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***63 THE UNIFORM REPRESENTATION OF CHILDREN IN ABUSE, NEGLECT, AND CUSTODY PROCEEDINGS ACT: BRIDGING THE DIVIDE BETWEEN PRAGMATISM AND IDEALISM**

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Over the last decade, standards governing the representation of children have received more attention from courts, legislators, and policymakers than ever before. [\[FN1\]](#) New statutory and rule-based directives for children's lawyers seem to appear almost daily, [\[FN2\]](#) and children themselves have *64 become increasingly vocal about wanting a say in decisions that impact them personally. [\[FN3\]](#) The practice of child advocacy has become a specialization for which there is certification, and child advocacy clinics are now commonplace in law schools across the United States. [\[FN4\]](#) Other nations, driven largely by the *U.N. Convention on the Rights of the Child*, [\[FN5\]](#) have likewise focused on child representation as a matter of policy reform. [\[FN6\]](#)

The increased attention to child representation, however, has not produced a clear consensus about what children's representatives should do. Instead, statutory provisions and procedural rules for children's lawyers *65 and guardians ad litem vary dramatically from state to state. [\[FN7\]](#) Scholars debate such fundamental questions as whether a child's lawyer should function as a traditional client-directed lawyer or a best interests advocate, [\[FN8\]](#) whether courts should always appoint lawyers for children in abuse and neglect proceedings, [\[FN9\]](#) whether courts should *ever* appoint lawyers for children in private divorce actions, [\[FN10\]](#) and whether guardians ad litem are a help or a hindrance in protecting children's interests. [\[FN11\]](#) If lawmakers, judges, and child advocates continue to disagree about the core functions of child representatives, the system lacks accountability and the quality of representation surely suffers.

The disagreements and uncertainty surrounding expectations of children's lawyers and lay representatives across the United States led *66 the National Conference of Commissioners on Uniform State Laws (NCCUSL) to conclude that the topic could benefit from a uniform law. A more immediate impetus was the American Bar Association's promulgation in 2003 of *Standards of Practice for Lawyers Representing Children in Custody Cases (ABA Custody Standards)* [\[FN12\]](#) and the perceived need for a uniform law to implement those standards. The project marks NCCUSL's entry into the ongoing national conversation about the proper role for children's representatives. In undertaking this effort, NCCUSL continues a strong tradition of law reform efforts in the family law realm. [\[FN13\]](#)

In the summer of 2006, after three years of study, debate, drafting, and redrafting, NCCUSL approved the *Uniform Representation of Children in Abuse, Neglect, and Custody Proceedings Act* (the 2006 Act). [\[FN14\]](#) One year later, in response to ongoing controversy, the conference again considered the Act and approved amendments that strengthened certain features of the Act but did not change the underlying framework. [\[FN15\]](#) The *Representation of Children Act* is NCCUSL's contribution to the policy choices in this field and seeks to implement several fundamental premises: every child in an abuse and neglect proceeding is entitled to legal representation; alternative models of children's counsel are necessary to accommodate the varying needs and capacities of children; courts in private custody proceedings should have discretion to appoint a representative for a child when there is a particularized need; and lay advocates can play a valuable role as an additional representative to help courts understand children's circumstances and determine their interests. While disagreement among child advocates exists as to each of these premises, the drafters of the new *Representation of Children Act* sought to develop an approach that would best serve the prac-

tical and legal needs of children and the judicial system.

This article explains the major policy debates underlying the *Representation of Children Act* and the rationales for the positions taken in the Act. Part I provides a brief background on the drafting history and scope of the new (and newly amended) Act. Part II gives an overview of *67 state law, and Part III summarizes the competing standards for children's representatives that have been proposed by various professional groups. Part IV explains the Act in more detail, describing its basic structure and intended operation. The focus is on the three categories of children's representatives authorized by the Act and the role of courts in administering the Act. Finally, Part V explores more fully the policy positions taken in the Act and the underlying rationales, with particular emphasis on the “best interests attorney” option in the statutory scheme.

If adopted nationwide, the *Representation of Children Act* should strengthen the law in a number of states by clearly defining the responsibilities and powers of children's lawyers and lay advocates and by mandating the appointment of counsel for every child who is the subject of an abuse and neglect proceeding. The Act requires child-centered representation and imposes objective standards of conduct to provide a measure of accountability. Moreover, the Act enhances the voice of the child by requiring that his or her wishes be made known to the court if the child so desires, regardless of the nature of the appointed representative. The drafters believe that the changes represent a step forward in child representation by differentiating and more carefully defining the roles of persons appointed by juvenile courts and family courts to represent children and by identifying certain core duties that transcend category and context. [\[FN16\]](#)

I. Background

In early 2004, the Executive Committee of NCCUSL approved the appointment of a drafting committee to develop an act on the role of attorneys representing children in custody disputes. [\[FN17\]](#) After the conference appointed the Drafting Committee on the Role of Attorneys Representing Children in Custody Disputes, [\[FN18\]](#) two preliminary issues faced the *68 committee. The committee had to decide, first, whether to include dependency and termination proceedings as well as private custody disputes, and, second, whether to address the role of the lay advocate, commonly called “guardian ad litem.” [\[FN19\]](#) As to the first issue, the Drafting Committee recognized that there was a need for more clearly defined representative roles in abuse and neglect proceedings as well as in private custody disputes. While the substantive issues, governing law, and litigation dynamics of the two settings are very different, the committee concluded that the standards governing representation of children in both settings should be the same. In the committee's view, both private custody disputes and child protection proceedings would benefit from more definite guidelines that impose clear duties owed to the child client. Crafting a set of standards applicable only to the custody context might produce confusion for judges as well as child advocates. Moreover, custody cases frequently involve allegations of abuse or neglect and sometimes evolve into dependency proceedings. Conversely, in dependency cases in juvenile court, judges may evaluate competing placements for a dependent child according to child-centered criteria that are similar to those applied by family court in a custody dispute. Thus, the committee concluded that any attempt to develop uniform standards of practice for children's representatives should include both types of court proceedings. [\[FN20\]](#)

As to the question of the lay representatives, the Drafting Committee came to the conclusion that a proposed act on child representation should include a structure for nonlawyer representatives in order to provide courts and child advocates with a set of integrated standards. Since most states have endorsed a hybrid lawyer—guardian ad litem model of child *69 representation—a model the committee ultimately rejected—the committee felt that a uniform act that omitted standards for the nonlawyer representative would be inadequate. At the same time, the committee recognized that many CASA programs and guardian ad litem programs around the nation have developed excellent standards of practice for local use. The committee's goal was to complement the valuable work already being done in that area by producing a law that would help clarify and distinguish the roles of lawyer and nonlawyer representatives. The conference ultimately approved of the committee's request that it be permitted to develop an act encompassing representation of children, by lawyers and nonlawyer advocates, in both custody and abuse and neglect proceedings.

[\[FN21\]](#)

Over the three years of debate and deliberation, the committee evolved in its approach to several of the challenging policy issues underlying the field of child representation. Patterned loosely after a newly enacted statutory scheme in Texas for representation of children [\[FN22\]](#) that itself was based on the *ABA Custody Standards*, the original draft of the Act endorsed the hybrid attorney/guardian ad litem category. [\[FN23\]](#) The committee fairly quickly abandoned that approach because of the inconsistency in roles and likelihood of ethical problems for attorneys under governing rules of professional conduct. [\[FN24\]](#) The *Representation of Children Act* now demarcates a clear distinction between lawyers and nonlawyer representatives for children.

The committee's approach to the best interests attorney, itself a controversial feature of the *ABA Custody Standards*, [\[FN25\]](#) evolved during deliberations on the original Act and proposed amendments to the Act and has been the focus of the most sustained criticism of the Act. Initially, the Drafting *70 Committee, in line with the *ABA Custody Standards*, [\[FN26\]](#) viewed the best interests attorney as a lawyer for the child's interests rather than for the child. [\[FN27\]](#) The committee's conceptualization of the role changed, however, to emphasize the best interests attorney's ethical responsibilities to the child as client. Thus, the 2006 Act envisioned the best interests attorney as a lawyer for the child and required the attorney to assume most of the basic responsibilities inherent in the attorney—client relationship. [\[FN28\]](#) Although interim proposed amendments to the Act in 2007 would have resurrected the definition of best interests attorney as a lawyer for the child's interests rather than the child, [\[FN29\]](#) the proposal generated a storm of opposition and was discarded. [\[FN30\]](#) Instead, the 2007 amendments reaffirmed the position of the 2006 Act and added language that made more explicit the ethical responsibilities owed by the best interests attorney to his or her child client. [\[FN31\]](#) On a related question, concerns emerged within NCCUSL during *71 early considerations of the Act as to whether the Act, by spelling out the duties of lawyers, might encroach on the authority of state judiciaries to regulate the practice of law. [\[FN32\]](#) As a result, the sections directly prescribing attorney duties are presented in two alternatives, giving states the option of adopting the substantive provisions by court rule rather than by legislative enactment. [\[FN33\]](#)

The Act's mandate for the appointment of a lawyer for every child in an abuse or neglect proceeding was a point of prolonged debate within NCCUSL because of the concern that the mandate, which goes beyond current federal law, would impose additional costs on those states that do not already require lawyers. [\[FN34\]](#) As a result, one interim draft contained a legislative escape clause, [\[FN35\]](#) but the committee ultimately returned to an unequivocal mandate as set forth in Section 4. [\[FN36\]](#) On another question relating to appointment of lawyers, early drafts permitted the appointment of a best interests attorney as an additional lawyer for a child already represented by a child's attorney under certain circumstances. [\[FN37\]](#) When concerns arose that a dual-attorney model might be confusing from a child's perspective and unpopular in state legislatures, the Drafting Committee first *72 bracketed the option in an interim draft [\[FN38\]](#) and finally removed the option altogether in a later draft. [\[FN39\]](#) Ironically, a slightly revised dual attorney option was reinserted into the Act as a result of a floor amendment at the 2006 Annual Meeting, on the rationale that the Act should provide courts with maximum flexibility in appointing representatives for children and that in some situations dual representation is advisable. [\[FN40\]](#)

Finally, on the contentious question of immunity for children's representatives, the committee originally followed the Texas model and proposed a provision that would have extended qualified immunity to both a best interests attorney and a best interests advocate. [\[FN41\]](#) As the role of the best interests attorney moved closer to that of a traditional attorney, however, the justifications for immunity diminished. The committee finally settled on granting qualified immunity only to the best interests advocate with a bracketed option for states wishing to grant immunity to best interests attorneys. [\[FN42\]](#)

Controversy surrounding the Act clearly did not end in 2007. When NCCUSL again submitted the Act for approval by the ABA House of Delegates at the ABA Midyear Meeting in 2008, [\[FN43\]](#) different sections within the ABA voiced strongly opposing positions on the Act. [\[FN44\]](#) As a result, NCCUSL once again withdrew the Act from House of Delegate consideration. [\[FN45\]](#)

*73 The evolution of the *Representation of Children Act*, from the original draft of 2004 to the final amended Act of 2007, was a fluid (if sometimes contentious) process of vigorous discussion, deliberation, debate, and compromise. The successive drafts reveal a gradual strengthening of representatives' duties toward the child, but the Act also reflects the committee's awareness of the practical needs and limitations of juvenile and family courts. The controversy that surrounds the Act's approach to children's lawyers will undoubtedly continue, but even the Act's most vociferous critics should agree that NCCUSL has helped focus national attention on the important topic of children's representation.

II. Child Representation Today

When NCCUSL began its consideration of the question of children's representation, it had the benefit of a rich literature on the topic, [FN46] a diverse landscape of state laws offering a variety of approaches, [FN47] and an assortment of competing standards from professional groups. [FN48] This part gives a brief overview of variations in the law of child representation around the United States.

*74 Although state laws vary widely in this area, some generalizations are possible. In the abuse and neglect context, children's representatives are much more likely to be appointed as guardians ad litem, or lawyers functioning as guardians ad litem, than as client-directed attorneys. [FN49] On the other hand, a few states require client-directed lawyers for children over a certain age, [FN50] for children who have clearly expressed an objective that is different from the position taken by an assigned representative, [FN51] or for children who are capable of directing counsel. [FN52] The preference for a guardian ad litem model is due in part to the mandate of the federal *Child Abuse Prevention and Treatment Act (CAPTA)*. [FN53] As a condition of receiving federal funds for child abuse prevention and treatment programs, *CAPTA* requires states to appoint a guardian ad litem for every child who is the subject of an abuse or neglect proceeding. Although *CAPTA* expressly*75 permits the guardian to be a lawyer, the statute requires that the guardian “make recommendations to the court concerning the best interests of the child,” [FN54] a function ordinarily associated with nonlawyers. [FN55] As a result, many states routinely appoint lawyers as guardians ad litem without careful delineation of the distinctions between the two roles. The hybrid lawyer/guardian ad litem typically has the task of assisting the court in determining a resolution that will be in the child's best interests and is not bound by the child's wishes. [FN56] While many states expressly require the representative to report the child's wishes to the court, [FN57] others do not explicitly impose that duty. [FN58] On the other hand, some states have required the lawyer/guardian ad litem to function as a witness in court, a role that raises obvious ethical problems if the representative is also functioning as a lawyer. [FN59]

In the context of private custody disputes, the statutory law of most states authorizes courts to appoint an attorney or a guardian ad litem for the child as a matter of discretion, but a few states require the appointment of a representative when custody is contested. [FN60] Regardless of label, the representative's role typically is to assist the court in protecting the child's best interests rather than to advocate the child's wishes. [FN61] Arizona became *76 the first state to adopt the three categories of representatives encompassed in the new *Representation of Children Act* for family law disputes, [FN62] and other states have adopted schemes similar to that of the Act. [FN63] As in the abuse and neglect context, a few states have prescribed procedures for the potential conflict in private custody disputes that can arise when the child's preferences diverge from the attorney's perception of the child's interests. [FN64] Most states, however, have simply left the potential conflict to be resolved by the representative on a case-by-case basis.

The ubiquitous designation of “guardian ad litem” can apply to a variety of functions in both child welfare and child custody cases across the United States. [FN65] While courts often refer to the guardian ad litem as “the arm of the court,” [FN66] the guardian's role may encompass acting as investigator, expert witness, mediator, and court advisor. [FN67] In states where the duties of guardians ad litem are spelled out by statute or court rule, they may include investigation of the case, interviews with parties and others knowledgeable about the child, review of relevant records, participation in court proceedings and settlement discussions, and reporting of findings and recommendations to the court. [FN68]

In her recent compilation of data on state child representation laws, Professor Jean Koh Peters concluded that states' laws continue to be “extremely varied, unclear and lacking uniformity, within and among *77 jurisdictions.” [FN69] She added that in many states the laws governing child representation “contain inherent confusion for any lawyer playing the role of representative, and thus for any child represented in the jurisdiction.” [FN70] This lack of clarity and consensus about the roles of children's representatives in formal law across the United States prompted NCCUSL to embark on the project that ultimately yielded the new *Representation of Children Act*.

III. Competing Standards from Professional Groups

The standards for children's representatives that have emerged from professional groups, and their points of divergence, reveal some of the key debates in this area. The American Academy of Matrimonial Lawyers (AAML), the ABA, and the National Association of Counsel for Children (NACC), among others, have all recommended guidelines for children's representation. [FN71] The impetus for each set of standards was the common recognition that the lack of clear guidance for children's representatives ultimately disserves children, but the approaches taken in the various models contrast sharply. The AAML has come down strongly in favor of client-directed lawyering and would strictly limit the functions of lawyers for children who are too young to direct counsel. [FN72] The role of a lawyer under *78 the AAML guidelines largely depends on whether the child is “impaired” or “unimpaired,” and the guidelines recommend the use of a presumptive age demarcation. [FN73] The role of a lawyer for an “unimpaired” child closely parallels the role of a lawyer for an unimpaired adult client [FN74]—the lawyer must zealously pursue his client's objectives and otherwise maintain an ordinary lawyer—client relationship. [FN75] The lawyer for the impaired child, in contrast, should not advocate a position on the outcome of the proceeding or on contested issues, but should merely develop facts for the decision-maker to consider. [FN76] In the AAML's view, “[t]he most serious threat to the rule of law posed by the assignment of counsel for children is the introduction of an adult who is free to advocate his or her own preferred outcome in the name of the child's best interests.” [FN77]

To varying degrees, the recommended standards from other professional groups permit children's lawyers under certain circumstances to diverge from a child client's wishes or to engage in substituted judgment to arrive at a position the child has not formulated. The *ABA Abuse and Neglect Standards*, for example, reject the notion of a presumptive demarcation to determine capacity, instead taking the position that a child's disability is “contextual, incremental, and may be intermittent.” [FN78] Those standards allow a lawyer to advocate a child's “legal interests” if the child cannot or does not express a position as to a particular issue. [FN79] Moreover, the standards*79 accept, albeit reluctantly, the attorney/guardian ad litem model. A lawyer appointed as guardian ad litem is “appointed to protect the child's interests without being bound by the child's expressed preferences.” [FN80] Thus, the standards envision a role for legal counsel even for the preverbal child. The commentary reveals a concern, similar to that of the AAML, about the risk of lawyers acting on personal bias, but the ABA's approach is to constrain lawyers by limiting their advocacy role, not by eliminating that role altogether.

Similarly, the NACC, while committed to client-directed representation for children, has expressed reservations as to the duty of the child's lawyer to advocate the child's wishes throughout the litigation. As NACC Executive Director Marvin Ventrell explained, the NACC aimed for a “delicate representation balance between zealous attorney advocacy and child protection” [FN81] by emphasizing the counseling function of the child's lawyer. [FN82] Under the *NACC Revised Standards*, the child's attorney does not owe “robotic allegiance” to each directive of the child. Instead, the child's lawyer may exercise a degree of substituted judgment to present a position that will serve the child's interests when the child cannot meaningfully participate in the formulation of the client's position. [FN83] Fully aware of the problems of unconstrained bias and subjectivity, the *NACC Revised Standards* require the child's lawyer to adhere to objective criteria in the determination of the child's interests. [FN84]

The new *Representation of Children Act* is most closely aligned with the position taken by the ABA in its 2003 *Custody Standards*. [FN85] Those standards were the direct impetus for the new Act and are the genesis of the “child's attorney” and “best interests attorney” terminology. [FN86] Under *80 the *ABA Custody Standards*, the best interests

attorney “provides independent legal services for the purpose of protecting a child's best interests, without being bound by the child's directives or objectives.” [\[FN87\]](#) Significantly, the Act has shaded that definition to create a more robust attorney—client relationship between the best interests attorney and the child, [\[FN88\]](#) but in many other respects, including the rejection of the hybrid attorney/guardian-ad-litem role, [\[FN89\]](#) the Act closely parallels the *ABA Custody Standards*. [\[FN90\]](#)

IV. Key Provisions of Representation of Children Act

The scope of the new *Representation of Children Act* is broad. Under Section 2, “abuse or neglect proceeding” includes child protection proceedings and actions to terminate parental rights. [\[FN91\]](#) “Custody proceeding,” in turn, includes proceedings in which legal or physical custody of, access to, or visitation or parenting time with a child is at issue. [\[FN92\]](#) This would encompass a range of court proceedings in which a child's custody may be contested, such as divorce, parentage determinations, adoptions, and cases brought to protect a child or parent from domestic violence. [\[FN93\]](#)

Drawing on the *ABA Custody Standards*, the Act provides for two distinct lawyer roles—the child's attorney and the best interests attorney. The Act also endorses a lay representative, denominated “best interests advocate,” and rejects the hybrid category of attorney/guardian ad litem. Like the *ABA Custody Standards*, the Act directs lawyers to remain within their professional role and bars them from functioning as witnesses. [\[FN94\]](#) Conversely, the best interests advocate is not to function as a lawyer even *81 if the individual appointed possesses a license to practice law. [\[FN95\]](#) For all three categories, the Act seeks to improve the overall competence and professionalism of children's representatives. The Act requires that lawyers and best interests advocates be qualified by experience or training, [\[FN96\]](#) and the commentary encourages states to adopt statewide standards of practice. [\[FN97\]](#)

The child's attorney and the best interest attorney share many core functions as a legal representative for the child. Under Section 11, they both must get to know their child client in context [\[FN98\]](#) and perform a comprehensive factual investigation, including interviews with people having relevant information. Both must advise and counsel the child in a developmentally appropriate way and keep the child informed of the status of the proceedings and the opportunity to participate. [\[FN99\]](#) Both should explain the meaning and consequences of the child's choices in terms the child can understand. Significantly, both categories of lawyer must inform the court of the child's expressed goals in the proceeding if the child so desires. [\[FN100\]](#) More generally, the attorney, whether acting as a child's attorney or as a best interests attorney, should participate actively in all hearings and conferences on issues within the scope of the appointment and review proposed stipulations affecting the child. [\[FN101\]](#) Both categories of lawyer have broad access to evidence relating to the child [\[FN102\]](#) and receive *82 full protection for their work product. [\[FN103\]](#) Thus, the child's attorney and best interests attorney have much in common and will often be performing identical services for the child client.

While the categories do share many core responsibilities, they differ in certain key respects. The child's attorney is in a client-directed relationship with the child and is bound by traditional ethical obligations governing that relationship. [\[FN104\]](#) Under Section 12, the lawyer has a general duty to advocate the child's objectives unless they are prohibited by law or lacking in factual foundation. [\[FN105\]](#) If the child cannot or will not direct the lawyer on a particular issue, Section 12 permits the lawyer to pursue a position that is in the child's best interests so long as it does not conflict with the child's expressed objectives. [\[FN106\]](#) Alternatively, the child's attorney may take no position on the matter in question or ask the court to appoint a best interests attorney or a best interests advocate. [\[FN107\]](#)

The child's attorney is the child's legal advocate in the proceeding and cannot refuse to advance the child's position based simply on a disagreement with the child's wishes. On the other hand, if a child takes a position that the attorney determines will seriously endanger the child, the attorney should counsel the child to reconsider his or her position. If the child adheres to the position despite the attorney's efforts to counsel the child to reconsider and the attorney determines that the child's goal will place the child “at risk of substantial harm,” Section 12 requires the attorney to take protective action. [\[FN108\]](#) The attorney may continue to represent the child and request the appointment of a best

interests advocate or a best interests attorney, or, alternatively, the attorney may withdraw from representation and request the appointment of a best interests attorney. [FN109] To protect attorney—client*83 confidentiality, the Act bars the attorney from revealing the reasons for the request for a new representative. [FN110] While Model Rule 1.14 permits but does not mandate protective action, it is broadly worded to cover clients of diminished capacity in general. [FN111] This provision of the Act is focused on that narrow circumstance where children's desires place them at risk of substantial harm. Since the child's safety is paramount, the Act requires the child's attorney to pursue one of those options while still respecting the child's directives to the extent feasible. [FN112]

The best interests attorney, in contrast, must advocate a position that will serve 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.” [FN113] Under Section 13, the best interests attorney is not bound by the child's expressed objectives but must consider those objectives and give them due weight according to the underlying reasons and the child's developmental level. [FN114] Although the best interest attorney's assessment of the child's interests may often coincide with the child's wishes, sometimes they will diverge. The attorney, already under a duty to get to know the child in context, to fully investigate the facts, and to consult knowledgeable persons, must arrive at a position in the proceeding according to objective legal criteria, not the subjective biases of *84 the attorney. [FN115] The governing legal standards, in other words, are the guideposts, applied to the client's individualized circumstances. [FN116] In dependency proceedings, for example, the governing law would include the federal mandate that states make reasonable efforts to preserve or reunify families. [FN117] Similarly, in custody disputes, the governing law would include the statutory factors guiding the best interests determination, such as the wishes of the parties and the child. [FN118]

The best interests attorney, like the child's attorney, may not reveal client confidences unless otherwise permitted by the rules of professional conduct. [FN119] Nevertheless, a difference does exist with respect to the attorney's possible use of information relating to the representation without the client's consent. The best interests attorney may use, but not disclose, information received from the child if necessary to perform the duties inherent in the attorney's role. [FN120] The distinction between use and disclosure— a distinction that the attorney must explain to the child—permits the attorney to use a child's communications in developing the case without revealing that the child was the source of the information. If a child, for example, were to tell her lawyer that a parent had been intoxicated while caring for the child, the lawyer might use that communication to investigate whether the child's statement was accurate and, in particular, whether the parent habitually abuses alcohol. If corroborating evidence of alcohol abuse were discovered, the best interests attorney might determine that recommending court-ordered treatment for the parent would serve the child's interests. In that event, the attorney could bring the evidence of alcohol abuse to the attention of the court through an independent witness without revealing that the child was the original source of information. This inroad on the traditional attorney—client relationship is consistent with the *ABA Custody Standards* [FN121] and a flexible reading of the *ABA Model Rules of Professional Conduct*. [FN122]

*85 The third category of representative under the Act is the “best interests advocate,” an individual, not functioning as an attorney, appointed to assist the court in determining the best interests of the child. [FN123] The definition of the best interests advocate includes volunteer advocates such as persons affiliated with Court Appointed Special Advocate (CASA) programs. [FN124] The advocate's duties include many functions associated with guardians ad litem, but the Act avoids the “guardian ad litem” terminology because of the widespread disagreement and confusion about the meaning of that term. Under Section 14, the best interests advocate must meet with the child, determine the child's needs, circumstances, and views, and conduct a full investigation. [FN125] Just as both categories of attorney must present the child's expressed objectives to the court, the advocate must also do so and must consider the child's goals in deciding what recommendations to make in the proceeding. [FN126] Section 16 bans ex parte contact with the court by any representative [FN127] and requires that a best interests advocate be subject to cross-examination if he or she submits recommendations to the court. [FN128] The ban on ex parte contact and the requirement that the advisor be available for cross-examination should avoid the due process problems identified by courts in the past. [FN129]

Because of the fundamental importance of the child's interests at stake in any abuse or neglect proceeding, Section 4 of the Act requires the appointment of either a child's attorney or a best interests attorney for every child who is the subject of such a proceeding. [\[FN130\]](#) Children have profound liberty interests in their own safety, health, and well-being as well as *86 interests in protecting their family relationships. An erroneous decision to place a child in foster care will harm the child by the removal itself, the out-of-home living experience, and the consequent disruption in family relationships. An erroneous decision to terminate parental rights severs the child's ties with his or her birth parents and, if adoption is not forthcoming, leaves the child a legal orphan. Conversely, an erroneous decision not to remove a child from the home may place the child at risk of harm from ongoing abuse or neglect. Similarly, an erroneous decision not to terminate parental rights may expose the child to the trauma of extended impermanency in foster care. Court decrees can effectively redefine a child's identity and permanently alter a child's future. Due to the importance of the children's interests at stake in child protective proceedings and the effectiveness of lawyers in helping courts avoid error, the ABA and prominent child advocacy groups have long supported a requirement for the appointment of counsel. [\[FN131\]](#)

Attorneys can employ the full range of their legal skills to identify and analyze legal issues affecting their child clients and protect their clients' procedural and substantive interests throughout the pendency of the case. The role of counsel may vary, but legal representation can ensure that decisions in a case are based on an accurate, informed, and sensitive assessment of the child's circumstances. Because of the lasting impact of dependency proceedings on a child's life and the system's need for effective investigation and legal advocacy, at least one court has concluded that all foster children in state care have a constitutional due process right to legal counsel. [\[FN132\]](#) Although one prominent scholar has warned that children's lawyers may do more harm than good, [\[FN133\]](#) the solution would seem *87 to lie in better training and mandatory standards for the individuals who undertake this important role, not the denial of legal counsel altogether. [\[FN134\]](#) Consistent with ABA policy, the Drafting Committee determined that legal representation was essential.

The drafters of the Act recognized that the mandate for appointed counsel differs from *CAPTA*'s [\[FN135\]](#) requirement for the appointment of a guardian ad litem for every child in an abuse or neglect proceeding. While some states may view a child's attorney as satisfying *CAPTA*, others read *CAPTA* to require a representative whose role is to protect the child's best interests. [\[FN136\]](#) Accordingly, Alternative A of Section 5 requires a best interests advocate unless the court has already appointed a best interests attorney. [\[FN137\]](#) Alternative B, on the other hand, leaves the appointment of a best interests advocate up to the discretion of the court, regardless of which category of lawyer is appointed for the child. [\[FN138\]](#)

The appointment of representatives for children in custody proceedings, in contrast, is discretionary under the Act. Under Section 6, courts should consult a variety of factors in determining whether a representative would be beneficial. [\[FN139\]](#) 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 for the child. While factors listed in Section 6 may raise special concerns warranting an appointment, courts should also recognize that the appointment of a lawyer or best interests advocate for a child in a custody case might be unnecessary and could introduce a potentially intrusive, polarizing, and expensive additional voice in the proceeding. [\[FN140\]](#)

*88 Under the Act, the court determines the role of the attorney at the time of the appointment, [\[FN141\]](#) based on information then available to it concerning the child and the child's circumstances. [\[FN142\]](#) Because of the exigencies of abuse and neglect proceedings, courts often must act quickly in appointing attorneys for children since the Act requires an appointment "before the first court hearing that may substantially affect the interests of the child." [\[FN143\]](#) For practical purposes, judges who lack detailed information about a child's circumstances may need to use the child's age and developmental level as a rough measure for purposes of the initial designation of an attorney role. At the same time, the Act recognizes that a child's capacity to direct counsel is "contextual and incremental and is not simply a function of chronological age." [\[FN144\]](#) Under Section 9, a court may revise the designation in light of new infor-

mation or changed circumstances. Thus, if a best interests attorney determines that the child is capable of directing counsel and conveys that information to the court, Section 9 permits the court to redesignate the best interests attorney as a child's attorney or to add the appointment of a child's attorney where appropriate. [\[FN145\]](#) Conversely, if a child's attorney determines that the child cannot or will not direct counsel, the attorney may ask the court to appoint a best interests attorney. [\[FN146\]](#) By giving the court the power to designate the category of representative, the Act seeks to ensure that the appointee and the court will understand the nature of the role from the time of the initial appointment forward.

The Act also addresses the issue of liability of the various representatives for malpractice or other misconduct. Section 18 makes clear that only the child has a right of action against the representative [\[FN147\]](#) and provides a qualified immunity for best interests advocates. [\[FN148\]](#) The grant of immunity *89 shields the best interests advocate from liability for actions and recommendations in the course of the appointment unless the advocate is guilty of willful misconduct or gross negligence. [\[FN149\]](#) This qualified immunity protects the advocates from civil damages actions so that they can fully investigate and formulate recommendations without fear of retaliation, thus meeting the courts' needs.

While most states extend immunity to persons serving in a guardian ad litem capacity, [\[FN150\]](#) the law on immunity for attorneys is less clear. Because the child's attorney functions as a traditional attorney who is client-directed, Section 18 does not extend immunity to that appointee and instead holds the attorney to ordinary standards of care. [\[FN151\]](#) The best interests attorney, in contrast, may advocate a position that is contrary to the child's expressed objectives. Nevertheless, the best interests attorney still must perform other aspects of traditional legal representation for the child. These include providing advice and counsel to the child, communicating the child's wishes to the court, and representing the child's legal rights in the litigation. In light of the Act's recognition of an attorney-client relationship between the best interests attorney and the child, Section 18 likewise holds that attorney to ordinary professional standards of care. Thus, the two categories of lawyers that can be appointed for a child are treated similarly for purposes of immunity. [\[FN152\]](#) Section 18, however, does provide a bracketed option for states that wish to extend qualified immunity to best interests attorneys. [\[FN153\]](#)

Finally, the Act requires that attorneys and best interests advocates receive adequate and timely compensation throughout the terms of the appointments, unless the person appointed is a volunteer advocate. [\[FN154\]](#) In abuse and neglect cases, the fees should come from public funds, and states are encouraged to ensure that adequate funds are appropriated and made *90 available for this purpose. [\[FN155\]](#) In custody cases, in contrast, compensation typically comes from the parties themselves. The Act permits the court to allocate fees between the parties and to impose various requirements to ensure timely and reasonable compensation for children's representatives. [\[FN156\]](#) Recognizing that increasing numbers of divorcing couples cannot afford legal representation even for themselves, the Act in commentary recommends that states create funds for children's attorneys and best interest advocates in custody cases. [\[FN157\]](#)

V. Two Models of Lawyering

While many people were pleased that NCCUSL would devote its resources to the important topic of children's representation, the approach taken in the Act has engendered considerable controversy among child advocates. In particular, critics have argued that the Act's endorsement of a "best interests attorney" alternative for children's counsel is a step back-ward in the field of children's advocacy. [\[FN158\]](#) A curious disjuncture exists between the law governing children's representatives around the country, on the one hand, and the arguments of many child advocates about the ideal role for children's lawyers, on the other. In contrast to the models of representation that one sees in the statutes, procedural rules, and case law, many children's rights advocates today endorse an exclusively client-directed model for children capable of directing counsel. The recommendations that emerged from the 1995 Fordham Conference as well as the 2006 UNLV Conference oppose the concept of best interests lawyering. [\[FN159\]](#) This opposition, although not a unanimous view, [\[FN160\]](#) seems to be driven as *91 much by a deep suspicion of subjective decision-making by lawyers [\[FN161\]](#) as by the desire to empower children. [\[FN162\]](#) As Professor Guggenheim, a

leading critic of best interests lawyering, put it, “[A] growing consensus of scholars and practitioners increasingly insist that personality, personal opinions, values, and beliefs should play as small a role as possible in carrying out the responsibilities of representing a child in a legal proceeding.” [\[FN163\]](#) The literature evinces a significant distrust of any model of lawyering that authorizes the lawyer to make decisions for the child based on the lawyer's independent assessment of the child's welfare. [\[FN164\]](#)

Although child advocates have been recommending stronger client-directed roles for lawyers for more than two decades, [\[FN165\]](#) state legislatures have not moved consistently in that direction. Recent legislative changes in various states have endorsed both a best interests model of child representation [\[FN166\]](#) as well as a client-directed model. [\[FN167\]](#) Moreover, *CAPTA* continues to require the appointment of a guardian ad litem in abuse and neglect proceedings whose statutory duties include making recommendations to the court “concerning the best interests of the child.” [\[FN168\]](#) While the widespread legislative preference for a best interest model may be, in part, an accommodation of that current federal mandate, family and juvenile court judges may also favor a best interests advocate in custody and child welfare cases. [\[FN169\]](#) Realistically, then, the new *Representation of Children Act* may have a better chance of improving child representation nationwide by endorsing a best interests model as well as a client-directed model and providing child-centered standards of practice for both categories of ***92** lawyers, rather than authorizing the client-directed model alone.

Criticisms of the best interests attorney role can be loosely grouped into three kinds of concerns. First, critics contend that lawyers who engage in best interests representation are acting outside ethical boundaries since they are unmoored from the bedrock of client direction. [\[FN170\]](#) Second, critics contend that lawyers lack expertise to determine children's interests. [\[FN171\]](#) Legal training, it is said, does not prepare a person to make the nuanced and complex evaluations required in arriving at a position that is in the child's best interests, and lawyers who exercise unbridled discretion in determining children's interests may give effect to personal biases and prejudices. [\[FN172\]](#) Third, child advocates argue that children, as possessors of basic human rights, are entitled to have their views advocated in proceedings affecting their interests. [\[FN173\]](#) Children should be empowered as rights-bearers, rather than being viewed as vulnerable and the subject of paternalistic lawyering. [\[FN174\]](#)

By providing guidelines for the best interests attorney, the new Act seeks to constrain the lawyer's discretion while also imposing affirmative duties on the lawyer that are consistent with a traditional attorney's role. The *ABA Model Rules* require that a lawyer remain in a traditional lawyer—client relationship “as far as reasonably possible.” [\[FN175\]](#) That underlying mandate is effectuated in the new Act by the umbrella requirements of legal representation that apply to both the best interests attorney and the child's attorney, [\[FN176\]](#) and by the important obligation of the best interests attorney to give the child's wishes due weight in determining the position to advocate. [\[FN177\]](#) Moreover, under the Act the child's views must be made ***93** known to the court in every case, regardless of the category of representative, if the child so desires. [\[FN178\]](#) Critics seem to overlook this important duty of the best interests lawyer when they argue that the child's voice will not be heard without a client-directed attorney. [\[FN179\]](#)

The best interests lawyer diverges from the traditional duty of loyalty, [\[FN180\]](#) however, in not being bound to follow the child's expressed wishes. The basis for that divergence is found in the nature of childhood— better viewed as a process of evolution, rather than as a status—during which the child is developing an identity, formulating viewpoints, and becoming less dependent on adults. [\[FN181\]](#) Because of that immaturity, the child lacks legal decision-making power in most respects. [\[FN182\]](#) Under traditional rules of professional conduct, lawyers have the authority to act on behalf of persons with diminished capacity to protect their interests. [\[FN183\]](#) Model Rule 1.14 recognizes that the lawyer's role must change if the client's capacity to make “adequately considered decisions ... is diminished.” [\[FN184\]](#) The commentary does not define “adequately considered decisions” but notes that when the client is a minor, “maintaining the ordinary client—lawyer relationship may not be possible in all respects.” [\[FN185\]](#) At the same time, the commentary emphasizes that even young children have opinions that are entitled to weight in court proceedings affecting their custody. [\[FN186\]](#) Rule 1.14 also ***94** explicitly permits attorneys to take “reasonably necessary protective action” where a client with diminished capacity is at risk of harm, [\[FN187\]](#) and its wording is sufficiently flexible to permit a wide range of lawyering functions on behalf of that client. [\[FN188\]](#) Again, the

commentary explains that in taking protective action, the lawyer should be guided by “the client's best interests and the goals of intruding into the client's decision-making autonomy to the least extent feasible, maximizing client capacities and respecting the client's family and social connections.” [\[FN189\]](#) Protective actions may include consulting family members and professionals to help make decisions, including seeking the appointment of a guardian ad litem. [\[FN190\]](#) While the joint appointment of a best interests advocate and a child's attorney might be ideal, financial cost will often pose a barrier to such dual appointments. [\[FN191\]](#) Moreover, whether a child's attorney in such a scenario should be bound by the best interests advocate's assessment of the child's interests is itself a problematic question. [\[FN192\]](#) In addition, the commentary to the *Model Rules* cautions against the appointment of a guardian in every case of diminished capacity. [\[FN193\]](#) The basic design of the *Model Rules* thus seems to offer sufficient flexibility to permit a lawyer to act in a best interests role when representing a child who lacks capacity to direct counsel. Section 11's umbrella requirements for any attorney and Section 13's specific duties for best interests attorneys are designed to satisfy ethical precepts by mandating child-centered representation in which the best interests attorney owes respect and loyalty to the client but not absolute allegiance to the child client's articulated wishes. Of course, a state may wish to modify its rules of professional conduct to expressly authorize the best interests attorney model. [\[FN194\]](#)

***95** Those who criticize best interests lawyering because lawyers lack expertise to make such determinations seem to envision a lawyer arriving at a litigation position in a vacuum, driven solely by personal bias or whim. Instead, the best interests lawyer must base his or her legal position on input from the child and the child's relatives, friends, teachers, treating physicians, and others closely affiliated with the child. [\[FN195\]](#) The lawyer's responsibilities include gathering information from a range of sources, since no single person possesses expertise to dispositively expound on the child's best interests. The mental health expert, for example, may offer opinions about the immediate and long-term psychological consequences that a child is likely to experience from competing custodial arrangements, but the child's ultimate interests surely encompass more than that. [\[FN196\]](#) A teacher or neighbor may provide crucial information about the child's observed conduct and social relationships. The best interests lawyer is in a position to bring to the court's attention multiple sources of information bearing on the child's welfare. When doing so, the attorney's independent and informed interpretation of the evidence will necessarily shape the presentation, but the attorney's advocacy is constrained by the applicable law and the availability of evidence.

The risk that best interest lawyers may act with unconstrained discretion is a legitimate concern, one that the Act addresses through the provision of guidelines governing the lawyer's conduct. The Act's construct of best interests lawyering seeks to protect the child's welfare by requiring the lawyer to make an independent assessment of the child's interests based on a thorough investigation according to applicable legal standards. Of course, the practical tasks facing the attorney will vary according to context. In custody cases, judges generally must resolve access and visitation disputes under a multi-factor best interests standard. In abuse and neglect cases, on the other hand, the state's *parens patriae* power depends on a demonstrated need to protect children from harm, and judicial discretion is more narrowly circumscribed. In either context, however, the best interests attorney can ensure that judges receive an independent presentation of evidence and legal argument that includes but is not limited to the child's stated objectives. Working in tandem with a CASA or a mental health ***96** expert can enhance the lawyer's understanding of the child's circumstances and needs. [\[FN197\]](#) Moreover, best interests attorneys as well as child's attorneys should get to know the child in context by speaking with a child's parents, caregivers, teachers, and others with whom the child has frequent contact. [\[FN198\]](#) In short, the best interests lawyer who complies with the guidelines of the Act will have regular direct contact with the child [\[FN199\]](#) and will keep the child's unique identity and needs at the center of the representation.

Moreover, other standards that emphasize the client-directed model nevertheless countenance the exercise of considerable discretion under the rubric of “substituted judgment.” [\[FN200\]](#) The complex substituted judgment assessments envisioned by Jean Koh Peters and both the *Fordham* and *UNLV Recommendations* are so nuanced that they would seem to invite at least as much discretion in determining a position to advocate as the best interests determination. [\[FN201\]](#) The approach proposed by Professor Peters requires the attorney to understand the child in context, to see the world through the eyes of the child by intricately mapping a system that revolves “around the twin suns of the child's world and the theory of the case.” [\[FN202\]](#) That ideal is worth striving for, and Professor Peters's

book contains admirable guidelines to help attorneys accomplish this goal. The cartography of the child's world, however, surely lends itself to subjective judgment. The *UNLV Recommendations* likewise direct lawyers to follow a child's directions and, for children with diminished capacity, to pursue goals that “reflect what the client would want and the decision the child would make if the child could formulate a position.” [\[FN203\]](#) The problem is that a young child who has not established a firm personality or identity *97 remains opaque. A lawyer's interpretation of what the child would have wanted were the child able to express a position may mask arbitrary value judgments more than would a transparent assessment of best interests. [\[FN204\]](#)

Similarly, the AAML approach of limiting a lawyer's function to investigation and presentation of evidence is unlikely to accomplish the desired result of eliminating all subjective advocacy by lawyers for “impaired” children. [\[FN205\]](#) Even in the circumscribed role for lawyers that the *AAML Standards* envision, a lawyer's decision-making about which facts to bring to the court's attention and which facts to deemphasize will inevitably involve preliminary judgments about the merits of the case. In a custody dispute, for example, an attorney may need to decide whether to call the court's attention to evidence of the child's emotional outbursts during visitation with one parent. The attorney's choice will depend on the attorney's prediction of the impact of such evidence. One cannot evaluate the importance of evidence without asking, “For what purpose?” A lawyer's decision that the evidentiary record before the judge needs amplification will inevitably rest on a value judgment about the significance of the omitted evidence. More fundamentally, the AAML approach leaves the younger child without a legal advocate. As Ann Haralambie has argued, “the diminished role of attorneys for ‘impaired’ children ... deprives the children, the court, and the other parties of the creative, child-oriented advocacy which is the hallmark of a trained child's attorney.” [\[FN206\]](#) The drafters of the Act concluded that the better path was to acknowledge that lawyers for children must sometimes operate without client direction and to provide guidance to ensure that the representation focuses on objective legal criteria and the individual child in context.

If critics are animated in part by the fear of excessive judicial deference to children's lawyers, the remedy would seem to be in educating judges and reforming the substantive law, not in eliminating the advocacy function of lawyers. [\[FN207\]](#) The court is the ultimate decision maker and should not rely exclusively on the position of a child's attorney, a best interests attorney, a best interests advocate, or an expert witness. Although the role of *98 counsel may vary depending on the developmental level of the child, the needs of the court, and other factors, the Act rests on the premise that having available two models of legal representation for children can help courts achieve accurate, informed, and sensitive assessments of the child's needs, wishes, and overall circumstances.

Critics also fear that best interests lawyering disempowers children. In this respect, the debate about the role of children's lawyers may be the result of differing perceptions about children, lawyers, and the adversary system. Put simply, those who argue for the client-direction model view children as rights-bearers whose voices have too long been silenced, and they view best interests lawyers as dangerous players in the system whose biased determinations of children's interests and desires to be “heroes” have hurt children. As Professor Jane Spinak writes, the best interests attorney model permits a lawyer “to protect his or her client and not to represent them.” [\[FN208\]](#) In the view of the client-direction champions, the adversary system works best when each player, including the child, has a vigorous advocate. The judge's task is to determine the truth or, at a minimum, to reach a resolution that will best serve the child's interests. Judges perform most competently when the lawyers before them do not usurp the judicial role but advocate their client's desires on a level playing field.

The concept of children's empowerment, however, is highly contextual. Even the staunchest of children's rights advocates do not argue for the issuance of drivers' licenses to ten year olds. Similarly, most children's rights champions do not urge that young children's wishes in custody disputes should be determinative. [\[FN209\]](#) By including a best interests model for children's lawyers, the *Representation of Children Act* recognizes the vulnerability and core dependency of children. Children lack the legal capacity to make decisions for themselves in most circumstances and often lack the cognitive and emotional capacity to be fully, or consistently, self-determining. [\[FN210\]](#) Children in the throes of a custody dispute or children who are the subject of abuse and neglect proceedings may be particularly vulnerable, and their expressed desires may be acutely unstable and unreliable. Indeed, studies have shown that the

cognitive and linguistic capacities*99 of abused children, for example, are often significantly delayed. [FN211] A lawyer whose representation is controlled by the erratic directions of a traumatized child whose parent is accused of abuse may not present as full or reliable an evidentiary picture to the court as the court needs. Moreover, because an increasing number of divorce litigants have no legal representation, the child's appointed lawyer in a custody dispute may be the only lawyer in the courtroom. [FN212] Thus, courts may prefer a lawyer's evaluation of the child's interests in addition to the child's own assessment, since the child may be in intense distress and unlikely to fully grasp the consequences of certain decisions. [FN213] Also, if the client-directed role were the sole lawyering model available, lawyers might too readily push their young clients for guidance and direction, sometimes urging the child to make a choice despite the child's desire or psychological need to remain neutral. [FN214] By including a best interests option, the Act respects the dignity of the child while also recognizing that the voiced preferences of children may be distorted by their circumstances.

The drafters of the new Act concluded that a best interests role must be an available option for children's attorneys because there will always be some percentage of children who are incapable of directing counsel, whether because of immaturity, disability, emotional distress, or otherwise. Moreover, there will always be judges who view the best interests model *100 of child representation as more likely to result in a full presentation of evidence than purely child-directed lawyering, even for children who are able and willing to tell their lawyers what to do. The best interests attorney under the Act's approach respects the child's individuality as well as the child's vulnerability; the attorney determines the position to take in the litigation based on a complex of factors, including but not limited to the child's expressed wishes. When a mature child is capable of directing counsel, the child's voice is an essential piece of the overall picture presented to the decision maker, and the child's own sense of dignity and agency will be enhanced by traditional legal representation. But when the child cannot or will not reliably direct counsel, the lawyer must determine a position that will serve her client's interests. The Act provides a structure to help that lawyer go through a careful deliberative process centered on the child in developing the position to take in the litigation. In the adversary system the best interests attorney's advocacy and evidentiary showings are simply that—a lawyer's presentation. The role should not usurp the judge's responsibility to determine best interests but may significantly enrich the judge's understanding of the child's circumstances and welfare.

VI. Conclusion

Informed, thoughtful people who care deeply about children's welfare may have very different ideas about how best to effectuate their concerns. [FN215] The new Act rests on the premise that greater clarity in role definition for children's representatives and the imposition of higher standards of performance will better serve the needs of children. The Act is designed with flexibility to meet the needs of all children, regardless of capacity, and the needs of courts as they confront issues of core importance and enormous difficulty.

Carrying forward the approach of the *ABA Custody Standards*, the Act recognizes two models of legal representation and requires child-centered methods of lawyering for both roles. While respecting the valid concerns of those who criticize the best interests attorney model, NCCUSL chose to maintain that model as an option while providing concrete guidelines that constrain the attorney's discretion. For both models of lawyering, the child client is at the center of the representation, and the lawyer's advocacy must be informed by the child's unique individuality and circumstances, not the lawyer's subjective whim. The Act also recognizes that the lay representative can play a valuable part in enhancing the court's understanding of the *101 case, through testimony, reports, or other recommendations. At the same time, the Act provides limitations on the lay advocate's role in order to differentiate attorney and nonattorney functions and to ensure due process protections for participants.

NCCUSL itself, much like a legislative body, is a conference of generalists, not specialists, and one of the concerns underlying every uniform act is the question of "enactability." A proposed set of standards for children's representatives that did not include a best interests role for lawyers as an option would be unlikely to garner the support of state legislatures or of NCCUSL itself. In legislative halls, a cry of children's rights surely resonates more as the right to be free from harm rather than the right to direct counsel. A notorious child abuse case in a state may very well result

in policy changes aimed at achieving greater protection of children, but there are few cases, if any, that might motivate a legislature to provide greater autonomy to child clients. [FN216] The forces that shape public opinion and legislative policy would seem to require the availability of a best interests model for children's lawyers. [FN217]

By endorsing and carefully defining two lawyering roles as well as the role of best interests advocate, by mandating the appointment of counsel for every child in an abuse and neglect case, and by setting out detailed factors to guide the appointment decision in custody cases, the Act has a real chance of achieving practical reform. It seeks to guarantee children a voice in the legal process while also helping the courts resolve these challenging cases with as much informed wisdom as possible.

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[FN1]. The Administration for Children & Families, U.S. Dept. of Health & Human Services, for example, has published guidelines for states, including brief explanations of the role of a child's representative under the Child Abuse Prevention and Treatment Act, codified in part at [42 U.S.C. § 5106a\(b\)\(2\)\(A\)\(xiii\)](#). See CHILD WELFARE POLICY MANUAL, available at http://www.acf.hhs.gov/j2ee/programs/cb/laws_policies/laws/cwpm/policy.jsp?idFlag=2 (last visited November 5, 2007). Moreover, various professional associations have crafted their own recommended standards for children's representation. See *infra* notes 58-78 and accompanying text. An influential conference entitled "Ethical Issues in the Legal Representation of Children" was held in 1995 at Fordham Law School and produced a set of recommendations to improve the professional practice of lawyers who serve on behalf of children. See [Recommendations of the Conference on Ethical Issues in the Legal Representation of Children](#), 64 FORDHAM L. REV. 1301 (1996) [hereinafter *Fordham Recommendations*]. A ten-year anniversary conference was convened at the University of Nevada Law School in 2006. The Nevada Conference on Representing Children in Families: Children's Advocacy and Justice Ten Years After Fordham carried forward the work of the Fordham conference and yielded a further set of recommendations. See [Recommendations of the UNLV Conference on Representing Children in Families](#), 6 NEV. L.J. 592 (2006) [hereinafter *UNLV Recommendations*].

[FN2]. A few of the new statewide standards that have been recently promulgated include Rule 10, ARIZ. R. FAM. LAW PROC., ARIZ. REV. STAT. ANN. § 17B (2006)(describing duties and powers of child's attorney, best interests attorney, and court-appointed advisor); [COLO. REV. STAT. § 13-91-103 \(2005\)](#) (describing role of child's legal representative in domestic relations cases); 29 DEL. CODE ANN. tit. 29 § 9007 A (2005)(defining legal representation of children in abuse and neglect cases); [750 ILL. COMP. STAT. 5/506 \(2006\)](#)(describing duties of guardian ad litem, attorney, and child's representative in domestic relations cases); MICH. COMP. L. ANN. § 712.A.17d (2004) (prescribing duties of lawyer—guardian ad litem). For a summary of recent legislative enactments relating to child representation in abuse and neglect cases, see ABA Center on Children and the Law, Court Improvement Progress Report 2005 National Summary, available at <http://www.abanet.org/child/cipcatalog/home.html>.

[FN3]. See, e.g., Theresa Hughes, [A Paradigm of Youth Client Satisfaction: Heightening Professional Responsibility for Children's Advocates](#), 40 COLUM. J.L. SOC. PROBS. 551 (2007) (reporting on surveys of youth clients in juvenile court showing that youth wanted more communication and contact from their lawyers); Catherine J. Ross, *Voices in the Wilderness: Who Is Listening to Dependent Teens*, 6 NEV. L.J. 1362 (2006) (describing studies showing that foster children want voice in court and typically feel their lawyers do not provide that voice); PEW COMM'N 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. (recommending that foster children participate in proceedings affecting their lives).

[FN4]. See generally Marvin Ventrell, *The Practice of Law for Children*, 66 MONT. L. REV. 1 (2005) (describing

increased respect for the field of child representation and legal education's focus on training for child advocacy specialization).

[FN5]. United Nations Convention on the Rights of the Child (CRC) G.A. Res. 44/25 U.N. Dec. A/Res/44.125, U.N. GAOR, 44th Sess. (Nov. 20, 1989), [available at 28 I.L.M. 1448 \(1989\)](#). Article 12 of the CRC is the pivotal provision regarding children's participation:

1. States Parties shall assure to the child who is capable of forming his or her own views, the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. For the purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

Id. at Art. 12.

[FN6]. For a survey of child representation standards within and outside the United States, see 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) [hereinafter *How Children Are Heard*]. The study by Professor Peters includes a state-by-state survey of standards in child protection proceedings according to criteria for appointment and duties of a representative. *See id.* at 1073, App. C [hereinafter *Child Protection Survey*]. *See also* Rebecca Stahl, "Don't Forget About Me": Implementing Article 12 of the United Nations Convention on the Rights of the Child in Old Commonwealth Countries and the United States, 24 ARIZ. J. INT'L & COMP. L. 219 (2008) (examining child representation standards in private custody disputes in Britain, Canada, and New Zealand).

[FN7]. *See ABA Child Custody and Adoption Pro Bono Project, Fifty-one Jurisdiction Research Project on Divorce* (2007), [available at http://www.abanet.org/legalservices/probono/childcustody.html](http://www.abanet.org/legalservices/probono/childcustody.html) (last visited Nov. 5, 2007) [hereinafter *ABA Child Custody Survey*] (surveying child representation standards in private divorce proceedings including criteria for appointment, role of representative, availability of immunity, and means of compensation); *Child Protection Survey*, *supra* note 6 (revealing marked variations across the United States and sometimes within a single state).

[FN8]. Compare Donald Duquette, [Legal Representation for Children in Protection Proceedings: Two Distinct Lawyer Roles Are Required](#), 34 FAM. L.Q. 441 (2000) [hereinafter *Two Distinct Lawyer Roles*] (stating that children's evolving capacities require separate standards for client-directed attorney and best interests guardian ad litem) with Annette R. Appell, [Decontextualizing the Child Client: The Efficacy of the Attorney—Client Model for Very Young Children](#), 64 FORDHAM L. REV. 1955 (1996) (asserting that lawyers acting in best interests role lack ethical legitimacy and do not adequately represent child clients). While there may be a mounting call for child-directed representation among scholars and child advocates, as identified by Linda D. Elrod in *Client-Directed Lawyers for Children: It Is the "Right" Thing to Do*, the existing statutory and procedural guidelines for children's lawyers are still heavily weighted towards best-interests representation. *See* Linda D. Elrod, [Client-Directed Lawyers for Children: It Is the "Right" Thing to Do](#), 27 PACE L. REV. 869 (2007); *see also, infra* notes 49-70 and accompanying text.

[FN9]. Compare Jacob Ethan Smiles, [A Child's Due Process Right to Legal Counsel in Abuse and Neglect Dependency Proceedings](#), 37 FAM. L.Q. 485 (2003) (arguing that a child's liberty interests at stake in dependency require appointment of counsel as a due process right), with Martin Guggenheim, [How Children's Lawyers Serve State Interests](#), 6 NEV. L.J. 805 (2006) (suggesting that children's lawyers do more harm than good by too frequently siding with state child protective agencies).

[FN10]. Compare Linda Elrod, *Counsel for the Child: The Time Is Now*, 26 FAM. L.Q. 53 (1992) (emphasizing the

value of legal representation for children), with Martin Guggenheim, *Reconsidering the Need for Counsel for Children in Custody, Visitation and Child Protection Proceedings*, 29 LOY. U. CHI. L.J. 200 (1998) (questioning whether lawyers for children have distorted substantive law through exercise of unconstrained discretion).

[FN11]. Compare 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. CTR. FOR CHILD. & CTS. 63 (1999) (describing variations in lay advocacy programs and emphasizing value of such advocacy in protecting children), with Richard Ducote, *Guardians ad Litem in Private Custody Litigation: The Case for Abolition*, 3 LOY. J. PUB. INT. L. 106 (2002) (contending that guardians ad litem (GAL) have too much discretion and are given too much deference by courts in determining children's best interests).

[FN12]. Am. Bar Ass'n (ABA), *Standards of Practice for Lawyers Representing Children in Custody Cases*, 37 FAM. L.Q. 129 (2003) [hereinafter *ABA Custody Standards*].

[FN13]. Some of the more notable successes from NCCUSL include the UNIF. CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT, 9 U.L.A. 649 (1999 & Supp. 2003), and the UNIF. INTERSTATE FAM. SUP. ACT, 9 U.L.A. 171 1B (2005). Other uniform acts in the family law realm that have not been widely adopted have still contributed to policy discussions across the United States. See, e.g., UNIF. ADOPTION ACT, 9 U.L.A. 20 (1999).

[FN14]. Since both the Act's full name (the Uniform Representation of Children in Abuse, Neglect, and Custody Proceedings Act) and its acronym (URCANCPA) are somewhat cumbersome, I will refer to it in the text as the Representation of Children Act, or simply the Act.

[FN15]. See *infra* notes 29-31 and accompanying text.

[FN16]. The Act, of course, does not address the shortcomings of the child welfare system or the limitations of adversarial dispute resolution in private custody contests. Rather, the Act's more modest goal is to improve child representation in the systems now in place, a goal that should complement other law reform efforts in this area. For thoughtful law reform proposals, see Clare Huntington, *Mutual Dependency in Child Welfare*, 82 NOTRE DAME L. REV. 1485 (2007) (advocating more state support for family preservation while still respecting familial autonomy and equality).

[FN17]. The resolution of January 10, 2004, was that "a drafting committee be formed to draft an act on the role of attorneys representing children in custody disputes, and that the committee be initially charged to cover custody matters broadly (including the full spectrum of custody matters, including abuse, neglect, dependency, and termination cases, but not delinquency." See National Conference of Commissioners on Uniform State Laws, Midyear meeting of the Executive Committee 7 (Jan. 10, 2004), <http://www.nccusl.org/Update/meetings/Exec011004mn.pdf>.

[FN18]. The Drafting Committee was chaired by Rhoda Billings, whose leadership skills helped navigate the committee through some intense debates. The committee itself included public and private lawyers, judges, and academics who worked tirelessly during the marathon meetings. The project benefitted from the experience, expertise, and thoughtful insights of the two ABA Advisors: Ann Haralambie, author of *THE CHILD'S ATTORNEY* (1993), and Howard Davidson, Director of the ABA Center for Children and the Law. Several observers, including Jeff Atkinson, Miriam Krinsky, Andrea Neimeyer, and Marvin Ventrell, attended many Drafting Committee meetings and offered valuable (and sometimes contrasting) viewpoints for the committee's consideration.

[FN19]. *ROLE OF ATTORNEYS REP. CHILDREN IN CUSTODY DISPUTES ACT* (Draft April 2004), <http://www.law.upenn.edu/bll/archives/ulc/RARCCDA/Apr2004ChildMtgDraft.pdf> [hereinafter *April 2004 Draft*].

[FN20]. From the outset, the Drafting Committee understood that the Act would not apply to the representation of

children in juvenile delinquency proceedings. Delinquency proceedings are quasi-criminal in nature and implicate unique constitutional concerns, such as the right of confrontation, the right to testify in one's defense, and the privilege against self-incrimination, not ordinarily associated with abuse and neglect and private custody proceedings. *See, e.g., State ex rel Q.U.O., 886 So. 2d 1188 (La. Ct. App. 2004)* (reviewing Fifth Amendment challenge to adjudication of delinquency); *In re C.J.W.J., 699 N.W.2d 328 (Minn. Ct. App. 2005)* (reviewing minor's claim of ineffective assistance of counsel under the Sixth Amendment in adjudication of delinquency).

[FN21]. The official approval from the Scope and Program Committee was given on January 14, 2005. The committee expended considerable time and energy on the exact wording and punctuation of the Act's name. *Compare April 2004 Draft, supra note 19, with REP. OF CHILDREN IN ABUSE, NEGLECT & CUSTODY PROC. ACT (2005 Annual Meeting Draft)*, <http://www.law.upenn.edu/bll/archives/ulc/RARCCDA/2005AMRepDraft.pdf>.

[FN22]. TEXAS FAM. CODE ANN. § 107 (Vernon 2003) (authorizing appointments of attorney ad litem, amicus attorney, and attorney in dual role for children). *See generally* HON. DEBRA H. LEHRMANN, COURT-APPOINTED LEGAL REPRESENTATION OF CHILDREN IN TEX. FAMILY LAW CASES §§ 3.10-12 (2004-05 ed.).

[FN23]. *See April 2004 Draft, supra note 19, at § 2(4), available at www.nccusl.org* (defining "dual role" representative as attorney and guardian ad litem).

[FN24]. Section 14 of the Act makes clear that the lay "best interests advocate" (denominated "court-appointed advisor" in the 2006 Act) is not to function as an attorney. *See infra* notes 123-29 and accompanying text. I've explored elsewhere the ethical tensions inherent in the hybrid attorney/guardian ad litem role. *See* Barbara Ann Atwood, *Representing Children: The Ongoing Search for Clear and Workable Standards*, 19 J. AM. ACAD. MATRIM. LAW. 183 (2005).

[FN25]. *See ABA Custody Standards, supra note 12, at 148-52 (Standard V.)*.

[FN26]. The ABA Child Custody Standards describe the best interests lawyer as representing the child's best interests rather than the child. *See Id.* at 150 (Standard V.F.).

[FN27]. *See April 2004 Draft, supra note 19, at § 2(1)*. (defining best interests attorney as an attorney who provides legal services "necessary to assist the court in protecting the child's best interests rather than to provide legal services to the child").

[FN28]. Sections 2(2) & 13, 2006 Act, *available at* www.nccusl.org.

[FN29]. *See* proposed amendments to the Uniform Representation of Children in Abuse, Neglect, and Custody Proceedings Act, June 8, 2007. The proposed amendments were the result of a negotiation after the ABA Litigation Section and that section's Children's Rights Litigation Working Group voiced strong opposition to the 2006 Act because of its endorsement of the best interests attorney as an option in abuse and neglect proceedings. NCCUSL took the unusual step of withdrawing the Act from consideration by the ABA House of Delegates at the 2007 ABA Annual Meeting so that various interest groups could try to agree on revisions that would be satisfactory to all groups. Negotiations ensued among representatives from the NCCUSL Standby committee (the original Drafting Committee for the Act), the ABA Family Law Section, and the ABA Litigation Section. In addition, suggestions for changes in the black letter and commentary were independently proposed by the National CASA Association and the ABA Commission on Domestic Violence, and representatives from those groups also participated in the negotiations. *See* Standby Committee, URCANCPA, Proposed Revisions (June 22, 2007), http://www.law.upenn.edu/bll/archives/ulc/RARCCDA/2007june22_memo.pdf

[FN30]. The ABA Litigation Section strongly opposed the proposed amendments to the Act, contending that the amendments would authorize lawyers decoupled from clients and would deny children access to counsel. *See* Letter from Kim J. Askew, Chair of ABA Litigation Section (July 19, 2007) (on file with author). The Children Rights Litigation Working Group particularly opposed the possibility of “best interests legal representatives” functioning in abuse and neglect proceedings and was not satisfied with several other features of the interim proposed amendments. *See* Memorandum from Frank P. Cervone, Support Center for Child Advocates, (July 26, 2007) (on file with author). Other groups opposed the interim amendments because of their weakening of the best interests attorney's ethical responsibilities toward the child. *See* Memorandum from Marvin Ventrell, Director of National Association of Counsel for Children, July 23, 2007 (copy on file with author). Some critics who had already opposed the Act took the position that the proposed changes would make a bad product even worse. *See* Letter from Professor Jane M. Spinak to New York commissioners (July 23, 2007) (on file with author).

[FN31]. *See* URCANCPA § 13 (“Except as otherwise provided 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.”). The 2007 amendments also implemented changes suggested by representatives of the National CASA Association and the ABA Domestic Violence Commission.

[FN32]. *See* Memorandum from Commissioner Battle Robinsion to Howard Swibel, President of NCCUSL, (Aug. 2, 2005), [http:// www.law.upenn.edu/bll/archives/ulc/RARCCDA/2005RobinsonIssuesMemo.pdf](http://www.law.upenn.edu/bll/archives/ulc/RARCCDA/2005RobinsonIssuesMemo.pdf).

[FN33]. *See* URCANCPA at Alt. B, §§ 11-13, legislative notes (noting states where duties of attorneys can be prescribed only by court rule or administrative guideline and not by legislative act). Interestingly, in Arizona, where the basic approach of the Act has been endorsed for family court cases, the mechanism for doing so was by court rule. *See* Rule 10, ARIZ. RULES FAM. L. PRO. (2006).

[FN34]. *See* Memo to Howard Swible, *supra* note 32.

[FN35]. An interim draft proposed a legislative note to give states the option of appointing a lay representative rather than a lawyer for a child in an abuse or neglect proceeding. *See* URCANCPA § 4, LEG. NOTE [hereinafter *Feb. 2006 Draft*], [http:// www.law.upenn.edu/bll/archives/ulc/RARCCDA/2006FebChildRepDraft.pdf](http://www.law.upenn.edu/bll/archives/ulc/RARCCDA/2006FebChildRepDraft.pdf). That proposal in turn triggered a strong letter of opposition from the president of the American Bar Association, who explained that ABA policy firmly supported the absolute mandate for appointment of lawyers in child protection proceedings and that he would anticipate “significant opposition in the ABA House of Delegates” if the Legislative Note were to remain in the Act. *See* Letter from ABA President Michael S. Greco to Hon. Rhoda B. Billings (Jan. 31, 2006) (on file with author).

[FN36]. *See* URCANCPA § 4 (“In an abuse or neglect proceeding, the court shall appoint either a child's attorney or a best interests attorney.”).

[FN37]. *See* ROLE OF ATTORNEYS REP. CHILDREN IN CUSTODY DISPUTES ACT § 402, Draft Oct. 2004 [hereinafter *Oct. 2004 Draft*], [http:// www.law.upenn.edu/bll/archives/ulc/RARCCDA/Oct2004MtgDraft.pdf](http://www.law.upenn.edu/bll/archives/ulc/RARCCDA/Oct2004MtgDraft.pdf) (permitting child's attorney to request appointment of best interests attorney where child's attorney believes that child's stated preference will place child at risk of harm).

[FN38]. *See id.* at § 12.

[FN39]. *See Feb. 2006 Draft, supra* note 35, at § 12.

[FN40]. *See* Transcripts of NCCUSL Annual Meeting (July 8, 2008) (amendment proposed by Comm'r Joan Zeldon and adopted by majority vote (transcripts on file with author); URCANCPA, at 9(c), 11(c), 12(d)—(e) (Alternative A).

[FN41]. See *Oct. 2004 Draft*, *supra* note 37, at § 18.

[FN42]. See URCANCPA § 18.

[FN43]. See ABA House of Delegates, Rep. 110B: Summary of Recommendations (2008 Midyear Meeting). (copy on file with author).

[FN44]. Compare ABA Litigation Section, *Summary of Opposition to NCCUSL Act on Representation of Children* (Jan. 2008) (copy on file with author) (criticizing the Act as inconsistent with ABA Model Rules of Professional Conduct and contending Act will deny children's right to counsel), with ABA Family Law Section, *Response to Litigation Section's Opposition to the ULC (formally known as NCCUSL) Act on Representation of Children in Abuse, Neglect and Custody Proceedings* (Feb. 2008) (copy on file with author) (defending the Act as consistent with ABA Model Rules 1.14 and 1.6 and contending Act will improve children's representation).

[FN45]. See ABA House of Delegates Resolutions (Feb. 11, 2008) (showing that Report 110B, NCCUSL's Submission of Child Representation Act, was withdrawn). Shortly before this article went to press, the ABA Standing Committee on Ethics and Professional Responsibility concluded that the Uniform Act was inconsistent with the ABA Model Rules of Professional Conduct in various respects and declined to recommend changes in the Model Rules themselves to expressly authorize the role of best interests attorney. In light of the Standing Committee's position, the NCCUSL leadership decided not to resubmit the Act in its current form for approval by the ABA House of Delegates. See Memorandum from John A. Seber, Executive Director, Uniform Law Commission (May 8, 2008) (copy on file with author). Nevertheless, since states are free to shape and construe their own rules of professional conduct independently, debates about the ethical duties of children's lawyers surely will continue at the state level.

[FN46]. A cross-section of the literature reviewed includes JEAN KOH PETERS, REPRESENTING CHILDREN IN CHILD PROTECTIVE PROCEEDINGS: ETHICAL AND PRACTICAL DIMENSIONS (2d ed. 2001) (stating that a child's lawyer should develop a child-centered relationship with child client over time and discern the child's views by contextual understanding of the child's world); ANN M. HARALAMBIE, THE CHILD'S ATTORNEY (1993) (suggesting that a child's lawyer should advocate for a child's wishes except where the wishes will place the child at risk of harm, but the lawyer can minimize ethical problems by counseling child); Duquette, *supra* note 8 (recommending that children's evolving capacities require separate standards for client-directed attorney and best interests guardian ad litem); Martin Guggenheim, [A Paradigm for Determining the Role of Counsel for Children](#), 64 [FORDHAM L. REV.](#) 1399 (1996) (stating that a child's lawyer should focus on the child's substantive legal rights rather than advocating the child's wishes, since the child's wishes mean little if substantive law does not afford a legal right to the child); 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) (noting that a lawyer can empower a child client through greater advocacy of the child's wishes); Emily Buss, [You're My What? The Problem of Children's Misperceptions of Their Lawyers' Roles](#), 64 [FORDHAM L. REV.](#) 1699 (1996) (stating that children's developmental limitations impede their understanding of lawyer—client relationship); Sarah H. Rarnsey, [Representation of the Child in Protection Proceedings: The Determination of Decision-making Capacity](#), 17 [FAM. L.Q.](#) 287 (1983) (noting a child's lawyer should advocate child's expressed wishes when child is “capable of making considered decision”). The proceedings of the UNLV Children's Conference generated a volume of scholarly and impassioned articles by experts and will undoubtedly have an impact on the field. See Bruce A. Green & Annette R. Appell, [Representing Children in Families—Foreword](#), 6 [NEV. L.J.](#) 571 (2006).

[FN47]. See *supra* note 6.

[FN48]. See *infra* notes 71-90 and accompanying text.

[FN49]. See *Child Protection Survey*, *supra* note 6. Professors Peters's research reveals that a clear majority of states

use the hybrid lawyer/guardian ad litem model. *See also* Katherine Hunt Federle, [Children's Rights and the Need for Protection](#), 34 FAM. L.Q. 421, 424-26 (2000) (noting that at least forty-one states mandate or permit appointment of guardian ad litem in abuse and neglect proceedings).

[FN50]. *See, e.g.*, [IDAHO CODE ANN. §16-1614](#) (2005) (stating that a child age twelve years or older may have attorney to function either as guardian ad litem or client-directed attorney within court's discretion); [MINN. STAT. § 260C.163](#) (2005) (providing that in child protection proceeding, children age ten or older are also entitled to counsel if court feels appointment is appropriate, and counsel shall not also act as child's guardian ad litem); [N.M. STAT. § 32A-3B-8](#) (2005) (noting that a child age fourteen or older is entitled to client-directed attorney); [WIS. STAT. § 48.23](#) (2005) (stating that a child age twelve years or older is entitled to counsel in a child protection proceeding before a court may place the child outside of the home, or the court may appoint a guardian ad litem instead of counsel for younger children).

[FN51]. *See, e.g.*, MICH. COMP. LAWS § 712A.17d(2) (2005) (permitting court to appoint additional attorney for child when lawyer—guardian ad litem's determination of child's best interests are inconsistent with child's view); *In re Williams*, 805 N.E.2d 1110 (Ohio 2004) (stating that if a child's wishes differ from the guardian ad litem's position in proceeding for termination of parental rights, the court must appoint independent counsel to represent child).

[FN52]. *See generally* ADMIN. OFFICE OF THE COURTS, D. JUDICATURE, MARYLAND GUIDELINES OF ADVOCACY FOR ATTORNEYS REPRESENTING CHILDREN IN CINA AND RELATED TPR AND ADOPTION PROCEEDINGS (2001) (stating that attorney is client directed if attorney determines child has “considered judgment”) [http:// www.courts.state.md.s/family/fecip/guidelines.pdf](http://www.courts.state.md.s/family/fecip/guidelines.pdf); *Massachusetts 2004 Performance Standards Governing the Representation of Children and Parents in Child Welfare Cases* § 1.6 (attorney is client-directed if attorney determines child is capable of making “adequately considered decision”).

[FN53]. CAPTA, *inter alia*, 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.” [42 U.S.C. § 5106a\(b\)\(2\)\(A\)\(xiii\)](#) (2000). Implementing regulations explain that the Child Abuse Prevention and Treatment Act (CAPTA) appointee shall “represent and protect the rights and best interests of the child.” [45 C.F.R. § 1340.14](#) (1990).

[FN54]. [42 U.S.C. § 5106a \(b\)\(2\)\(A\)\(xiii\)](#).

[FN55]. The UNLV Conference Recommendations include a proposal to amend CAPTA to explicitly provide for the appointment of client-directed lawyers for children in abuse and neglect proceedings. *See UNLV Recommendations*, *supra* note 1, at 611-12 (pt. V.A.2).

[FN56]. *See Child Protection Survey*, *supra* note 6.

[FN57]. *See, e.g.*, [ME. REV. STAT. ANN. tit. 22, § 4005\(1\)\(E\)](#) (2004) (stating that guardian ad litem must make child's expressed wishes known to court); [42 PA. CONS. STAT. ANN. § 6311\(b\)\(9\)](#) (2004) (noting guardian ad litem must advise court of child's wishes; conflict between guardian's recommendation and child's wishes shall not be considered conflict of interest). *See* Federle, *supra* note 49, at 427-28.

[FN58]. *See, e.g.*, [R.I. GEN. LAWS § 40-11-14](#) (2004) (requiring court to appoint “a guardian ad litem and/or a court-appointed special advocate” without specifying duties). Professor Peters's research indicates that seventeen jurisdictions do not expressly require the child's representative to advocate or present the child's wishes to the court.

See *Child Protection Survey*, *supra* note 6, at 1014.

[FN59]. For a case addressing these ethical tensions, see [Clark v. Alexander, 953 P.2d 145 \(Wyo. 1998\)](#) (modifying traditional ethical restrictions on the attorney—client relationship to permit the attorney/guardian ad litem to breach confidentiality in order to advocate client's best interests but barring the attorney/guardian ad litem from testifying as fact witness). See generally Atwood, *supra* note 24, at 199-205 (discussing case law that addresses ethical limitations on attorneys that conflict with guardian ad litem role).

[FN60]. See, e.g., [WIS. STAT. § 767.407](#) (2007) (requiring, with limited exceptions, appointment of guardian ad litem if custody is contested). See generally *ABA Child Custody Survey*, *supra* note 7.

[FN61]. California's governing statute, for example, provides that the child's counsel “is charged with the representation of the child's best interests. The role of the child's counsel is to gather facts that bear on the best interests of the child, and present those facts to the court, including the child's wishes when counsel deems it appropriate” [CAL. FAM. CODE § 3151](#) (2007).

[FN62]. See ARIZ. R. FAM. L. PROC., 17B ARIZ. REV. STAT. R. 10 (Supp. 2006).

[FN63]. See, e.g., 750 ILL. COMP. STAT. 506 (2006) (designating three roles for children's representatives in custody disputes, including attorney, guardian ad litem, and “child representative”—an attorney who advocates child's best interests); [MD. CODE ANN. FAM. LAW § 1-202](#) (Lexis-Nexis 2006) (noting that in custody or support case, court may appoint lawyer to serve as “child advocate attorney” or “best interest attorney” and in either role, lawyer shall exercise ordinary care and diligence).

[FN64]. See, e.g., [MICH. COMP. LAWS § 722.24](#)(2) (2004) (applying lawyer— guardian ad litem model, including discretionary appointment of attorney for child where child's objectives diverge from position advocated by lawyer— guardian ad litem); [UTAH CODE ANN. § 78-7-45](#) (2007) (requiring attorney guardian ad litem to communicate child's wishes to court where attorney— guardian ad litem's position differs from child's wishes).

[FN65]. See generally Raven C. Lidman & Betsy R. Hollingsworth, *The Guardian ad Litem in Child Custody Cases: The Contours of Our Legal System Stretched Beyond Recognition*, 6 *GEO. MASON L. REV.* 255 (1998) (describing myriad functions of guardian ad litem and recommending that term be discarded altogether for more precise designations by role, such as investigator, mediator, or expert witness).

[FN66]. See, e.g., [Clark v. Alexander, 953 P.2d 145, 152 \(Wyo. 1998\)](#) (stating that the traditional role of a guardian ad litem is to serve as an “arm of court”); [Collins v. Tabet, 806 P.2d 40 \(N.M. 1991\)](#) (holding that a guardian ad litem functioning as an “arm of the court” is entitled to absolute quasi-judicial immunity).

[FN67]. See generally Lidman & Hollingsworth, *supra* note 65.

[FN68]. See, e.g., [MINN. STAT. § 518.165](#) (2004) (enumerating a broad range of duties for guardians ad litem in custody cases); [ARIZ. REV. STAT. ANN. § 8-522](#) (2003) (listing duties of “special advocates” in dependency actions).

[FN69]. *How Children Are Heard*, *supra* note 6, at 1014.

[FN70]. *Id.* at 1015.

[FN71]. See generally American Academy of Matrimonial Lawyers (AAML), [Standards for Attorneys and Guardians](#)

[ad Litem in Custody or Visitation Proceedings](#), 13 J. AM. ACAD. MATRIM. LAW. 1 (1995) [hereinafter *AAML Standards*] (recommending client-directed representation for “unimpaired” children, presumptively those children age twelve or older, and limited nonadvocacy role for lawyers representing “impaired” children); ABA, [Proposed Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases](#), 29 FAM. L.Q. 375 (1995) [hereinafter *ABA Abuse and Neglect Standards*] (recommending client-directed representation for child capable of directing counsel and representation of child’s “legal interests” for child lacking that capacity); Nat’l Ass’n of Counsel for Children (NACC), *American Bar Association Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases (NACC Revised Version)* (1996) [hereinafter *NACC Revised Standards*] (recommending client-directed representation, but permitting representation of child’s interests when child cannot meaningfully formulate position); *ABA Custody Standards*, *supra* note 12 (proposing two models of representation, child’s attorney and best interests attorney). The American Law Institute (ALI) has also weighed in on the role of attorneys in private custody disputes. See AM. LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.13 (2002) [hereinafter *ALI PRINCIPLES*] (proposing client-directed representation for child competent to direct terms of representation and appointment of guardian ad litem for child lacking competence).

[FN72]. See *AAML Standards*, *supra* note 71. The standards were the result of a deliberative process within the AAML, but they also show the thoughtful influence of the reporter, Professor Martin Guggenheim. See generally Martin Guggenheim, [The Right to Be Represented But Not Heard: Reflections on Legal Representation for Children](#), 59 N.Y.U. L. REV. 76 (1984) (suggesting that children over age seven should be deemed responsible for directing their attorneys and that younger children should be deemed incapable). Professor Guggenheim later revised his thinking to link the role of the child’s lawyer more closely to the particular legal context involved, focusing on the substantive rights afforded to the child in various areas of the law. See generally Guggenheim, *supra* note 46. Most recently, Professor Guggenheim has suggested that children’s lawyers in child welfare cases may do more harm than good by supporting state interventions into the family in the guise of children’s best interests. See generally Guggenheim, *supra* note 9; MARTIN GUGGENHEIM, WHAT’S WRONG WITH CHILDREN’S RIGHTS? 174-212 (2005) (questioning policies underlying child welfare reform).

[FN73]. *AAML Standards*, *supra* note 71, at 10 (Standard 2.2) providing that children age twelve or older are presumptively unimpaired—that is, capable of directing a lawyer—and children younger than twelve are presumptively impaired. *AAML Standards*, *supra* note 71, at 10 (Standard 2.2.) The use of the “impaired/unimpaired” distinction derived from the language of MODEL RULES OF PROF’L CONDUCT R. 1.14 (2002) (providing guidelines for lawyers who represent clients with diminished capacity).

[FN74]. *AAML Standards*, *supra* note 71, at 15 (Standard 2.3). The only variation in role that is linked to the client’s status as a child is the requirement that counsel try to expedite the proceedings and encourage settlement to protect the child from the harm that is caused by the litigation itself. See *id.* at 18 (Standard 2.6).

[FN75]. *Id.* at 161 (Standard 2.4). (noting that a lawyer should counsel a child but also must seek to attain the child’s objectives, even if unwise).

[FN76]. *Id.* at 28 (Standard 2.12).

[FN77]. *Id.* at 19 (Standard 2.7) cmt.

[FN78]. *ABA Abuse and Neglect Standards*, *supra* note 71, at 379-80 (Standard B-3) cmt.

[FN79]. *Id.* at 381 (Standard B-4(1), (2)). “Legal interests,” in turn, are to be determined with reference to “objective criteria” established by law, based on the child’s needs and interests and not merely the lawyer’s personal values and experiences. *Id.* at 383-84 (Standard B-5) cmt.

[FN80]. *Id.* at 376 (Standard A-2). At the same time, the ABA Abuse and Neglect Standards recognize the problematic nature of the dual role and express a clear preference for appointments of a child's attorney. Under the standards, if there is a conflict in the role of guardian ad litem and child's attorney— such as where the child's expressed wishes differ from what the lawyer believes to be in the child's best interests—the lawyer is directed to continue to perform as the child's attorney and withdraw as guardian ad litem. *Id.* at 379-80 (Standard B-2(1)).

[FN81]. *See generally* 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).

[FN82]. *ABA Abuse and Neglect Standards*, *supra* note 71, at 380 (Standard B-4).

[FN83]. *Id.* at 382 (Standard B-4(2)).

[FN84]. The criteria include a full investigation of the child's circumstances, an individualized assessment of the child at the moment of the determination, consideration of the child welfare paradigms of psychological parent and family network, and the use of experts. *See id.* These criteria were drawn from Jean Koh Peters, *The Role and Content of Best Interests in Client-Directed Lawyering for Children in Child Protective Proceedings*, 64 *FORDHAM L. REV.* 1505 (1996).

[FN85]. *See generally* *ABA Custody Standards*, *supra* note 12.

[FN86]. *See generally id.* The evolution of the standards is described by Reporter Linda D. Elrod, in *Raising the Bar for Lawyers Who Represent Children: ABA Standards of Practice for Custody Cases*, 37 *FAM. L.Q.* 105, 107-14 (2003).

[FN87]. *ABA Custody Standards*, *supra* note 12, at 138 (Standard II. B).

[FN88]. *See infra* notes 113-22 and accompanying text.

[FN89]. Like the AAML Custody Standards, the ABA Custody Standards reject the dual attorney/guardian-ad-litem role because of the inherent conflicts in that hybrid category and the ambiguity surrounding the term “guardian ad litem.” *See* Elrod, *supra* note 86, at 115-17.

[FN90]. In an effort to constrain the lawyer's personal biases, the ABA Custody Standards require the best interests attorney to use “objective criteria set forth in the law related to the purposes of the proceeding.” *ABA Custody Standards*, *supra* note 12, at 150 (Standard V. F). The commentary states that determining a child's best interests is “a matter of gathering and weighing evidence, reaching factual conclusions and then applying legal standards to them.” *Id.* at 150-51.

[FN91]. URCANCPA § 2(1) (2007).

[FN92]. *Id.* at § 2(5).

[FN93]. *See id.* at § 2(b) cmt.

[FN94]. *See id.* at § 17(a)(3)-(4). This effectuates the ethical prohibition on lawyers against acting as witness and advocate in the same proceeding. *See* MODEL RULES OF PROF'L CONDUCT R. 3.7 (2004).

[FN95]. See URCANCPA, *supra* note 28, at §§ 2(2), 16(c).

[FN96]. *Id.* at §§ 7, 8(a).

[FN97]. In particular, individuals appointed under the Act should have knowledge not just of applicable substantive law and available treatment systems but of child development, the impact of abuse and violence, the role of culture in family dynamics, children's communication styles, and other areas germane to child representation. See *id.* at §§ 7, 8, cmts.

[FN98]. Section 11(b)(1)(Alternative A) instructs both categories of lawyers to meet with the child and ascertain “in a manner appropriate to the child's developmental level, the child's needs, circumstances, and views.” *Id.* at §§ 11(b)(1) (Alternative A). The duty to get to know the child in context, a notion powerfully developed by Professor Jean Koh Peters, means that the lawyer must try to understand the child's perspectives and individualized circumstances in determining how to represent the child. See *generally* PETERS, *supra* note 46.

[FN99]. See URCANCPA § 11(b)(4), (5)(Alternative A). As noted in the Comment to Section 11, the child may benefit emotionally and psychologically by participating in a court proceeding affecting his or her future. A recent nationwide study concluded that in the abuse and 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.” PEW COMM'N ON CHILDREN IN FOSTER CARE, *supra* note 3, at 42.

[FN100]. The child's attorney not only has the duty to inform the court but must advocate the child's position, subject to limited exceptions. See URCANCPA § 12(c) (Alternative A). The best interests attorney, on the other hand, has the duty to present the child's expressed objectives to the court if the child so desires but not necessarily to advocate those objectives. See *id.*, § 13(d) (Alternative A).

[FN101]. See URCANCPA § 11 (Alternative A, cmt).

[FN102]. See *id.* at § 15.

[FN103]. See *id.* at § 17.

[FN104]. Consistent with Rule 1.14 of the ABA Model Rules, the child's attorney should determine whether the child has sufficient maturity to understand and form an attorney—client relationship. As the Comment to Section 12 makes clear, a child's capacities are fluid and incremental, and a child might be capable of directing a lawyer as to major questions in the litigation but incapable of providing guidance on minor issues. *Id.* at § 12 cmt.

[FN105]. *Id.* at § 12(c) (Alternative A).

[FN106]. *Id.* at § 12(d)(1) (Alternative A). In this respect, the Act diverges from the language of the ABA Custody Standards, which permit the lawyer in this situation to advocate a position that will serve the child's “legal interests,” defined as “interests of the child that are specifically recognized in law and that can be protected through the courts.” *ABA Custody Standards*, *supra* note 12 at 144-45, (Standard IV.C.2) cmt. Because the distinction between “legal interests” and “best interests” seemed enigmatic to the Drafting Committee, the terminology of “best interests” was used.

[FN107]. URCANCPA § 12(d)(2), (3) (Alternative A).

[FN108]. *Id.* at § 12(e) (Alternative A).

[FN109]. *Id.* at § 12(e) (Alternative A). When the child's attorney requests the appointment of a best interests attorney, the child's attorney may either stay in the case or withdraw. Although representation by two attorneys serving in different capacities is not common, the possibility of such dual representation is recognized in the ABA Custody Standards and in the law of a few states. *See ABA Custody Standards, supra* note 12, at 145, (Standard IV.C.3) (providing that where child's objectives place child at risk of substantial harm, child's attorney may request appointment of best interests attorney and continue to represent child's expressed position); MICH. COMP. LAWS 712A.17d(2) (2004) (allowing for appointment of additional child's attorney where lawyer—guardian ad litem's position conflicts with child's wishes).

[FN110]. URCANCPA § 12(f) (Alternative A).

[FN111]. MODEL RULES OF PROF'L CONDUCT R. 1.14(b) provides:

When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken, and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

The commentary expands on the options a lawyer may consider and emphasizes that the lawyer should be guided by the client's wishes and values, to the extent known.) *Id.* at R.1.14(b) cmt.

[FN112]. Both the ABA Abuse and Neglect Standards and the ABA Custody Standards recognize, in commentary, 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. *See ABA Abuse and Neglect Standards, supra* note 71, at 380-81 (Standard 1.B-4(3) cmt. (if there is substantial danger of serious injury or death, lawyer *must* take minimum steps necessary to ensure child's safety); *ABA Custody Standards, supra* note 12 at 145 (Standard IV.C(3) cmt.).

[FN113]. URCANCPA § 13(b).

[FN114]. *Id.* at § 13(e) (Alternative A).

[FN115]. As explained in the commentary, the best interests attorney must follow objective criteria and not substitute his or her personal values. *Id.* at § 13 cmt. “The ‘criteria established by law relating to the purposes of the proceeding’ will include standards imposed by federal and state law for child protection in abuse and neglect proceedings, as well as a state's substantive law governing child custody determinations or other issues relevant to the proceeding.” *Id.*

[FN116]. *Id.* at § 13, cmt.

[FN117]. *See, e.g.*, ADOPTION AND SAFE FAMILIES ACT OF 1997, [42 U.S.C. § 671\(a\)\(15\)](#) (1997).

[FN118]. *See, e.g.*, UNIF. MARRIAGE & DIVORCE ACT § 402, 9A U.L.A. 282 (1998).

[FN119]. URCANCPA §13(f) (Alternative A).

[FN120]. *Id.* (noting a best interests 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”).

[FN121]. *ABA Custody Standards*, *supra* note 12, at 148 (Standard V.B.).

[FN122]. MODEL RULES OF PROF'L CONDUCT R. 1.14(c) (providing that "[w]hen taking protective action [for a client with diminished capacity], the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests."). For a further explanation of the flexibility inherent within Rule 1.14, see *infra* notes 184-93 and accompanying text.

[FN123]. URCANCPA § 2(2). The 2006 Act used the terminology of "court-appointed advisor." *See generally Feb. 2006 Draft*, *supra* note 35, available at www.nccusl.org. At the urging of the National CASA Association, NCCUSL changed the terminology in the 2007 amendments to better reflect the advocacy function of lay representatives. *See Memorandum from NCCUSL Standby Com.*, *supra* note 29.

[FN124]. The CASA is a lay volunteer who advocates as a nonlawyer on behalf of a child in child protection proceedings. 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. One of the key strengths of the CASA program is the assignment of only one child to one CASA at a time, producing highly individualized and child-focused representation.

[FN125]. URCANCPA § 14(1).

[FN126]. *Id.* at § 14(3),(4).

[FN127]. *Id.* at § 16(b).

[FN128]. *Id.* at § 16(e).

[FN129]. *See, e.g., In re Bates*, 819 N.E.2d 714 (Ill. 2004) (noting that statutory provision permitting guardian ad litem to submit report without being subject to cross-examination by mother in custody proceeding was a violation of mother's procedural due process rights).

[FN130]. URCANCPA § 4.

[FN131]. *ABA Abuse and Neglect Standards*, *supra* note 71, at Preface ("All children subject to court proceedings involving allegations of child abuse and neglect should have legal representation as long as the court's jurisdiction continues."); INST. OF JUD. ADMIN. & AM. BAR ASS'N, JUVENILE JUSTICE 74 (Robert E. Shepherd, Jr., ed. 1996) (calling for independent representation for children in proceedings affecting their status or custody).

[FN132]. In *Kenny A. v. Perdue*, 356 F. Supp. 1353 (N.D. Ga. 2005), a federal district court interpreted the due process clause of Georgia's constitution to require appointed counsel for foster children in abuse and neglect proceedings and proceedings to terminate parental rights. In light of the strength of the child's interests and the serious risk of error, the court concluded that "only the appointment of counsel can effectively mitigate the risk of significant errors in deprivation and TPR proceedings." *Id.* at 1361. According to the court, "[j]udges, unlike child advocate attorneys, cannot conduct their own investigations and are entirely dependent on others to provide them information about the child's circumstances.... CASAs are also volunteers who do not provide legal representation to a child." *Id.* In a consent decree reached after the decision, the parties agreed that the standards of conduct for children's attorneys should be drawn in part from the ABA Abuse and Neglect Standards. *See Consent Decree in A. et al. v. Barnes*, Oct. 27, 2005 (1:02-CV-01686) (Judge Marvin H. Shoob).

[FN133]. *See generally* Guggenheim, *supra* note 9 (suggesting that children's attorneys too readily side with state

child protection agencies and rarely oppose state intervention). Professor Guggenheim more broadly questions the results of children's rights advocacy in his book, *See generally* GUGGENHEIM, *supra* note 72.

[FN134]. *See* Howard Davidson, [Children's Rights and American Law: A Response to What's Wrong with Children's Rights](#), 20 EMORY INT'L L. REV. 69 (2006).

[FN135]. *See supra* notes 53-55 and accompanying text.

[FN136]. For a discussion of the meaning of the CAPTA guardian ad litem requirement, *see In re Charles T.*, 125 Cal. Rptr. 2d 868 (Ct. App. 2002) (holding that appointment of legal counsel for child satisfies CAPTA because counsel has duty to advocate for the protection of a child, present evidence, advise the court of the child's wishes, and investigate interests of the child beyond dependency).

[FN137]. URCANCPA, *supra* note 28 at § 5(a)(1) (Alternative A).

[FN138]. *Id.* at § 5(a) (Alternative B).

[FN139]. *Id.* at § 6(b). The factors listed in Section 6(b) draw heavily from a similar set of discretionary factors included in the ABA Custody Standards. *See ABA Custody Standards*, *supra* note 12, at 152-60 (Standard VI).

[FN140]. *See* ALI PRINCIPLES, *supra* note 71, at § 2.13 cmt. 6 (suggesting that appointment of advocate for child may constitute undesirable and inappropriate intrusion on parental authority and heighten adversarial nature of proceeding without enhancing court's ability to discern child's best interests).

[FN141]. URCANCPA § 9.

[FN142]. *Id.* at § 4(b), 6(c).

[FN143]. *Id.* at § 4(a).

[FN144]. *See id.* at § 4, cmt. For a thoughtful early framework for determining children's competency to direct counsel, *see* Ramsey, *supra* note 46, at 316 (recommending representation of a child's expressed wishes when the child is "capable of making a considered decision").

[FN145]. *See* URCANCPA §§ 5(a)(1) (Alternative A), 9(c)(1), (2).

[FN146]. *See id.* at § 9(c)(3). Because of the differences between the child's attorney and the best interests attorney concerning the attorney's use of information relating to the representation, the Act does not permit a redesignation of a child's attorney as a best interests attorney. *See id.* at § 9, cmt.

[FN147]. *See id.* at § 18(a). Although courts have recognized that the representative owes a duty of professional competence to the child and not to the other parties in the litigation, embittered parents still press such claims. *See In re Z.J.*, 153 S.W.3d 535 (Tex. App. 2004) (noting that mother lacked standing to challenge performance of child's appointed attorney ad litem in parental rights termination proceeding).

[FN148]. *See* URCANCPA § 18(b).

[FN149]. *Id.*

[FN150]. See [Carrubba v. Moskowitz, 877 A.2d 773 \(Conn. 2005\)](#) (surveying immunity law across nation and noting that most states extend absolute immunity to children's representatives; recognizing absolute immunity for child's counsel who advocated child's wishes but whose primary duty was protection of child's best interests).

[FN151]. See URCANCPA § 18(b)

[FN152]. At least one court has held that an attorney appointed to represent a child's interests in a divorce action was not entitled to immunity from tort liability. See [Fox v. Wills, 890 A.2d 726 \(Md. 2006\)](#).

[FN153]. See URCANCPA § 18(b). Some states may prefer this approach in order to encourage individuals to accept appointments as best interests attorneys, particularly in the context of acrimonious divorces. See [Blunt v. O'Connor, 737 N.Y.S.2d 471, \(App. Div. 2002\)](#); *ABA Custody Standards, supra* note 12, at 160 (Standard VI. F) (extending qualified immunity to best interests attorneys).

[FN154]. See URCANCPA §§ 19, 20.

[FN155]. The Act does provide for reasonable reimbursement to the state by the parties where appropriate. *Id.* at § 19(c).

[FN156]. *Id.* at § 20(b).

[FN157]. *Id.* at cmt.

[FN158]. See generally Jane M. Spinak, [Simon Says Take Three Steps Backwards: The National Conference of Commissioners on Uniform State Laws Recommendations on Child Representation](#), 6 NEV. L.J. 1385 (2006).

[FN159]. *Fordham Recommendations, supra* note 1, at 1301 (stating that lawyer for child capable of directing representation must allow child to set goals of representation); *UNLV Recommendations, supra* note 1, at 609 (suggesting that children's attorneys should take direction from client and should not substitute for child's wishes attorney's own judgment of what is best for children or for that child).

[FN160]. See generally Donald N. Duquette, [Two Distinct Roles/Bright Line Test](#), 6 NEV. L.J. 1240 (2006) (arguing that client-directed model and best-interests model are both needed to accommodate developing capacities of childhood, and recommending bright-line age demarcation); Robert F. Harris, [A Response to the Recommendations of the UNLV Conference: Another Look at the Attorney/Guardian ad Litem Model](#), 6 NEV. L.J. 1284 (2006) (arguing that hybrid model gives attorney needed discretion to tailor representation to individual needs of child client).

[FN161]. See generally Guggenheim, *A Paradigm for Determining the Role of Counsel for Children, supra* note 46.

[FN162]. See generally JEAN KOH PETERS, *supra* note 46; Federle, *supra* note 46.

[FN163]. Guggenheim, *Reconsidering the Need for Counsel for Children, supra* note 10, at 301.

[FN164]. As Professor Guggenheim explains, skepticism about best interests lawyering stems from multiple goals: to avoid decision-making based on personal bias, to foster predictability, to confine lawyers to their professional roles, and to ensure that the policies of the substantive law are carried out. *Id.* at 312-13.

[FN165]. See generally *Fordham Recommendations, supra* note 1; Guggenheim, *The Right to Be Represented But Not*

Heard, *supra* note 72; *Ramsey*, *supra* note 46.

[FN166]. *See, e.g.*, ARIZ. R. FAM. L. PROC., R. 10 (2006); [MD. CODE § 1-202](#) (Lexis-Nexis 2006); MICH. COMP. LAWS § 712A.17d (2004).

[FN167]. *Massachusetts 2004 Performance Standards*, *supra* note 52.

[FN168]. *See supra* notes 53-55 and accompanying text.

[FN169]. Judge Debra Lehrmann, worries that her obligation to protect the child from harm will be compromised if the child's lawyer advocates exclusively what the child wants and asks, "Does the child's interest in directing the actions of counsel outweigh the child's interest in being assured that all evidence bearing on his or her welfare is presented to the court?" Hon. Debra H. Lehrmann, *Who Are We Protecting?* 63 TEX. B.J. 122, 126 (2000). *See also* Ann M. Haralambie, [Humility and Child Autonomy in Child Welfare and Custody Representation of Children](#), 28 [HAMLIN J. PUB. L. & POL'Y](#) 177, 177 (2006) (noting that judges are reluctant to embrace client-directed lawyering for children).

[FN170]. *See generally* Annette R. Appell, [Decontextualizing the Child Client: The Efficacy of the Attorney—Client Model for Very Young Children](#), 64 [FORDHAM L. REV.](#) 1955 (1996).

[FN171]. *See generally* Guggenheim, *Reconsidering the Need for Counsel*, *supra* note 10; Appell, *supra* note 170 (lawyers lack training to effectively determine children's interests in child welfare proceedings).

[FN172]. *See, e.g.*, Appell, *supra* note 170, at 1966; *AAML Standards*, *supra* note 71, at 19-20 (Standard 2.7, cmt.) (noting that lawyers are untrained to determine what is best for children and therefore are not competent to act as "de facto guardian" in child custody proceedings).

[FN173]. *See generally* Jessica Matthews Eames, [Seen But Not Heard: Advocating for the Legal Representation of a Child's Expressed Wish in Protection Proceedings and Recommendations for New Standards in Georgia](#), 48 [EMORY L.J.](#) 1431 (1999); Federle, *supra* note 46.

[FN174]. *See generally* Barbara Bennett Woodhouse, [Talking About Children's Rights in Judicial Custody and Visitation Decision-Making](#), 36 [FAM. L.Q.](#) 105, 130 (2002) ("From a child's rights perspective, one of the most important decisions a judge can make is the decision whether to appoint an attorney to represent the child."); Federle, *supra* note 49.

[FN175]. MODEL RULES OF PROF'L CONDUCT R. 1.14(a) (providing that "[w]hen a client's capacity to make adequately considered decisions in connection with a representation is impaired, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client—lawyer relationship with the client.")

[FN176]. *See* URCANCPA § 11.

[FN177]. *Id.* at § 13(d).

[FN178]. *Id.* at § 12 (child's attorney's duty), § 13(c) (best interests attorney's duty).

[FN179]. *See, e.g.*, Elrod, *supra* note 8, at 902.

[FN180]. In general, Model Rule 1.2 requires lawyers to abide by their clients' decisions concerning the objectives of representation. *See* MODEL RULES OF PROF'L CONDUCT R. § 1.2(a).

[FN181]. *See* Emily Buss, [Confronting Developmental Barriers to the Empowerment of Child Clients](#), 84 CORNELL L. REV. 895, 918-48 (1999) (surveying child development literature and highlighting child's inchoate understanding of self in relationship to legal process); Harry Brighthouse, [How Should Children Be Heard?](#), 45 ARIZ. L. REV. 691, 698-99 (2003) (noting that childhood is a process of self-definition and does not fit easily with a rights-bearing status as a moral or a philosophical matter). The fluid nature of childhood and adolescence, from a cognitive development perspective, informed the Supreme Court's reasoning in its decision striking down the juvenile death penalty. *See* Roper v. Simmons, 569 U.S. 551, 569-75 (2005). *See generally* Elizabeth S. Scott, [The Legal Construction of Adolescence](#), 29 HOFSTRA L. REV. 547 (2000).

[FN182]. *See* Wallace J. Mlyniec, [A Judge's Ethical Dilemma: Assessing a Child's Capacity to Choose](#), 64 FORDHAM L. REV. 1873 (1996) (applying child development research to various contexts in which children's choices carry legal weight, including abortion, child custody, medical treatment, and delinquency).

[FN183]. *See, e.g.*, [Clark v. Alexander](#), 953 P.2d 145 (Wyo. 1998) (construing ethical constraints as flexible enough to encompass attorney/guardian ad litem model in child representation); Buss, *supra* note 46, at 1718-19 (noting ambiguity of former Rule 1.14 in its authorization for lawyer to depart from client direction if client cannot make "adequately considered decisions").

[FN184]. MODEL RULES OF PROF'L CONDUCT R. 1.14(a).

[FN185]. *Id.* at cmt.

[FN186]. The comment states, "[C]hildren as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody." *Id.*

[FN187]. *See id.* at R. 1.14.

[FN188]. *See* JENNIFER L. RENNE, LEGAL ETHICS IN CHILD WELFARE CASES 34-45 (2004) (exploring ways in which best interests lawyering for children comports with general guidelines of Rule 1.14 and emphasizing that attorney should be guided by respect for client).

[FN189]. MODEL RULES OF PROF'L CONDUCT R. 1.14, cmt.

[FN190]. *Id.* at R. 1.14(b).

[FN191]. In [Clark v. Alexander](#), 953 P.2d 145, 153 (Wyo. 1998), for example, the court stated, in the context of a custody dispute, "We believe that the costs attending the appointment of both an attorney and a guardian ad litem would often be prohibitive and would in every case conscript family resources better directed to the children's needs outside the litigation process."

[FN192]. In [Schult v. Schult](#), 699 A.2d 134 (Conn. 1997), for example, the court held that a child's attorney in a divorce action may advocate a different position as to the child's best interests from that recommended by the child's guardian ad litem.

[FN193]. MODEL RULES OF PROF'L CONDUCT R. 1.14, cmt. (noting that appointment of legal representative may be more expensive or traumatic for the client than circumstances, in fact, require).

[FN194]. Cf. ILL. SUP. CT. RULES OF PROF'L CONDUCT R. 907 (2006) (setting out standards of practice for attorneys who represent children).

[FN195]. As recognized by Jean Koh Peters, experts who have been or will be involved with the child over the long term may be of more value to the court than the one-time expert consultant appointed for the litigation. See PETERS, *supra* note 46, at 355-64.

[FN196]. See, e.g., Daniel W. Shuman, *What Should We Permit Mental Health Professionals to Say About "The Best Interests of the Child"?: An Essay on Common Sense, Daubert, and the Rules of Evidence*, 31 FAM. L.Q. 551 (1997) (contending that courts should be cautious about permitting mental health experts to express opinions about a child's best interests, in light of the fallibility of mental health predictions).

[FN197]. See Randi Mandelbaum, *Revisiting the Question of Whether Young Children in Child Protection Proceedings Should Be Represented by Lawyers*, 32 LOY. U. CHI. L.J. 1, 85-87 (2000) (stating that lawyers working in combination with court-appointed special advocates would improve child representation).

[FN198]. See generally Christine Gottlieb, *Children's Attorneys' Obligation to Turn to Parents to Assess Best Interests*, 6 NEV. L.J. 1263 (2006) (exploring the value of incorporating parental assessments of best interests in representing children); Mary Kay Kisthardt, *Working in the Best Interests of Children: Facilitating the Collaboration of Lawyers and Social Workers in Abuse and Neglect Cases*, 30 RUTGERS L.J. 1 (2006) (discussing ways in which interdisciplinary collaborations can improve lawyers' competence in representing children).

[FN199]. Interestingly, a recent survey of children involved in juvenile court proceedings reported that the children's most frequent complaint about their lawyers was the lawyers' failure to communicate with them on a regular basis. See generally Hughes, *supra* note 3.

[FN200]. See Duquette, *supra* note 160, at 1242-43 (suggesting that the ABA Abuse and Neglect Standards, the NACC Revised Version, and the Fordham Recommendations all contain opportunity for lawyer discretion that is unreviewed and unconstrained by objective criteria).

[FN201]. *Id.*

[FN202]. PETERS, *supra* note 46, at 135.

[FN203]. UNLV Recommendations, *supra* note 1 at 610 (Rec. IV. A. 2(c)(ii)).

[FN204]. Cf. *In re Christopher I.*, 131 Cal. Rptr. 2d 122 (Ct. App. 2003) (finding best interests of child standard, rather than substituted judgment standard, governed determination of whether to withhold life-sustaining medical treatment for comatose eighteen-month-old infant, since child had never been competent to make his own decisions or express his emotions on issue before court).

[FN205]. 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).

[FN206]. *Id.*

[FN207]. See *id.* at 92-93; Mandelbaum, *supra* note 197, at 79-80 (noting judicial training should teach judges to achieve more in-depth understanding of children's circumstances).

[FN208]. Spinak, *supra* note 158, at 1390.

[FN209]. *But see* Randy Frances Kandel, [Just Ask the Kid! Towards a Rule of Children's Choice in Custody Determinations](#), 49 U. MIAMI L. REV. 299, 375 (1994) (recommending that as between fit parents, wishes of child six years old and older should be legally dispositive).

[FN210]. *Cf.* Buss, *supra* note 181 (noting that children's lack of capacity to understand lawyer—client relationship and client impact in litigation undermines empowerment ideal). While Professor Buss may not endorse the best interests lawyering model, she does question the pure client-direction model, since it assumes that the client appreciates his or her influence over the lawyer and the legal process. She recommends that children's lawyers reconceptualize their role as one of teaching the child about the opportunity to assert control. *See id.* at 950-60.

[FN211]. *See generally* Carol D. Stock & Philip A. Fisher, *Language Delays Among Foster Children: Implications for Policy and Practice*, 85 CHILD WELFARE 445 (2006) (stating that foster children experience significant developmental delays that too often go untreated); ANN GRAFFAM WALKER, HANDBOOK ON QUESTIONING CHILDREN 59 (1999) (noting that maltreated children fall significantly below normal curve for both receptive and expressive language skills).

[FN212]. *See, e.g.,* Jona Goldschmidt, [The Pro Se Litigant's Struggle for Access to Justice: Meeting the Challenge of Bench and Bar Resistance](#), 40 FAM. CT. REV. 36 (2002) (citing studies showing increase in percentage of pro se litigants in family court across United States); Steven K. Berenson, [A Family Law Residency Program?: A Modest Proposal in Response to the Burdens Created by Self-Represented Litigants in Family Court](#), 33 RUTGERS L.J. 105, 107 (2001) (reporting that percentage of cases in which at least one litigant appears pro se is significantly higher in family law cases than in any other area of law and constitutes a majority of family law cases in studied jurisdictions). *See generally* JONA GOLDSCHMIDT ET AL., MEETING THE CHALLENGE OF PRO SE LITIGATION: A REPORT AND GUIDEBOOK FOR JUDGES AND COURT MANAGERS (1998) (reporting on survey of judges indicating significant increase in self-representation by litigants).

[FN213]. *See* Subha Lembach, [Representing Children in New York State: An Ethical Exploration of the Role of the Child's Lawyer in Abuse and Neglect Proceedings](#), 24 WHITTIER L. REV. 619, 634-35 (2003); Duquette, *supra* note 8, at 446.

[FN214]. *See* Carol Smart, [From Children's Shoes to Children's Voices](#), 40 FAM. CT. REV. 307, 318 (2002) (noting interviews with children of divorce revealed that children wanted to have voice in legal process, but “a majority of children were clear that they did not want to be forced to make choices”); Robert E. Emery, [Children's Voices: Listening—and Deciding—Is an Adult Responsibility](#), 45 ARIZ. L. REV. 621 (2003) (questioning whether observing a child's “right to be heard” can unreasonably burden children with responsibility of making adult decisions).

[FN215]. The UNLV Conference itself yielded concrete evidence of the diverse and impassioned viewpoints held by experts in the field. *See generally* *Special Issue on Legal Representation of Children: Representing Children in Families Forward*, 6 NEV. L.J. 571-1424 (2006).

[FN216]. *See* Randi Mandelbaum, *Are Abused and Neglected Children in New Jersey Faring Any Better Since the Tragedies of 2003?*, N.J. LAWYER 9 (2005) (analyzing legislative response to publicized cases of child abuse in New Jersey, including greater investigative resources). If a child complaining of abuse were disbelieved by an appointed representative, then legislators might support the adoption of a standard to compel lawyers and guardians to report the child's wishes to the court but would be unlikely to push for client-directed lawyering.

[FN217]. In contrast, the Model Act, recently proposed by the ABA Litigation Section and included in this volume,

evinces a robust and thoughtful commitment to client-directed lawyering for children. It offers states a clear alternative in this important field and will surely be an important contribution to the ongoing debate.

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