of substantial harm and the child persists in that position despite the attorney's advice and counsel, the attorney *must* request a best interests advocate or best interests attorney for the child or withdraw from representation and request the appointment of a best interests attorney. Thus, the Act provides mechanisms to protect the attorney-client relationship while still ensuring that evidence of potential harm to the child will be brought to the attention of the court.

The best interests attorney is also in an attorney-client relationship with the child but, in contrast with the child's attorney, is not bound by the child's expressed wishes in determining what to advocate.[29] Instead, the best interests attorney has the substantive responsibility of advocating for the child's best interests based on an objective assessment of the available evidence, including the circumstances and needs of the child, and according to applicable legal principles. Often the best interests attorney's position and the child's stated position will coincide, particularly in light of the attorney's duty to take the child's expressed wishes into account in determining what to advocate and to present the child's wishes to the court if the child so desires. Moreover, the availability of a best interests model of representation is particularly important for those children who are unable or unwilling to direct counsel.[30]

The practical tasks facing a best interests attorney will vary according to context. In contested custody cases, judges generally must resolve access and visitation disputes under a discretionary best interests standard. In abuse and neglect cases, on the other hand, the state's parens patriae authority depends on a demonstrated need to protect children from harm, and judicial discretion is more narrowly circumscribed. In either context, the parties' presentations in an adversarial setting may not be adequate to provide the court with necessary information. Because of the potential impact of these proceedings on the lives of children, many courts want the participation of a best interests lawyer to ensure that they receive an independent presentation of evidence and legal argument that includes but is not limited to the child's stated objectives.[31]

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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).

[29] "Best interests attorney" is a term that was first used in the ABA Custody Standards to avoid the confusion generated by "guardian ad litem." *See* ABA Custody Standards, II. B (Commentary).

[30] For an explanation of the need for a best interests attorney, see Donald N. Duquette, *Legal Representation for Children in Protection Proceedings: Two Distinct Lawyer Roles are Required*, 34 FAM. L.Q. 441 (2000).

[31] *See, e.g.*, Debra H. Lehrmann, *Who Are We Protecting?*, 63 TEX. B.J. 122 (2000).

The lack of clear directives for lawyers who function as best interests attorneys has resulted in varied and conflicting expectations as to their responsibilities. Because disagreement exists over such fundamental questions as whether the lawyer may serve as a witness, be subject to cross-examination, or divulge client confidences, concrete guidelines governing the lawyers' duties and powers are essential.

Section 13 of the Act directs the best interests attorney to advocate for a resolution of the proceeding that is consistent with the child's best interests "according to criteria established by law and based on the circumstances and needs of the child and other facts relevant to the proceeding." In other words, the best interests attorney is not free to rely on subjective bias but should adhere to recognized legal standards, such as those found in statutes, case law, and procedural rules, and should develop a position that reflects the child's unique circumstances. Unlike the child's attorney, the best interests attorney is not bound by the client's expressed objectives, but neither should the best interests attorney disregard the child's preferences. Instead, the best interests attorney has an explicit duty to take into account the child's objectives and the reasoning underlying those objectives, in light of the child's developmental level, in determining what to advocate. *See* Section 13(d).

Significantly, in other respects the best interests attorney serves as a traditional lawyer, and the ethical precepts governing a lawyer-client relationship apply to the best interests attorney's relationship with the child. Under the general duties of representation spelled out in Section 11, the best interests attorney, like the child's attorney, must counsel the child about the consequences of the child's choices and must keep the child informed of the status of the proceedings. Similarly, the best interests attorney must present the child's expressed objectives to the court if the child so desires. Moreover, the best interests attorney may not disclose the child's confidential communications unless otherwise permitted to do so under applicable ethical standards. The best interests attorney, however, may use the child's confidences for purposes of the representation. *See* Section 13(e).

The third category addressed in the Act is the best interests advocate, whose role is to assist the court in determining the child's best interests. The best interests advocate's responsibilities include investigation of the case and, where appropriate, making a recommendation to the court. *See* Section 14. The Act makes clear that the best interests advocate may not perform acts that would be restricted to a licensed attorney, even if the person functioning as best interests advocate holds a license to practice law. The Act also endorses and in no way restricts the widespread use of Court Appointed Special Advocates (CASAs) to fulfill the role of best interests advocate.[32]

[32] The Court Appointed Special Advocate is a lay volunteer who advocates as a non-lawyer on behalf of a child in child abuse and neglect proceedings. Volunteers are screened and trained at the local level, but all CASA programs that are affiliated with the National Court Appointed Special Advocate Association must comply with the standards issued by that organization. *See* www.nationalcasa.org. In addition, many states have established their own standards to ensure that the volunteers representing children are competent and possess relevant training and experience. *See generally* Michael S. Piraino, *Lay Representation of Abused and Neglected Children: Variations on Court Appointed Special Advocate Programs and Their Relationship to Quality Advocacy*, 1 JOURNAL OF CENTER FOR CHILDREN AND THE COURTS 63 (1999). The Office of Juvenile Justice and Delinquency of the United States Department of Justice is authorized to enter into cooperative agreements with the National CASA Association to

An important premise underlying the Act is that an attorney should be appointed for every child who is the subject of an abuse or neglect proceeding. To that end, Section 4 requires the appointment of either a child's attorney or a best interests attorney in such cases.[33] In abuse or neglect proceedings, as defined in the Act, court orders may effectively determine a child's future, including whether the child will remain in his or her home, the nature and duration of any placement outside the home, the child's contact with parents and other relatives, and the child's access to social services. The requirement of appointed counsel rests on the recognition that children's interests in these proceedings are of fundamental importance. Attorneys not only can identify legal issues regarding their child clients based on their understanding of the law but also can use their full panoply of legal skills to ensure the protection of their clients' rights and needs. The Act requires lawyers to provide competent and diligent representation, to participate fully in the conduct of the litigation, to complete a thorough factual investigation, and to be actively and aggressively involved in all stages of the case. Significantly, attorneys can counsel their child clients on the meaning and consequences of a particular legal proceeding and any position the child wishes to take in that proceeding. Moreover, attorneys can assist their child clients in ancillary legal proceedings.[34] Although the role of counsel may vary depending on the developmental level of the child and other factors, legal representation for children can ensure that court orders are based on an accurate, informed, and sensitive assessment of the child's circumstances.

The mandate for appointment of an attorney for every child in an abuse or neglect proceeding is consistent with trends across the United States. Currently, more than half the states require the appointment of an attorney or an attorney/guardian ad litem by statute or case law, and all but about a dozen states regularly appoint attorneys for children as a matter of practice whether or not required to do so by state law.[35] Moreover, at least one federal district court has held that appointment of counsel for every child in the state foster care system is constitutionally required as a matter of procedural due process.[36] Although the mandate of this Act may impose additional

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expand CASA programs nationally. *See* 42 U.S.C.A. § 13013 (2005 & Supp. 2006). One of the key strengths of the CASA program is that a CASA volunteer generally represents only one child at a time. Moreover, an attorney for the child working in tandem with a CASA volunteer can provide a powerful "team" approach in juvenile court. In addition, CASA volunteers may have access to the CASA program's own legal representative for legal advice.

[33] Federal 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) (2000).

[34] 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. The ABA included that principle in standards it developed in collaboration with the Institute for Judicial Administration. *See* ABA/IJA Joint Commission on Juvenile Justice Standards, STANDARDS RELATED TO COUNSEL FOR PRIVATE PARTIES (1976).

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

[36] In Kenny A. ex rel. Winn v. Perdue, 356 F. Supp. 2d 1353 (N.D. Ga. 2005), the court held that every child in foster care within the state was entitled to appointed counsel as a matter of procedural due process under the

financial costs on those few states that do not currently provide for legal representation for children in abuse and neglect cases, the drafters of the Act believe that the incomparable benefit to children and overall society of an improved child welfare system outweighs those monetary costs.

The mandate for appointment of an attorney for a child also has implications for a state's compliance with federal law. The federal Child Abuse Prevention and Treatment Act (CAPTA) requires the appointment of a "guardian ad litem" for a child as a condition of receiving federal funds for child abuse prevention and treatment programs, but the role and identity of that representative are largely undefined.[37] The statute expressly permits the guardian to be a lawyer, and the statutory duty of that appointed representative is to carry out a thorough investigation and "to make recommendations to the court concerning the best interests of the child."[38] In response to CAPTA, almost all states now require some form of child representation in abuse and neglect proceedings, but the role of the representative ranges from lay guardian to legal counsel. The appointment of a best interests attorney presumably would satisfy the CAPTA requirement in light of the best interest attorney's role as defined in Section 13. A child's attorney might also satisfy the CAPTA mandate, since representation by a child's attorney ultimately will promote the child's best interests. The responsibilities of the child's attorney include the duty to counsel the child about the consequences of the child's choices and to assist the child in choosing options that will not expose the child to a risk of substantial harm. Nevertheless, some states may choose to require a best interests advocate if the attorney appointed for the child is not a best interests attorney in order to receive an independent assessment of the child's best interests. For that reason, the Act provides two alternative approaches to permit states to choose whether to mandate such an additional appointment. *See* Section 5 and Comment. Under the first alternative in Section 5, the appointment of a best interests advocate is required unless the attorney appointed for the child is a best interests attorney. In contrast, under the second alternative, the appointment of a best interests advocate is discretionary when either a child's attorney or a best interests attorney has been appointed for the child in an abuse or neglect proceeding.

In custody proceedings, the Act leaves to judicial discretion the question of appointing a child's representative. There are significant benefits to appointing a representative for a child when the court has a special need for guidance and information in determining the child's best interests. Moreover, when a child has expressed a viewpoint and desires an advocate, the appointment of counsel may be particularly appropriate. On the other hand, the appointment of a representative for the child in some circumstances may exacerbate acrimony between the parties,

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Georgia state constitution. Significantly, the Georgia constitutional provision tracks the federal Due Process Clause, and the court relied on interpretations of the Due Process Clause in the federal Constitution in its analysis.

[37] *See* 42 U.S.C.A. § 5106a(b)(2)(A)(xiii) (2003), 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."

[38] *Id.*

pressure the child to choose between parents, or unduly burden the parties' financial resources. Thus, the court should consider the child's interests, the court's needs, and the financial burden on the parties before making an appointment. Section 6 provides a list of factors that may suggest a particularized need for the appointment of a representative, but the decision of whether to appoint a representative in any given context remains within the court's discretion.[39]

While the Act sets out basic guidelines for the appointment and role of attorneys and best interests advocates, states can provide more detailed guidelines through separate standards of practice. Standards are in effect in many states that address ethical concerns, specific training and experience requirements, and other professional issues facing children's representatives.[40] Through Sections 7 and 8 of this Act, states may incorporate by reference any standards the state has adopted relating to qualifications and training of children's representatives.

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

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

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

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

SECTION 2. DEFINITIONS. In this [act]:

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

(2) "Best interests advocate" means an individual, not functioning as an attorney, appointed to assist the court in determining the best interests of a child.

(3) "Best interests attorney" means an attorney who provides legal representation for a child to protect the child's best interests without being bound by the child's directives or objectives.

(4) "Child's attorney" means an attorney who provides legal representation for a child.

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

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

Comment

The definitions in the Act parallel the categories of attorneys for children that are set forth in the ABA Custody Standards: child's attorney and best interests attorney. *See* American Bar Association, *Standards of Practice for Lawyers Representing Children in Custody Cases*, 37 FAM. L. Q. 131 (2003). The Act also includes appointment of a person sometimes described as a non-lawyer "guardian ad litem," but the Act uses the new term "best interests advocate" in order to avoid the widespread disagreement and confusion about the meaning of "guardian ad litem" and the duties of a person in that role. Under the Act, a "child's attorney" is a client-directed lawyer in a traditional attorney-client relationship with the child. A "best interests attorney" also provides legal representation to a child and performs as a traditional attorney with one key difference: the best interests attorney is not bound by the child's expressed wishes in determining what to advocate, although the attorney must consider the child's preferences. The meaning of "child"

may vary according to state law and will be defined by state law for purposes of this Act.

The "best interests advocate" assists the court in determining the best interests of a child and will therefore perform many of the functions formerly attributable to guardians ad litem, but the Act makes clear that best interests advocates are not to function as attorneys. Instead, a best interests advocate will independently investigate the child's circumstances and may sometimes testify in the case about the child's best interests. *See* Section 14. Similarly, because the role of attorney, whether child's attorney or best interests attorney, is functionally and ethically inconsistent with that of a guardian ad litem, the Act does not endorse the hybrid role of attorney/guardian ad litem employed in numerous states. At the same time, best interests advocates may have their own legal representation, and the Act has no impact on that practice.

"Best interests attorney" is a term of art that was introduced by the ABA in developing the Custody Standards and signifies an independent legal representative for a child client who advocates positions in the proceeding that will serve the child's interests even if those positions are not identical with the child's expressed views. In other respects, however, the best interests attorney performs the same duties of representation that are performed by the child's attorney, including the duty to provide advice and counsel to the child and the duty to inform the court of the child's expressed objectives if the child so desires. *See* Sections 11 and 13. Several jurisdictions have authorized attorneys to function in the same capacity as best interest attorneys but have denominated them differently. *See, e.g.*, VERNON'S TEX. CODE ANN. FAMILY CODE § 107.021 (amicus attorney); MICH. COMP. LAWS ANN. 712A.17d (West 2006) (lawyer-guardian ad litem); 750 Ill. Comp. Stat. Ann. § 5/506 (West 2006) (child representative).

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

Under the definitions of this Act, abuse or neglect proceedings include child protection proceedings ordinarily brought in juvenile court, such as dependency actions and foster care placements, as well as actions to terminate parental rights. A custody proceeding, in contrast, includes other court proceedings in which the child's legal or physical custody is at issue, such as divorce or dissolution, separation, determination of parentage, contested adoptions, contested private guardianships, or protection from domestic violence or harassment. States may wish to specify that other actions that affect the child's physical and legal custody, such as mental health civil commitment proceedings, also qualify as custody proceedings.

In some circumstances, credible and serious allegations of abuse or neglect will surface in a custody proceeding. If the court determines that the case should go forward as an abuse or neglect proceeding (ordinarily entailing a transfer to juvenile court), then this Act's terms

regarding abuse or neglect proceedings–including, in particular, the mandatory appointment of counsel for the child–will govern. In some states a custody case can be referred to juvenile court for investigative purposes. Such a referral would not in itself transform the proceeding into an abuse or neglect proceeding unless a dependency petition were filed as a result of the referral.

SECTION 3. APPLICABILITY AND RELATIONSHIP TO OTHER LAW.

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

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

Comment

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

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

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

State law varies on children's procedural status in abuse, neglect, and custody proceedings. In several states, children are viewed as parties to abuse or neglect proceedings and have the right to participate through their representatives in all stages of the proceedings. *See, e.g.*, MINN. STAT. ANN § 260C.163(2) (child who is subject to petition for protection has right to participate in all proceedings); In re Williams, 805 N.E.2d 1110 (Ohio 2004) (child is party to parental rights termination action and has right to legal counsel). In other states, children are non-parties whose rights of participation are more limited. In the Matter of Comm'r of Soc. Serv's on Behalf of R.S., 647 N.Y. Supp. 2d 361 (NY Fam. Ct. 1996) (child is not party to child protective proceeding

and therefore cannot be deposed as party); In re Anthony S., Jr., 675 N.Y. Supp. 2d 759 (NY Fam. Ct. 1998) (child is not party to termination of parental rights proceeding and therefore cannot seek relief from judgment). In child custody disputes, children typically are not viewed as parties and are not permitted to become parties through intervention. *See, e.g.*, Auclair v. Auclair, 730 A.2d 1260 (Md. App. 1999); J.A.R. v. Superior Court, 877 P.2d 1323 (Ariz. App. 1994); In re Marriage of Hartley, 886 P.2d 665 (Col. 1994). On the other hand, in at least one state, a child who is the subject of a custody dispute is viewed as an indispensable party to the proceeding. *See,* e.g., In re J.W.F. v. Schoolcraft, 763 P.2d 1217 (Utah App. 1988). Alternatively, some states may prefer to treat the issue as a matter of permissive joinder rather than mandatory joinder. *See, e.g.*, REVISED CODE WASH. ANN. § 26.26.555 (2006) (child is permissible but not necessary party in parentage action). At the same time, even where children are not viewed as formal parties, they often have many of the rights of parties as a practical matter.

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

SECTION 4. MANDATORY APPOINTMENT IN ABUSE OR NEGLECT PROCEEDING.

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

(b) In determining whether to appoint a child's attorney or a best interests attorney, the court may consider such factors as the child's age and developmental level, any desire for an attorney expressed by the child, whether the child has expressed objectives in the proceeding, and the value of an independent advocate for the child's best interests.

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

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

Comment

This section requires the appointment of an attorney for every child who is the subject of

an abuse or neglect proceeding because of the fundamental importance of the interests at stake. Although the nature of the attorney's role may vary from case to case, the child's right to legal representation is a function of basic procedural justice. In abuse or neglect cases, court orders may effectively determine a child's future life, including family contact and family identity, educational services, geographic location, and cultural affiliation. The appointment of an attorney for the child protects the dignity of the child and helps ensure that the court will make an informed and sensitive decision based on a full understanding of the child's views and circumstances. Under subsection (d), the child's right of representation is not subject to waiver by the child or anyone acting on behalf of the child.

As a condition of receiving federal funding for child abuse prevention and treatment programs, states must appoint a "guardian ad litem" in every judicial proceeding involving an abused or neglected child. *See* Child Abuse Prevention and Treatment Act, 42 U.S.C.A. §5106a(b)(2)(A)(xiii) (2003) ("CAPTA"). Prior to CAPTA's enactment in 1974, few states provided children with independent representation in abuse and neglect proceedings. With its incentive of federal funding, CAPTA has led to almost universal appointment of guardians ad litem–either a lawyer or a non-attorney advocate–in juvenile court child protection proceedings. *See generally* Howard A. Davidson, *Child Protection Policy and Practice at Century's End*, 33 FAM L.Q. 765 (1999). This Uniform Act goes a step further than CAPTA and requires the appointment of either a child's attorney or a best interests attorney for every child involved in an abuse or neglect proceeding. For discussion of whether the appointment of either a child's attorney or best interests attorney satisfies CAPTA, see Comment to Section 5.

The Act leaves the choice between a best interests attorney or a child's attorney to judicial discretion. To the extent feasible, the court should review the child's file, reports from case workers, and any other available sources of information regarding the child's circumstances and capacities before making the initial appointment. Because of the exigencies of many abuse and neglect proceedings, however, courts often must act quickly in appointing attorneys for children. For practical purposes, judges who lack detailed information about a child's circumstances may need to use the child's age as a rough measure for purposes of the initial designation of an attorney's role. Ordinarily, a child's attorney would be appropriate for an older child capable of communicating and exercising considered judgment. If a child has voiced a desire for a lawyer, that request typically would weigh on the side of appointing a child's attorney to provide the child with a traditional advocate. A best interests attorney, in contrast, would be appropriate for a nonverbal or very young child incapable of expressing a considered decision about issues that are relevant to the proceeding.

Nevertheless, a child's capacity to direct counsel is contextual and incremental and is not simply a function of chronological age. An attorney appointed as a best interests attorney may ask the court to be redesignated as a child's attorney after meeting with the child and concluding that the role of child's attorney is more appropriate. Determinations about capacity should be grounded in insights from child development science and should focus on the child's decision-making process rather than the child's choices themselves. Moreover, because of the evolving nature of children's competencies, a child for whom a best interests lawyer is appropriate at one hearing or proceeding may have matured sufficiently to warrant the appointment of a child's

attorney at a later hearing or proceeding. Section 9(c) recognizes the authority of a court to change the nature of an attorney's appointment from best interests attorney to child's attorney based on new information or a request from the original appointee.

The disjunctive in subsection (a) makes clear that the court may not appoint a child's attorney and a best interests attorney for the same child in the original order of appointment. Dual representation by two lawyers functioning in different roles would likely be confusing to the child and could result in the lawyers taking different positions in court for the same child client. Although the court may appoint an attorney and a best interests advocate for the same child in the original order of appointment, that form of dual representation does not pose the same tensions as would representation by two competing lawyers. In unusual circumstances, however, a court may determine after the original appointment that appointment of a second attorney for a child is warranted by the needs of the case. This Act permits such an appointment in the discretion of the court. *See* Sections 9(c) and 12(d) and (e).

This section permits the appointment of a single lawyer for two or more siblings, even if that lawyer is acting as child's attorney for one sibling and best interests attorney for another. A lawyer for multiple siblings may have a better understanding of the children's family context than would a lawyer for only one sibling. Thus, the presence of a *potential* conflict of interest should not preclude the representation of multiple siblings. On the other hand, if an *actual* conflict of interest arises, joint representation would be inappropriate. If an attorney represents siblings and a conflict arises, the attorney should take action required by the rules of professional conduct. If the representation of one child is materially limited by the lawyer's responsibilities to another child (where, for example, one child seeks to establish parental unfitness and another opposes the production of such evidence), the attorney must take remedial steps and may be forced to withdraw from some or all representation. *See* Rule 1.7, ABA Model Rules of Professional Conduct (2004). Key concerns are whether pursuing one client's objectives will prevent the lawyer from pursuing another client's objectives, and whether confidentiality will be compromised. *See* JENNIFER L. RENNE, LEGAL ETHICS IN CHILD WELFARE CASES 47-60 (ABA 2004).

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

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

SECTION 5. APPOINTMENT OF BEST INTERESTS ADVOCATE IN ABUSE OR NEGLECT PROCEEDING.

Alternative A

(a) In an abuse or neglect proceeding:

(1) if the court does not appoint a best interests attorney, the court shall appoint a best interests advocate before the first court hearing that may substantially affect the interests of the child; or

(2) if the court appoints a best interests attorney, the court may appoint a best interests advocate if the court determines that a best interests advocate is necessary to assist the court in determining the best interests of the child.

(b) In determining whether a best interests advocate is necessary under subsection (a)(2), the court shall consider such factors as the court's need for information and assistance, the circumstances and needs of the child, the value of a best interests advocate's expertise and experience, and any request for the appointment of a best interests advocate.

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

Alternative B

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

(b) In determining whether a best interests advocate is necessary under subsection (a), the court shall consider such factors as the court's need for information and assistance, the circumstances and needs of the child, the value of a best interests advocate's expertise and experience, and any request for the appointment of a best interests advocate.

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

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

Comment

This section permits states to decide whether to require a best interests advocate under

certain circumstances. Because some states may want to ensure that a best interests representative will always participate in the proceeding, Alternative A requires a best interests advocate whenever the court has not appointed a best interests attorney for the child. At the same time,Alternative A permits the appointment of a best interests advocate as a matter of discretion even when a best interests attorney has been appointed. Alternative B, in contrast, treats the appointment of a best interests advocate as always a matter of judicial discretion to be determined on a case-by-case basis. Both alternatives provide factors to guide the courts in deciding whether a best interests advocate is needed in the case, including an advocate's relevant expertise and experience and any express request for an advocate. Such a request would typically come from the child's lawyer but also might come from the parties or their representatives.

The options within this section may have implications for a state's compliance with federal law. As a condition of receiving federal funding for child abuse prevention and treatment programs, states must appoint a "guardian ad litem" for every child who is the subject of an abuse or neglect proceeding. Child Abuse Prevention and Treatment Act, 42 U.S.C.A. § 5106a(b)(2)(A)(xiii) (2003) ("CAPTA"). *See* Comment to Section 4. The federal Act does not define the role of the guardian ad litem beyond stating that the guardian, who may be an attorney or court appointed special advocate, shall "(I) obtain first-hand, a clear understanding of the situation and needs of the child; and (II) make recommendations to the court concerning the best interests of the child." *Id*. While some states view either a best interests attorney or a child's attorney as fulfilling CAPTA's guardian ad litem requirement, other states may interpret CAPTA more narrowly. For an analysis of the meaning of the CAPTA requirement, see In re Charles, 102 Cal. App. 4th 869, 125 Cal. Rptr. 2d 868 (Cal. App. 2002) (holding that appointment of legal counsel satisfies CAPTA because counsel has duty to advocate for protection of child, present evidence, advise court of child's wishes, and investigate interests of child beyond dependency). For those states that interpret CAPTA to always mandate a best interests representative, Alternative A requires a best interests advocate unless the court has appointed a best interests attorney. Alternative B, on the other hand, would be appropriate for those states that view CAPTA's requirement as fully satisfied by the appointment of either a child's attorney or a best interests attorney.

CAPTA's language on its face requires the appointed representative "to make recommendations to the court concerning the best interests of the child." *See* 42 U.S.C.A. § 5106a(b)(2)(A)(xiii) (2003). A best interests attorney by definition should satisfy CAPTA, since that attorney's role is to provide legal representation for a child to protect the child's best interests. Although the best interests attorney cannot submit a recommendation to the court as a witness, *see* Section 17, the attorney ordinarily will develop a position in the proceeding regarding the child's interests after a full investigation and advocate that position through legal argument based on admissible evidence. Even apart from CAPTA, courts may want an independent assessment of best interests to ensure a complete presentation of evidence. *See, e.g.*, Debra H. Lehrmann, *Who Are We Protecting?*, 63 TEX. B.J. 122 (2000).

The child's attorney also may satisfy CAPTA, and states that require appointment of legal "counsel" for children in child protection proceedings have not been held to be out of compliance with CAPTA. *See, e.g.*, MASS. GEN. LAWS ANN.119 §29 (2006) (requiring appointment of "counsel" for child in child protection proceedings); WEST'S ANN. CODE OF MD. §3-813 (2006)

(same). A child's attorney must perform myriad services on the child's behalf to ensure protection of the child's legal rights and interests, including counseling of the child, full investigation of the case, and facilitating settlement where appropriate. Also, when the child cannot or does not direct the attorney as to a particular issue–a frequent occurrence with a young client–the child's attorney may advocate a position the lawyer determines is in the child's best interests so long as it is not inconsistent with the child's expressed objectives. *See* Section 12(d)(1). Moreover, the attorney must take remedial action if the child's expressed objectives will subject the child to a risk of substantial harm. *See* Section 12(e). Thus, a child's attorney arguably facilitates the court's resolution in the child's best interests by fulfilling the many responsibilities imposed by this Act. For these reasons, the second bracketed option in this section treats the appointment of a best interests advocate as discretionary when either a child's attorney or best interests attorney has been appointed. In support of this more flexible interpretation of the CAPTA guardian ad litem requirement, see U.S. Department of HHS Children's Bureau, *Adoption 2002: The President's Initiative on Adoption and Permanence for Children,* Commentary to Guideline 15A.

SECTION 6. DISCRETIONARY APPOINTMENT IN CUSTODY PROCEEDING.

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

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

(1) any desire for representation or participation expressed by the child;

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

(3) the likelihood that the child will be called as a witness or be questioned by the court in chambers and the need to minimize harm to the child from the processes of litigation;

(4) any level of acrimony that indicates a lack of objectivity of the parties regarding the needs of the child;

(5) any interference, or threatened interference, with custody, access, visitation, or parenting time, including abduction or risk of abduction of the child;

(6) the likelihood of a geographic relocation of the child that could substantially reduce the child's time with:

(A) a parent;

(B) a sibling; or

(C) another individual with whom the child has a close relationship;

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

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

(9) any dispute as to paternity of the child.

(c) If the court determines to make an appointment under subsection (a), in deciding whether a child's attorney, best interests attorney, or best interests advocate is appropriate, the court shall consider such factors as the child's age and developmental level, any desire for an attorney expressed by the child, whether the child has expressed objectives in the proceeding, the value of an independent representative for the child's best interests, and the value of a best interests advocate's expertise and experience.

Comment

This section leaves the appointment of an attorney or best interests advocate for children in custody cases to judicial discretion, but courts should recognize the significant benefit in having a representative for a child under certain circumstances. 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 the harmful collateral effects of litigation. For a discussion of the value of legal representation when the interests of children and parents diverge, see Catherine Ross, *From Vulnerability to Voice,* 64 FORDHAM L. REV. 1579 (1996).

The introductory paragraph of subsection (b) identifies general considerations that courts should take into account in determining whether to appoint a 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. When issues involving parentage, relocation, or custodial interference are raised, the appointment of a representative for the child may be helpful to the court in resolving the underlying legal and factual questions. In

circumstances where a parent's conduct poses a risk of harm to the child or others, such as cases involving domestic violence, child abuse, or substance abuse, the appointment of an independent representative for the child may be necessary for the court to reliably determine the evidentiary issues in the case. Representation for the child may be particularly important where intra-familial violence distorts the litigation process itself by creating serious imbalances of power. Indeed, in some jurisdictions, family courts may refer custody proceedings to the juvenile court for investigation of allegations of abuse or neglect. In that circumstance, even if the case does not ultimately become an abuse or neglect proceeding, the appointment of a representative for the child could enhance the court's understanding of the child's circumstances and needs, including the child's expressed preferences.

The determination of which category of representative to appoint is addressed in subsection (c). The decision to appoint a child's attorney, best interests attorney, or best interests advocate 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 a case involving an emotionally disturbed child, for example, the appointment of a mental health professional as best interests advocate may be particularly helpful, while in a proceeding involving an older child with defined views, a child's attorney may be appropriate. In contrast, a preverbal child in the middle of a bitter and protracted custody dispute may need representation through a best interests attorney.

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

SECTION 7. QUALIFICATIONS OF CHILD'S ATTORNEY OR BEST INTERESTS ATTORNEY. The court may appoint as a child's attorney or best interests attorney only an individual who is qualified through training or experience in the type of proceeding in which the appointment is made [, according to standards established by [insert reference to source of standards]].

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

Comment

All court-appointed attorneys for children, whether in the role of child's attorney or best interests attorney, must have adequate training or experience to discharge their duties with competence. States are encouraged to adopt state-wide standards of practice for all children's attorneys through court rule or rule promulgated by the state bar or other regulatory agency. Standards of practice should include a description of required training in applicable statutory codes, case law and court procedures, including state law relevant to divorce, child custody, child support, domestic violence, adoption, paternity, child welfare, and other regulations of family life. Relevant state laws would also include the uniform acts regulating inter-state custody and support disputes, such as the Uniform Child Custody Jurisdiction and Enforcement Act, 9 U.L.A. 649 (1999 & Supp. 2003), the Uniform Interstate Family Support Act, 9 U.L.A. pt. IB at 253 (1999), and the new Uniform Child Abduction Prevention Act.

In addition, lawyers representing children should be familiar with federal law pertaining to family regulation, children's health care, educational policy, and other areas relevant to child protection. Relevant laws in the child protection and foster care arena include such statutes as the Child Abuse Prevention and Treatment Act (CAPTA), Pub. L. No. 93-247, 88 Stat. 4 (codified as amended at 42 U.S.C. §§ 5101-5116); the Adoption and Safe Families Act, Pub. L. No. 105-89, 111 Stat. 2115 (codified at scattered sections of 42 U.S.C.); the Promoting Safe and Stable Families Amendments of 2001, Pub. L. No. 107-133, 115 Stat. 2414 (2002) (codified at 42 U.S.C. §§ 629-677 (Supp. 2002) (expanding programs under titles IV-B and IV-E of Social Security Act); and the Indian Child Welfare Act, Pub. L. No. 95-608, 92 Stat. 3071 (1978) (codified at 25 U.S.C. §§ 1901-63). Federal statutes impacting children's privacy rights include the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232(g) (2000) (commonly referred to as "Buckley Amendment"), and the Health Insurance Portability and Accountability Act of 1996, Pub. L. No.104-191, 110 Stat. 1936 (codified at scattered sections of 29 U.S.C. and 42 U.S.C.). Children's lawyers should also be familiar with the Violence Against Women Act, Pub. L. No. 103-322, Title IV, 108 Stat. 1902 (1994) (codified as amended at scattered sections of 8, 18, and 42 U.S.C.), the Parental Kidnapping Prevention Act, 28 U.S.C. § 1738 (2000), and federal immigration laws affecting parents and children. Significantly, in cases involving abused or neglected children, the 2003 amendments to CAPTA require that guardians ad litem, including attorneys and court appointed special advocates, receive training appropriate to their roles. *See* 42 U.S.C.A. § 5106a(b)(2)(A)(xiii) (2003).

In addition, children's lawyers should have knowledge of child development and child psychology, the dynamics of child abuse or neglect, the impact of domestic violence, the long-term consequences of separation from primary caregivers and placement in temporary care, and the central role of culture and ethnicity in family relations and children's identities. Children's lawyers should be trained in communicating with children and should understand the significance of cognitive development, culture, socio-economic factors, and abuse on a child's linguistic abilities. *See generally* ANNE GRAFFAM WALKER, HANDBOOK ON QUESTIONING CHILDREN (ABA 1999). Moreover, familiarity with the ABA Abuse and Neglect Standards, the revisions of those standards adopted by the National Association of Counsel for Children, and the ABA Custody Standards would be helpful before accepting an appointment to represent a child. *See* Prefatory Note (discussing variations in proposed standards). Finally, the training of children's lawyers should be conducted on an ongoing basis. Mandatory periodic training requirements exist in many states to ensure that children's counsel continue to meet standards of competence over time.

For resources to improve the quality of child representation in child welfare cases, see ABA Center on Children and the Law, *Child Welfare Court Improvement*, available at http://www.abanet.org/child/rclji/courtimp.html.

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

In making an appointment under this Act, the court should ensure that the attorney's caseload is not so burdensome as to undermine his or her ability to competently serve as the child's representative and to fulfill all the duties identified in Sections 11-13. *See* ABA Abuse and Neglect Standards L-1, 29 FAM. L.Q. 375 at 405 (recognizing duty of trial courts to control size of court-appointed caseloads in abuse and neglect cases). For effective representation, a lawyer must be able to engage in certain essential tasks, including meeting with his or her client, interviewing relevant witnesses, conducting investigation and discovery, and reviewing records pertaining to the child. Moreover, lawyers for children in the abuse and neglect context must monitor the implementation of court orders and agency case plans. In a commendable set of policies, the National Association of Counsel for Children has recommended that a full time attorney in child protection proceedings represent no more than 100 children at a time, assuming a caseload that includes clients at various stages of cases and some clients who are part of the same sibling group. *NACC Recommendations for Representation of Children in Abuse and Neglect Cases (2001), available at http://www.naccchildlaw.org/documents/naccrecommendations.doc. See also Kenny A. ex rel. Winn v. Perdue*, 356 F. Supp. 2d 1353, 1362 (N.D. Ga. 2005) (citing testimony of Marvin Ventrell, NACC Executive Director). In many instances, a smaller case load will be appropriate.

SECTION 8. BEST INTERESTS ADVOCATE: QUALIFICATIONS AND LIMITATIONS.

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

(b) An attorney appointed as a best interests advocate may take only those actions that may be taken by a best interests advocate who is not an attorney.

(c) The appointment of a best interests advocate does not create a professional relationship between the advocate and the child unless such a relationship is expressly established in the order of appointment.

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

Comment

In appointing a best interests advocate for a child, the court must ensure that the individual is qualified based on training, ability, and experience in child advocacy. As with the training for attorneys for children, the best interests advocates' training should be required on an ongoing basis. Best interests advocates should have knowledge of child development and child psychology, the dynamics of child abuse and neglect, the impact of domestic violence, the impact of separation and the long-term consequences to a child of being in temporary care, and treatment and rehabilitation systems. They should be trained in communication with children and should understand the role of cultural identity in personality formation, family life, and social interaction. Best interests advocates should also be familiar with applicable state and federal law relevant to abuse, neglect, and custody proceedings.

The category of "best interests advocate" is intended to encompass the role of the volunteer advocate, such as an individual designated as Court Appointed Special Advocate (CASA). A CASA, generally assigned to advocate for a single child in an abuse or neglect proceeding, can provide the court with a unique understanding of the child's circumstances and can be a powerful advocate for getting needed services to the child. Where CASA programs are available, judges recognize the value of the CASA volunteer's input and typically make the appointment at the outset of a proceeding. *See* Michael S. Piraino, *Lay Representation of Abused and Neglected Children: Variations on Court Appointed Special Advocate Programs and Their Relationship to Quality Advocacy*, 1 J. CENTER CHILD. & CTS. 63 (1999). As a practical matter, many courts rely on private or governmental programs for lists of volunteer advocates, or a specific volunteer list maintained by the court pursuant to other provisions of state law. Although such programs may be designated in the initial order of appointment on a temporary basis pursuant to Section 9, the program should identify the particular individual who will function as the best interests advocate as soon as feasible.

This section makes clear that if the court appoints an attorney to function as best interests advocate, that person is not to function as an attorney in the proceeding. The Child Abuse Prevention and Treatment Act, 42 U.S.C.A. § 5106a(b)(2)(A)(xiii) (2003) ("CAPTA"), expressly provides that the guardian ad litem may be an attorney or a court-appointed special advocate, or both. *See* Comment to Section 5. Although CAPTA may permit an attorney guardian ad litem to serve as an attorney, under this Act an attorney appointed as best interests advocate (including an attorney serving as a CASA) is not appointed to provide legal representation and should function only as a non-lawyer. Similarly, the appointment of a best interests advocate does not in itself create a therapist-patient relationship or other professional relationship between the best interests advocate and the child. Thus, unless the order of appointment expressly states otherwise, a child's communications with a best interests advocate appointed under this Act are not privileged.

Social workers, counselors, and therapists are often appointed as guardians ad litem for children because of their valuable expertise in mental health, child development, and family

dynamics, but the use of guardians ad litem in custody disputes has come under sharp attack in recent years, based in part on the lack of clear guidelines for their role. *See, e.g.*, Richard Ducote, *Guardians Ad Litem in Private Custody Litigation: The Case for Abolition*, 3 LOY. J. PUB. INT. L. 106 (2002). This Act, using the terminology of "best interests advocate," requires standards for qualifications and performance in order to avoid the problem of unconstrained discretion.

SECTION 9. APPOINTMENT ORDER.

(a) Subject to subsection (b), an appointment of a child's attorney, best interests attorney, or best interests advocate must be in a record, identify the individual who will act in that capacity, and clearly set forth the terms of the appointment, including the grounds for the appointment, rights of access as provided under Section 15, and applicable terms of compensation. In a custody proceeding, the appointment order must also specify the duration of the appointment.

(b) In the appointment order under subsection (a), the court may identify a private organization or governmental program through which a child's attorney, best interests attorney, or best interests advocate will be provided. The organization or program shall designate an individual who will act in that capacity and submit to the court the name of the individual as soon as practicable, at which time the court shall amend the appointment order to identify the designated individual.

(c) If appropriate in light of information not available to the court at the time of the original appointment, changed circumstances, or a request by the appointee, the court may modify the appointment order to:

(1) redesignate as a child's attorney an individual originally appointed as a best interests attorney;

(2) add the appointment of a child's attorney if the original or amended appointment was a best interests attorney; or

(3) add the appointment of a best interests attorney if the original or amended appointment was a child's attorney.

Comment

Orders of appointment for children's representatives often fail to communicate clearly the expectations for the representative. Lack of clarity in a representative's role can lead to ineffective representation. Under this section, an order of appointment must be in writing and identify the role of the appointed representative in plain language understandable to non-lawyers. The order should explain the reasons for the appointment and the scope of the representative's responsibilities. In custody proceedings, the order should state how long the appointment will

last. Because of the ongoing nature of abuse and neglect proceedings, in contrast, a finite endpoint is often impossible to define in the initial order of appointment. *See* Section 10. Payment terms also should be set out expressly in the order. Clarity in the order will help all parties understand the role and authority of the appointed representative. Moreover, the court will be better equipped to exercise effective oversight if the appointed representative's powers and duties are clearly described in the order. For a Model Appointment Order, *see* Appendix A, *ABA Custody Standards*, 37 FAM. L.Q. 131, at 161.

This section permits a court to designate a private organization or governmental program in making an appointment under the Act, since it may not always be possible for a court to include the name of the representative at the outset of an abuse or neglect proceeding. In that event, the designated organization or program must promptly identify the individual who will provide the representation.

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

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

Under subsections (c)(2) and (3), a court in unusual cases may appoint a second attorney for a child in light of changed circumstances, new information not available at the time of the original appointment, or a request by the appointee. Although most states presently do not authorize dual legal representation for a child, a few states have recognized that such a structure may be appropriate in certain situations. *See, e.g.*, MICH. COMP. LAWS ANN. 712A.17(d) (West 2006) (court may appoint separate attorney to represent child's wishes where child's wishes diverge from lawyer-guardian ad litem's determination of child's interests); In re Williams, 805 N.E.2d 1110 (Ohio 2004) (in proceeding to terminate parental rights, court must appoint independent counsel to represent child if child's position differs from that of lawyer/guardian ad litem for child). Thus, under subsection (c)(2), where the original appointment is a best interests attorney but the child's wishes diverge markedly from the best interests attorney's determination of the child's best interests, a court might decide that additional representation by a child's attorney is warranted. Appointment of a child's attorney might also be appropriate where a child explicitly requests a separate attorney to advocate the child's wishes. Under subsection (c)(3), in contrast, where the original appointment is a child's attorney, the court might determine that additional representation by a best interests attorney would be appropriate under certain circumstances. For example, the court might make such an appointment, based on a request from

the child's attorney or otherwise, if the child's expressed goals have placed the child at risk of substantial harm. *See* Section 12(e).

SECTION 10. DURATION OF APPOINTMENT.

(a) In an abuse or neglect proceeding, unless otherwise provided by a court order, an appointment of a child's attorney, best interests attorney, or best interests advocate continues in effect until the individual is discharged by court order at the conclusion of the proceeding.

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

Comment

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

Under this section, the appointment of a representative in an abuse or neglect proceeding presumptively lasts until the proceeding is concluded and the representative is discharged by court order. Although the court can provide otherwise, the appointment ordinarily will continue until the child is no longer under state protection. For example, if a child's dependency proceeding is dismissed and the child's case is closed, the proceeding can be deemed concluded. On the other hand, a child in long-term foster care may not have an active case file but the proceeding would not be "concluded" within the meaning of this section. Indeed, in the latter situation, the child's representative can play an essential role in ensuring that periodic assessments of the child's placement and services occur as required by law. In any event, the requirement of an express order of discharge will avoid any uncertainty for a representative in the duration of the appointment.

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

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

Alternative A

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

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

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

(2) consulting with any best interests advocate for the child;

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

(4) providing advice and counsel to the child;

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

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

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

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

(c) When the court has appointed both a child's attorney and a best interests attorney for a child under Section 9(c), the court and the attorneys shall confer to determine how the attorneys will perform their common duties under this [act].

Alternative B

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

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

Comment

Most of the key responsibilities of legal representation are common to the child's attorney and the best interests attorney. The general duties of an attorney, whether serving as a child's

attorney or a best interests attorney, include developmentally appropriate communication with the child and interviews of all parties and persons likely to have significant knowledge of the child's circumstances. The attorney should investigate the case fully while still complying with ethical restrictions on contact with represented parties; conversely, the attorney should ensure that other parties respect the ethical restrictions arising from the fact that the child has legal representation in the proceeding. The attorney is in a pivotal position in negotiations and should attempt to resolve the case in the least adversarial manner possible. Both a child's attorney and a best interests attorney have the duty to advise and counsel the child and review proposed settlements on behalf of the child. Similarly, lawyers should be cognizant of children's sense of time and should expedite the proceedings to achieve a prompt resolution whenever feasible.

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

In addition, courts must ensure that children's attorneys receive notice of all judicial proceedings affecting the child's welfare and the opportunity to be present and participate in those proceedings. The attorney, whether child's attorney or best interests attorney, should participate actively in all hearings and conferences on issues within the scope of the appointment. Moreover, the child's attorney and best interests attorney should inform the child of hearings, settlement conferences, and other proceedings and, when appropriate, enable the child to attend. The emotional and psychological value to a child of participating in a proceeding affecting his or her welfare may be of profound significance. A nationwide study of the foster care system concluded that, in the abuse or neglect context, "[c]hildren, parents, and caregivers all benefit when they have the opportunity to actively participate in court proceedings, as does the quality of decisions when judges can see and hear from key parties." The Pew Commission on Children in Foster Care, *Fostering the Future: Safety, Permanence and Well-Being for Children in Foster Care* 42 (2004), available at www.pewfostercare.org. On the other hand, a child might receive little therapeutic benefit from observing an acrimonious custody dispute or hearing an exchange of accusations between his or her parents. Thus, this section recognizes the potential value of participation by the child and places a corresponding duty on both the child's attorney and best interests attorney to determine whether to facilitate the child's direct participation in a given proceeding.

A child's legal counsel, whether a child's attorney or best interests attorney, may become aware of needs of the child that go beyond the particular proceeding. In abuse or neglect proceedings in particular, a child may be eligible for specialized educational, medical, or mental health services under federal or state programs. To the extent that a lawyer learns of such needs, the lawyer should request permission from the court to pursue issues on behalf of the child, administratively or judicially, even if those issues do not specifically arise from the court appointment. *See* Standard D-12, *ABA Abuse and Neglect Standards*, 29 Fam L.Q. 375 at 393. For a detailed enumeration of the pretrial and trial responsibilities for children's counsel in the

custody context, attorneys should refer to Standards III (F) and (G), *ABA Custody Standards*, 37 FAM. L. Q. 131 at 136-39.

This section recognizes that in the unusual case where a child has both a child's attorney and a best interests attorney, the attorneys should determine, in consultation with the court, how each is to fulfill his or her duties of representation. The structure of dual representation requires the attorneys to cooperate in defining their roles while maintaining their professional independence. The court would be the ultimate arbiter of any conflicts between the attorneys that they cannot satisfactorily resolve themselves.

SECTION 12. SEPARATE DUTIES OF CHILD'S ATTORNEY.

(a) A child's attorney owes to the child the duties imposed by the law of this state in an attorney-client relationship, including duties of individual loyalty, confidentiality, and competent representation.

Alternative A

(b) A child's attorney, in a manner appropriate to the child's developmental level, shall explain the nature of the attorney-client relationship to the child, including the requirements of confidentiality.

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

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

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

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

(3) request appointment of a best interests attorney or best interests advocate if one has not been appointed.

(e) If, despite appropriate legal counseling, the child expresses objectives of representation that the child's attorney reasonably believes would place the child at risk of substantial harm, the attorney shall:

(1) request the appointment of a best interests advocate, if a best interests advocate has not been appointed;

(2) withdraw from representation and request the appointment of a best interests

attorney; or

(3) continue the representation and request the appointment of a best interests attorney.

(f) The child's attorney may not disclose the reasons for requesting a best interests advocate or best interests attorney under subsection (e) except as permitted by [insert reference to this state's rules of professional conduct].

Alternative B

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

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

Comment

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

Consistent with Rule 1.14, ABA Model Rules of Professional Conduct (2004), the child's attorney should determine whether the child has sufficient maturity to understand and form an attorney-client relationship and whether the child is capable of making reasoned judgments and engaging in meaningful communication. A determination of incapacity may be incremental and issue-specific, thus enabling the child's attorney to continue to function as a client-directed lawyer as to major questions in the proceeding. When a child does lack capacity to formulate objectives of representation as to a particular matter, this section permits the child's attorney to advocate the best interests of the child as to that matter. In so doing, however, the child's attorney may not take a position that is contrary to an expressed objective of the child in the proceeding. For cases of such incremental lack of capacity, the child's attorney may also simply take no position on the matter in question. Alternatively, the child's attorney may request the appointment of a best interests advocate or a best interests attorney.

A child's attorney may not refuse to advocate the child's wishes simply because the attorney disagrees with the child's view or believes the child's objectives will not further the child's best interests. On the other hand, if pursuing the child's expressed wishes is not merely

contrary to the lawyer's opinion of the child's interests but would put the child at risk of substantial physical, emotional, psychological or other harm, the child's attorney is not bound by the child's directive. In most cases, the ethical conflict involved in asserting a position that would seriously endanger the child can be resolved through the lawyer's counseling function. If it cannot be resolved, this section directs the child's attorney to either request the appointment of a best interests advocate or withdraw and request the appointment of a best interests attorney. A third option presented under subsection (e)(3) is the dual attorney model. Under that subsection, the child's attorney would continue to represent the child but also request the appointment of a best interests attorney.

This section reflects the approach of the ABA Abuse and Neglect Standards and the ABA Custody Standards as to the attorney's options when the child's expressed goals in the proceeding may place the child at risk of harm. *See* ABA Abuse and Neglect Standard B-4 (3) (child's attorney may request appointment of guardian ad litem where child's expressed preference would be seriously injurious to child); ABA Custody Standard IV. C. (3) (child's attorney may request appointment of best interests attorney where child's expressed objective would put child at risk of substantial harm). Although both the Custody Standards and the Abuse and Neglect Standards use "may" rather than "shall," the commentary for both Standards recognizes that a child's safety is paramount and that attorneys "must" take the minimum steps necessary to protect the child from harm while still respecting the child's wishes to the greatest extent possible. Thus, under this section a child's attorney must take protective action if, despite the attorney's counseling, the child continues to express objectives that the attorney believes will place the child at risk of substantial harm.

This section relies on the basic premises of the ABA Model Rules of Professional Conduct relating to incapacitated clients. Model Rule 1.14 permits a lawyer to take protective action when a client with diminished capacity cannot adequately act in the client's own interests and is at risk of substantial harm, but it requires the lawyer to maintain, as far as reasonably possible, a normal client-lawyer relationship. Under that Rule, lawyers are impliedly authorized to reveal information about a client with diminished capacity when taking protective action on behalf of the client, but only to the extent reasonably necessary to protect the client's interests. Also, Model Rule 1.6(b) permits attorneys to disclose confidential information where necessary to prevent reasonably certain death or substantial bodily harm. Accordingly, under subsections (e) and (f), a child's attorney who requests the appointment of a best interests advocate or best interests attorney should do so in general terms, without revealing the underlying reasons for the request, unless disclosure of the information is permitted by the rules of professional conduct. Under those rules, disclosure is permitted if the attorney concludes that revealing the information to the court or another entity is reasonably necessary to protect the child. *See* Model Rule 1.14(c). For example, the attorney may have credible information that the child is the victim of on-going sexual abuse under circumstances unlikely to be discovered by other individuals or agencies. *See generally* JENNIFER L. RENNE, LEGAL ETHICS IN CHILD WELFARE CASES 17-31 (ABA 2004).

Often a best interests advocate can satisfactorily assist the court in determining the child's best interests through appropriate investigation and submission of reports. In unusual cases, however, a court may choose to appoint a best interests advocate as well as a lawyer to represent the advocate to ensure a full presentation of the evidence. Another alternative for the court would

be to appoint a best interests attorney under Section 12(e)(3).

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

If a court grants permission to withdraw from representation in an abuse or neglect proceeding, the court must ensure that the child continues to have legal representation in compliance with Section 4. In general, the court has discretion to appoint either a best interests attorney or child's attorney, and the court should decide on the nature of the appointment in light of the child's wishes, the court's needs, the circumstances of the prior attorney's withdrawal, and other factors in the case. A request from an older child for a child's attorney should be given special consideration by the court. Nevertheless, if a child's attorney has withdrawn under the circumstances described in the preceding paragraph, the court presumably would appoint a best interests attorney to continue the representation.

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

SECTION 13. SEPARATE DUTIES OF BEST INTERESTS ATTORNEY.

(a) Except as otherwise provided in [this section] [court rule] [administrative guideline], a best interests attorney owes to the child the duties imposed by the law of this state in an attorney-client relationship, including duties of individual loyalty, confidentiality, and competent representation.

(b) A best interests attorney shall advocate for the best interests of the child according to criteria established by law and based on the circumstances and needs of the child and other facts relevant to the proceeding.

Alternative A

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

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

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

information that the child gives to the attorney.

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

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

(f) A best interests attorney may not disclose or be compelled to disclose information relating to the representation of the child except as permitted by [insert reference to this state's rules of professional conduct], but the attorney may use such information for the purpose of performing the duties of a best interests attorney without disclosing that the child was the source of the information.

Alternative B

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

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

Comment

A best interests attorney provides independent legal representation to a child to protect the child's best interests and is not an agent of the court. The attorney is in an attorney-client relationship with the child and is governed by the responsibilities inherent in that relationship except as otherwise required by the attorney's duty to advocate for the child's best interests. The best interests attorney, as defined in the Act, is consistent with ethical guidelines permitting a lawyer to take protective action on behalf of a client with diminished capacity. *See* Rule 1.14, ABA Model Rules of Professional Conduct. Through the representation of a best interests attorney, a child who cannot or will not direct counsel can nevertheless have a legal advocate. Although the best interest attorney is not client-directed, the attorney should function as a traditional lawyer for his or her client to the fullest extent practicable. This principle is consistent with the directive of the Model Rules of Professional Conduct regarding representation of a client with diminished capacity, including diminished capacity due to minority: as far as reasonably possible, the lawyer is to "maintain a normal client-lawyer relationship with the client." Rule 1.14(a), ABA Model Rules of Professional Conduct (2004). The common duties of the child's attorney and the best interests attorney under Section 11 make clear that the best interests attorney's role encompasses the many responsibilities that any lawyer owes to his or her client, including the fundamental obligations to provide the client with advice and counsel, to fully

investigate the issues in the case, and to ensure the protection of the client's legal rights.

The best interests attorney model is a widely accepted role for children's attorneys across the United States. See, e.g., In re Christina N., 639 S.E.2d 770 (W. Va. 2006) (child's attorney guardian ad litem is generally governed by rules of legal ethics but has duty to protect child's best interests); Clark v. Alexander, 953 P.2d 145 (Wyo. 1998) (child's attorney guardian ad litem has duty to advocate child's best interests and requires modified application of rules of professional conduct); Schult v. Schult, 699 A.2d 134 (Conn. 1997) (child's attorney in custody dispute could advocate position independently determined to be in child's best interests and was not bound to advocate position urged by guardian ad litem). It has been explicitly endorsed by the ABA in the context of private custody disputes. *See* Standard V., *ABA Custody Standards*, 37 FAM. L.Q. at 148-51 (providing detailed guidelines for best interests attorneys). Nevertheless, the role of best interests attorney has been criticized because of the discretionary and subjective nature of the determination of best interests and the lawyer's lack of expertise to make such a determination. *See, e.g.*, Martin Guggenheim, *A Paradigm for Determining the Role of Counsel for Children*, 64 FORDHAM L. REV. 1399 (1996). This Act addresses the critiques by providing clear guidelines for that attorney's performance, directing the attorney to take the child's views into account in determining what to advocate, and requiring the attorney to present the child's views to the court if the child so desires. Recognizing that the determination of best interests is imprecise and highly contextual, this section directs the best interests attorney to follow objective criteria and focus on the unique facts of the case. The premise underlying this section is that the best interests attorney should carry out a child-centered representation according to applicable law and should never formulate a position on the basis of personal bias. The "criteria established by law" will include standards imposed by federal and state law for child protection in abuse or neglect proceedings, such as the federal mandate that state agencies make reasonable efforts to preserve or reunify families. *See* Adoption and Safe Families Act of 1997, 42 U.S.C. § 671(a)(15). In the custody context, legal criteria will include the state's substantive law governing child custody determinations, such as statutory factors guiding the best interests determination. *See, e.g.*, Section 402 of the Uniform Marriage and Divorce Act, 9A U.L.A. 282 (1998).

The best interests attorney's legal representation must be informed by an understanding of the child's individual circumstances and needs, including the child's developmental level, unique family relationships, socio-economic factors, and cultural background. The attorney should take into account the views of family members, neighbors, teachers, doctors, and others with relevant knowledge. The best interests attorney not only has the duty to inform the court of the child's expressed wishes if the child so desires, but the attorney also must consider those wishes in formulating a position to advocate. In other words, the child's viewpoints are always highly relevant to the lawyer's determination of the child's best interests. In many cases, the value to the child of having a lawyer champion his or her wishes is itself a consideration in determining the child's best interests. Often, the attorney's assessment of the child's interests will coincide with the child's wishes, but sometimes they will diverge. When they do diverge, the attorney should help the child understand the attorney's reasoning through counseling. Where the child persists in taking a position that the best interests attorney finds to be contrary to the child's best interests, the best interests attorney also has the option of requesting the appointment of a child's attorney to represent the child. *See* Section 9(c). Such dual representation, however, would be unusual.

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, and this section makes clear that confidentiality rules govern the best interests attorney. In general, the rules of confidentiality bar disclosure of information relating to a client's representation unless the client consents. *See* ABA Model Rules of Professional Conduct (2004), Rule 1.6. Nevertheless, as explained in the commentary to Section 12, 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. Thus, when a client of diminished capacity is at risk of substantial harm, a lawyer is impliedly authorized "to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests." Model Rule 1.14(c). Under ordinary ethical guidelines, then, the best interests attorney, like the child's attorney, may reveal information relating to the representation without the child's consent if necessary to protect the child from harm. *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 the attorney's use of information obtained in the course of representing the child may be necessary to enable the attorney to protect the child's best interests. Under this section, information received from the child is protected by ordinary rules of professional conduct except that *use* of such information is permitted to enable the best interests attorney to perform his or her role. Although some states have permitted the hybrid lawyer/guardian ad litem to reveal the child's confidential communications to the court where necessary to promote the child's best interests, *see* Clark v. Alexander, 953 P.2d 145 (Wyo. 1998), this section provides greater protection for the child's confidences.

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

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

SECTION 14. DUTIES OF BEST INTERESTS ADVOCATE . A best interests advocate shall:

(1) within a reasonable time after the appointment:

(A) meet with the child and, in a manner appropriate to the child's developmental level:

(i) explain the role of the best interests advocate; and

(ii) ascertain the child's needs, circumstances, and views;

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

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

(D) consult with any child's attorney or best interests attorney appointed in the proceeding;

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

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

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

(5) maintain the confidentiality of information relating to the proceeding except as necessary to perform the duties of best interests advocate or as may be specifically provided by law of this state other than this [act];

(6) if the advocate considers it appropriate, and subject to the requirements of Section 16(e), present recommendations to the court by testimony or written report or both regarding the child's best interests and the bases of those recommendations;

(7) provide to the parties and to any attorney for the child copies of any report or other document submitted to the court by the advocate; and

(8) if the advocate considers it appropriate, encourage settlement and the use of any alternative forms of dispute resolution and participate in such processes to the extent permitted

under the law of this state.

Comment

This section describes the general function of the best interests advocate and makes clear that the best interests advocate should explain his or her role to the child in terms the child can understand. The best interests advocate has a duty to conduct an independent investigation in order to ascertain the facts of the case. In carrying out that duty, the best interests advocate must have access to the child and a reasonable opportunity to interview persons with relevant knowledge of the child, including the parties. In addition, the best interests advocate's investigation ordinarily should include a review of relevant records. To ensure that the best interests advocate has the ability to carry out his or her responsibilities under this section, the order of appointment should expressly provide for such rights of access. If the child has both a best interests advocate and a lawyer, whether a child's attorney or a best interests attorney, the best interests advocate should notify the lawyer before contacting the child. The lawyer, as the child's legal representative, has the right that any lawyer would have to be present during an interview of the lawyer's client.

A best interests advocate should encourage settlement and the use of mediation or other alternative dispute resolution mechanisms only when the advocate determines that such approaches are in the child's best interests. In weighing such processes, the advocate should consider the child's circumstances and wishes, the parties' positions, and any other factor bearing on the benefits and risks of a non-adversarial method of dispute resolution in the particular proceeding. Mediation of a custody dispute, for example, might be seriously distorted to the detriment of the child if the parties have a history of domestic violence and cannot negotiate on fair and equal terms. *See* Nancy Ver Steegh, *Yes, No and Maybe: Informed Decision Making About Divorce Mediation in the Presence of Domestic Violence*, 9 WM & MARY J. WOMEN & L. 145 (2003). Thus, a best interests advocate must carefully evaluate alternative dispute resolution processes as well as any agreements reached to ensure that the child's interests are protected.

In abuse, neglect, and custody proceedings, the best interests advocate's obligations to the court may include the duty to make recommendations concerning the child's best interests. State law currently varies as to whether guardians ad litem should or must make recommendations to the court on the ultimate disposition of the case. Disagreement also exists within the mental health profession about whether mental health professionals are qualified to offer opinions on the ultimate question of the child's best interests. Many commentators argue that the determination of a child's best interests is the prerogative of the court and not within the expertise of the mental health profession. *See generally* GARY B. MELTON, JOHN PETRILA, NORMAN G. POYTHRESS, & CHRISTOPHER SLOBOGIN, PSYCHOLOGICAL EVALUATIONS FOR THE COURTS: A HANDBOOK FOR MENTAL HEALTH PROFESSIONALS (Guilford Press 2d ed. 1997); Daniel W. Shuman, *The Role of Mental Health Experts in Custody Decisions* 36 FAM. L.Q. 135 (2002) (arguing that mental health assessment instruments are unreliable as predictors of children's best interests). Nevertheless, mental health experts routinely evaluate custody alternatives and testify as to children's best interests. *See* Marc J. Ackerman & Melissa C. Ackerman, *Child Custody Evaluation Practices: A 1996 Survey of Psychologists*, 30 FAM. L.Q. 565 (1996). In any event, the best interests advocate should be prepared to make such recommendations if requested by the court, always ensuring that the recommendation or opinion is based on the advocate's thorough and unbiased investigation of

the case.

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

Many states have developed more detailed standards governing the duties of best interests advocates, generally under the current rubric of "guardian ad litem," than those contained in this Act. *See, e.g.*, Judicial Council of Virginia, *Standards to Govern the Appointment of Guardians Ad Litem*, at http://www.courts.state.va.us/1/cover.htm There are also numerous sources governing CASA programs and specifying the duties of CASA volunteers. *See, e.g.*, Nat'l CASA Association, *Standards for National CASA Association Member Programs* (2002), available at www.nationalcasa.org; Office of Juvenile Justice and Delinquency Prevention, *Court Appointed Special Advocates: A Voice for Abused and Neglected Children in Court* (1997). This Act is not intended to displace such state law standards, and those states that have promulgated more detailed standards by statute or rule should amend them to clarify that they apply to best interests advocates.

SECTION 15. ACCESS TO CHILD AND INFORMATION RELATING TO CHILD.

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

(1) the child; and

(2) confidential information regarding the child, including the child's educational, medical, and mental health records, any agency or court files involving allegations of abuse or neglect of the child, any delinquency records involving the child, and other information relevant to the issues in the proceeding.

(b) A child's record that is privileged or confidential under law other than this [act] may be released to an individual appointed under this [act] only in accordance with that law, including any requirements in that law for notice and opportunity to object to release of records. Information that is privileged under the attorney-client relationship may not be disclosed except as

otherwise permitted by law of this state other than this [act].

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

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

Alternative A

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

Alternative B

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

(f) If no objection to an order issued pursuant to subsection (a)(2) is filed with the court by the date specified in the notice, the order takes effect the day after the specified date. If an objection is filed with the court, the court shall conduct a hearing on a priority basis. Any appeal from the court's order granting or denying access must be processed in accordance with [insert reference to expedited appellate procedures in other civil cases].

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

Comment

Individuals appointed to represent children under this Act must have access to information regarding the child in order to perform their assigned roles competently. A court order is necessary because the child, as a minor, generally lacks the legal right to grant access to his or her own records. Thus, unlike the lawyer for an adult client, the child's representative needs the court's authorization to gain access to the client's confidential files. Relevant files include those concerning child protective services, juvenile delinquency, medical treatment and mental health care, alcohol and substance abuse, developmental disabilities, and educational programs. Access

should also be provided to records of a probate or other court proceeding as well as records of any trust or account for which the child is a beneficiary. Records custodians have a duty to comply with orders of access under this section by permitting appointed representatives to review and copy relevant records. If a custodian provides copies of records to the child's representative, costs should be allocated according to the state's general discovery practices.

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

Nevertheless, under subsections (b), a child's records that are privileged or otherwise protected under other state or federal law may be released only if legal requirements are met. For example, the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g (the "Buckley Amendment"), and the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), codified at scattered sections of 29 U.S.C. and 42 U.S.C., impose independent requirements for access that a child's representative must observe. *See* 34 C.F.R. § 99.31-39 (requirements for access to educational records under Buckley Amendment); 45 C.F.R. § 164.502 (requirements for access to health records under HIPAA). In some circumstances, the order of appointment will need to contain qualifying language to enable the appointed representative to gain access to the protected records. Similarly, if a parent, guardian or other party has the right to object to release of records under other provisions of state or federal law, the order of access must provide for notice and an opportunity to be heard consistent with that law. In some states, older children themselves have standing to object to the disclosure of certain records, such as records of psychiatric counseling, drug treatment, or treatment for sexually transmitted diseases. *See, e.g.*, In the Matter of Berg, 886 A.2d 980 (N. H. 2005); Attorney ad Litem for D.K. v. Parents of D.K., 780 So.2d 301 (Fla. App. 2001). In that circumstance, the custodian of the records may refuse to release the records until the child consents or a court otherwise orders the release consistent with state law. Finally, subsection (b) makes clear that information protected by the attorney-client privilege is not subject to disclosure unless otherwise permitted by applicable law.

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

This section provides two alternatives for determining when an order of access becomes

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

SECTION 16. PARTICIPATION IN PROCEEDING.

(a) A child's attorney, best interests attorney, or best interests advocate appointed under this [act] is entitled to:

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

(2) receive notice of and participate in each hearing in the proceeding [and participate and receive copies of all records in any appeal that may be filed in the proceeding]; and

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

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

(c) A best interests advocate may not take any action that may be taken only by an attorney licensed in this state, including making opening and closing statements, examining witnesses in court, and engaging in discovery other than as a witness.

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

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

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

(2) the reasons for the advocate's recommendations.

(f) A party may call any best interests advocate for the child as a witness for the purpose of cross-examination regarding the advocate's report even if the advocate is not listed as a witness by a party.

[(g) In a jury trial, disclosure to the jury of the contents of a best interests advocate's report is subject to this state's rules of evidence.]

Comment

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

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

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

of any attorney appointed or retained to represent a best interests advocate.

Although the best interests advocate is appointed to assist the court in determining the child's best interests, ex parte communications with the court are never permitted unless authorized specifically by law. In some states, a guardian ad litem is viewed as an arm of the court and may submit a report to the court in a method not governed by the ordinary rules of evidence. Under subsection (e), the best interests advocate may give a report to the court, but only if the advocate is present in court and available for cross examination. The due process rights of the parties require that they receive notice of a best interests advocate's recommendations and opportunity to be heard and to engage in cross examination. *See, e.g.*, In re Marriage of Bates, 819 N.E.2d 714 (Ill. 2004) (failure to provide copy of guardian ad litem report to mother in custody proceeding was violation of due process); Leinenbach v. Leinenbach, 634 So.2d 252 (Fla. App. 1994) (trial court erred in relying on report of guardian ad litem where father was not afforded opportunity to rebut contents of report). Legislation or court rules currently may permit a guardian ad litem's report to be submitted to the court in advance of a court hearing, or an emergency communication to be made directly to a judge regarding a child who is at risk of harm. This Act permits such exceptions only when they are specifically authorized by law other than this Act.

Likewise, neither the child's attorney nor the best interests attorney may engage in ex parte contact with the court except as otherwise authorized by law, since an attorney must comply with relevant rules of professional conduct whenever he or she communicates with the court. Although this prohibition on ex parte communication is rooted in the rules of professional ethics governing all lawyers, experience has shown that lawyers or other advocates for children sometimes bend the rules in their desire to protect the interests of their clients. Thus, the prohibition is restated in the Act.

SECTION 17. ATTORNEY WORK PRODUCT AND TESTIMONY.

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

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

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

(3) introduce into evidence a report prepared by the attorney; or

(4) testify in court.

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

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

protection of attorney work product.

Comment

As a result of the widespread use of the hybrid attorney/guardian ad litem model of representation for children across the United States, the traditional ethical limitations on attorneys' conduct in litigation have often been disregarded. *See generally* ANN M. HARALAMBIE, THE CHILD'S ATTORNEY 1-23 (ABA 1993). In several states, for example, the attorney/guardian ad litem may testify and be cross-examined. *See, e.g.*, Jacobsen v. Thomas, 100 P.3d 106 (Mt. 2004). This section clarifies that the child's attorney and the best interests attorney are to stay within their professional role as lawyers. Thus, the work product of both the child's attorney and the best interests attorney is presumptively shielded from disclosure. Likewise, neither category of attorney ordinarily should testify as a witness in a proceeding in which the attorney is representing a child.

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

SECTION 18. CHILD'S RIGHT OF ACTION.

(a) Only the child has a right of action for money damages against a child's attorney, best interests attorney, or best interests advocate for inaction or action taken in the capacity of child's attorney, best interests attorney, or best interests advocate.

(b) A [best interests attorney or] best interests advocate appointed pursuant to this [act] is not liable for money damages because of inaction or action taken in the capacity of [best interests attorney or] best interests advocate unless the inaction or action taken constituted willful misconduct or gross negligence.

Comment

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

This section provides qualified immunity for best interests advocates. The provision of qualified immunity is based on the recognition that best interests advocates need protection from

civil actions for damages when performing functions consistent with their appointed role. Immunity is necessary to ensure that they can fully investigate and formulate opinions and recommendations without fear of retaliation. The threat of litigation from a child client, often fueled by an unhappy parent in the wings, might interfere with the advocate's exercise of judgment and might deter qualified individuals from accepting appointment in the first place. Since courts will often view the best interests advocate as a source of unbiased and independent assessments of a child's circumstances, the law should protect those persons from the threat of vindictive lawsuits.

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

On the other hand, the Act does not provide immunity for persons appointed as a child's attorney, and states are given the option to provide or not provide immunity for best interests attorneys. Although a few states have extended qualified immunity to children's attorneys, *e.g.*, VERNON'S TEXAS CODE ANN. FAMILY CODE § 107.009 (2004), the premise of this section is that such lawyers are in a traditional lawyer/client role and should be held to ordinary standards of care. The child's attorney is a client-directed lawyer in a traditional mode of client representation. It should be noted, however, that some courts have taken a functional approach to the question of immunity and have extended immunity to children's lawyers where the conduct at issue occurred when the lawyer was functioning as a best interests representative. *See* Carrubba v. Moskowitz, 877 A.2d 773 (Conn. 2005) (recognizing absolute immunity for child's attorney whose primary duty was to protect child's best interests); Marquez v. Presbyterian Hospital, 608 N.Y.S.2d 1012 (Sup. Ct. 1994) (holding that law guardian is entitled to qualified immunity when functioning primarily as child's guardian ad litem but would be liable for ordinary negligence when functioning as child's attorney). The functional approach, however, would seem difficult to administer in light of the fluid and integrated nature of an attorney's representation for a single client.

The best interests attorney in some ways combines the functions of a child's attorney and of a best interests advocate. While the best interests attorney may advocate a position that is contrary to the child's expressed objective, the attorney must perform the other aspects of traditional legal representation for the child. These include providing the child with advice and counsel, communicating the child's wishes to the court, and representing the child's legal rights in the litigation. In light of the attorney-client relationship that exists between the best interests

attorney and the child, one option provided by this section is to hold that attorney to ordinary professional standards of care. Thus, the two categories of lawyers that can be appointed for a child may be treated similarly for purposes of immunity. *Accord* Fox v. Wills, 890 A.2d 726 (Md. 2006); MD. CODE §1-202 (holding "child advocate attorney" and "best interest attorney" to standard of ordinary care and diligence).

Nevertheless, some states have extended immunity to best interests attorneys since that category of lawyer is not purely client-directed but instead advocates for the child's best interests. *See, e.g.*, Blunt v. O'Connor, 737 N.Y.S. 2d 471, 291 A.D.2d 106 (App. Div. 2002). Because the best interests attorney develops a position based on objective criteria rather than solely the child's directives, that attorney may be particularly vulnerable to claims of malpractice by disgruntled parties to the litigation. The American Bar Association has recommended qualified immunity for best interests attorneys. *See* Standard VI. F, *ABA Custody Standards,* 37 FAM. L.Q. 131 at 160. Without such immunity, attorneys may be unwilling to accept appointments, particularly in the context of acrimonious divorces. By bracketing "best interests attorney" in subsection (b), the Act permits states to choose to provide qualified immunity to that category of representative in addition to the best interests advocate.

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

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

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

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

Comment

This section requires that attorneys and best interests advocates receive adequate and timely compensation in abuse or 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. Because courts have individualized procedures for paying fees and costs for representation of indigent children, often determined on a county-by-county basis, this section is framed in general terms to provide flexibility. In many jurisdictions, fee schedules have been developed to standardize the compensation for children's representatives.

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

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.A. § 5106a(b)(2)(A)(xiii) (2003). 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 a child's attorney or best interests attorney. *See* Section 4. As a practical matter, a clear majority of states already appoint attorneys as children's representatives in abuse and neglect cases. When a best interests advocate is also required under Section 5, that appointment will likewise be at public expense for indigent children. A child's attorney, best interests attorney, or best interests advocate also should have access, where necessary, to reimbursement for experts, investigative services, and other activities undertaken to fulfill the obligations of the appointment.

SECTION 20. FEES AND EXPENSES IN CUSTODY PROCEEDING.

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

(b) The court may do one or more of the following:

(1) allocate fees and expenses among the parties;

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

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

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

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

Comment

In custody proceedings, courts should make clear to all parties how fees will be determined and how and by whom the fees are to be paid. Lawyers and best interests advocates, unless functioning as volunteer advocates, should be paid in accordance with prevailing legal standards of reasonableness.

This section recognizes that most states do not have public funds available to compensate children's representatives in custody disputes other than abuse or neglect proceedings. The ordinary approach will be for the court to assess fees against the parties, taking into account significant disparities in ability to pay and awarding fees in proportion to ability to pay. This section recognizes judicial discretion to allocate fees. Courts typically take into account not only ability to pay but a variety of factors affecting the fairness of the allocation. Courts should be alert to the potential for economic coercion by one party against the other where there is a significant disparity in income-earning ability. A court's authority to impose monetary sanctions, including attorneys fees, for bad faith tactics in litigation is not affected by this section.

In some cases, public funds will be available under other provisions of state law for fees and expenses in private custody disputes. Recently, the American Bar Association House of Delegates called for states "to provide legal counsel as a matter of right at public expense to low income persons in those categories of adversarial proceedings where basic human needs are at stake, such as those involving shelter, sustenance, safety, health or child custody as determined by each jurisdiction." *Recommendation 112A*, ABA House of Delegates (Aug. 7-8, 2006). Thus, the ABA's "civil Gideon" challenge includes the need for funding at the state or local level for the representation of indigent children embroiled in custody disputes.

Fee requests must be in writing and in sufficient detail to enable courts to make a determination that the request is reasonable. Courts also may require periodic reporting from appointed representatives regarding their services and fees. The award of fees and expenses in appropriate cases may include reasonable costs for expert witnesses, investigative services, research, and other activities where the attorney or best interests advocate demonstrates to the court that such expenses are necessary to accomplish the objective of the proceeding. Courts should ensure, of course, that the award of fees and expenses of counsel does not interfere with a party's ability to satisfy a child support obligation**.**

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. REPEALS. The following acts and parts of acts are repealed:

(1) . . . . . .

(2) . . . . . .

(3) . . . . . .]

SECTION 23. CONFORMING AMENDMENTS. The following acts or parts of acts

are amended to conform to the terminology used in this [act]:

.....

Legislative Note: *Statutes that refer to children's representatives by terminology different from that used in this act may need to be amended to conform to the terminology used in this act.*

SECTION 24. EFFECTIVE DATE. This [act] takes effect on _____.