

Family Law Quarterly
Spring, 2008

***103 RIGHTING WRONGS: A REPLY TO THE UNIFORM LAW COMMISSION'S UNIFORM REPRESENTATION OF CHILDREN IN ABUSE, NEGLECT, AND CUSTODY PROCEEDINGS ACT**

Katherine Hunt Federle [\[FN1\]](#)

Copyright © 2008 by American Bar Association; Katherine Hunt Federle

The Uniform Representation of Children in Abuse, Neglect, and Custody Proceedings Act (URCANCPA), most recently adopted by the Uniform Law Commission in August 2007, [\[FN1\]](#) is a piece of paternalistic legislation that, while ostensibly well-intentioned, undermines the rights of children, violates the *Model Rules of Professional Conduct*, and sets the law regarding the representation of children back twenty years. Despite ***104** vociferous objections, [\[FN2\]](#) the drafters of *URCANCPA* have insisted on an approach to child representation that does not comport with Model Rule 1.14 [\[FN3\]](#) and moves away from the trend in many states to provide the child with a client-directed lawyer in abuse and neglect proceedings. [\[FN4\]](#) Perhaps even more disturbing, *URCANCPA* envisions a new kind of lawyer, one who has no obligation to advocate for the client's objectives and may use confidential information to argue for outcomes that may directly conflict with the client's express preferences. [\[FN5\]](#) This approach appears to rest on the dangerous assumption that the child does not really need a client-directed lawyer but an advocate for the child's best interests because the child lacks the capacity to direct the lawyer. While such thinking is contrary to the experience of the vast majority of lawyers who represent children, it also serves to disempower the child and strip her of a meaningful voice in the proceedings.

One of the most significant problems with *URCANCPA* is that it violates the *Model Rules of Professional Conduct*. [\[FN6\]](#) Rule 1.14, which governs the lawyer's obligation to a client with diminished capacity, is quite clear that minority does not diminish capacity per se. [\[FN7\]](#) Moreover, even when age is disabling, Rule 1.14 states unequivocally that the lawyer shall, as far as reasonably possible, maintain a normal attorney—client relationship. [\[FN8\]](#) Even if the client lacks legal competence, the commentary to Rule 1.14 is clear that the client may still be able to reach conclusions about matters affecting her own interest. [\[FN9\]](#) This means, according to the commentary, that very young children may be competent to participate in the attorney—client relationship. Thus, the fact that a client has diminished capacity does not lessen the lawyer's obligation to treat the client with attention and respect. In those instances in which the person does have a ***105** legal representative, the lawyer should, as far as reasonably possible, accord the represented person the status of client, particularly in maintaining communication. [\[FN10\]](#)

What is critical here is that Rule 1.14 leaves the determination about client capacity to the sound discretion of the lawyer. It is the lawyer who makes the determination that a client has diminished capacity by considering, among other factors, the client's ability to articulate the reasoning behind a decision, the client's variable state of mind, and the ability to appreciate the consequences of a decision. [\[FN11\]](#) But deciding the client may have diminished capacity alone is insufficient. The lawyer also must reasonably believe that the client is at risk of substantial physical, financial, or other harm unless action is taken; the client cannot adequately act in his or her own interest; and the client cannot maintain a normal attorney—client relationship. [\[FN12\]](#) Only then may the lawyer take protective action, although the lawyer is free to take no action at all. [\[FN13\]](#) If the lawyer decides to take protective action, he may choose to consult with family members, provide a period of reconsideration, seek professional services or ask the court for the appointment of a guardian ad litem. [\[FN14\]](#) But again, the decision to seek protective measures is left to the lawyer.

However, *URCANCPA* undermines the essential premise of Rule 1.14: that the lawyer is in the best position to determine whether a client has diminished capacity and what action, if any, should be taken. Section 12 [FN15] simultaneously eliminates lawyer discretion while expanding the situations under which protective action must be taken. For example, if the *106 attorney for the child “reasonably believes the child lacks capacity or refuses to direct the attorney with respect to a particular issue,” the attorney shall “present a position that serves the child's best interests if it is not inconsistent with the child's expressed objectives; take no position; or request the appointment” of a guardian ad litem. [FN16] Nothing in Rule 1.14 authorizes the lawyer to take these steps when the client refuses to provide direction on a particular issue, nor does the rule require the lawyer to take protective action under any circumstance. Section 12 of *URCANCPA* also requires the attorney to seek the appointment of a guardian ad litem or withdraw from the representation if the child “expresses objectives of representation that the child's attorney reasonably believes would place the child at risk of substantial harm.” [FN17] Under Rule 1.14, however, the mere fact that the client has objectives that, *if fulfilled*, presumably by the court, place the client at substantial risk of harm is inadequate. Before deciding whether to take protective action, the lawyer also must reasonably believe that the client has diminished capacity; the client is at risk of substantial physical, financial, or other harm unless action is taken; the client cannot adequately act in his or her own interest; *and* the client cannot maintain a normal attorney—client relationship. [FN18]

This approach signifies a departure from the trend toward providing children with client-directed lawyers. Contrary to assertions made in *URCANCPA*, at least one third of the states already mandate the appointment of a lawyer for the child in abuse and neglect cases. [FN19] In these states, the role is that of a traditional lawyer who is bound by the client's objectives and directives. [FN20] *URCANCPA* thus invites state legislatures to retrench from the right to counsel; consequently, a state's adoption of the model language of *URCANCPA* might eliminate the statutory right to counsel in favor of a right to a best-interests guardian. As a policy matter this not only runs counter to the trend but also is simply unwise.

*107 What underlies much of *URCANCPA*'s approach is the apparent belief that children simply should not have client-directed lawyers. Although proponents of *URCANCPA* claim that the appointment of a lawyer for the child is mandatory in abuse or neglect proceedings, on closer examination it is clear that this claim is a sham. Section 4 of *URCANCPA* mandates the appointment of either a “child's attorney” or a “best-interests attorney.” [FN21] A child's attorney is a client-directed lawyer (although how that attorney is to comply with Model Rule 1.14 under *URCANCPA* is unclear). [FN22] The “best-interests attorney” is not an attorney as is traditionally understood and defined but is someone who “protects the child's best interests *without being bound by the child's directives or objectives*.” [FN23] Calling the best interests attorney a lawyer belies the nature of the role for the best interests attorney who is not bound by the fundamental pillars of the ethical practice of law— client loyalty, client confidentiality, and a duty to advocate for the client's objectives.

Worse, *URCANCPA* authorizes the court (and, by implication, the legislature) to decide whether the child should have a lawyer or a guardian ad litem. Although *URCANCPA* identifies a number of factors to be considered by the court in making its determination, like the age and developmental level of the child or whether the child has expressed a desire for the lawyer, the court is not required to consider these factors. [FN24] It also is unclear how the court is supposed to know what the child wants or how capable the child is because presumably, the child has no independent advocate present to express the child's preferences or objectives. Nor are the other parties to the proceeding likely to be objective spokespersons for the child, much less persuasive on the issue given their own interests in the litigation. What we are left with then, is this disturbing precedent: the judge gets to decide who represents the child.

The notion that somehow client-directed lawyering is bad for children is reinforced by other provisions of *URCANCPA*. Section 5, for example, provides for the appointment of a lay guardian ad litem (called a “best *108 interests advocate” under *URCANCPA* [FN25]) when the court has failed to appoint a best-interests attorney. [FN26] Although the commentary to *URCANCPA* suggests that the appointment of a guardian ad litem may be necessary to comply with the requirements of the *Child Abuse Prevention and Treatment Act* [FN27] (and correctly notes that states that only provide lawyers for children have never been held to be out of compliance [FN28]), the commentary also notes that courts may want an “independent assessment of best interests to ensure a complete presentation of evi-

dence.” [\[FN29\]](#) The implication is clear: should the child have a client-directed lawyer, the court would not have the ability to make an independent determination about the child's best interests, which would impair decision making.

This approach is deeply problematic. First, if the court must or needs to appoint a guardian ad litem, the cost to the court in appointing two representatives for the child militates against the appointment of a client-directed lawyer for the child. Second, the best-interests standard is, itself, indeterminate. [\[FN30\]](#) The idea that a court can “know” what is in the child's best *109 interest may simply be wishful thinking in any given case. Finally, in the context of abuse or neglect proceedings, the best-interests determination should be made *after* the state has established that the child has been abused or neglected or that termination is warranted. The issue is not whether the child's best interests will be served by remaining with her biological family but whether the *state* has established a ground for finding that the child is abused or neglected. Only after the child is found to be abused or neglected should the court make a best-interests determination. The difficulty with the approach articulated by *URCANCPA* is that it assumes the child's best interests are at stake before any determination as to abuse or neglect is made. This leads to the inevitable conclusion that a guardian ad litem is essential to the process but renders a client-directed lawyer for the child seemingly superfluous.

The idea that a child must have a guardian ad litem is a curious one. For better or for worse (and there certainly are those who do think it is worse), we have an adversarial legal system. We continue to believe—and even strongly embrace—the concept of the parties presenting their perceptions of the events from which we believe we will ascertain the truth. In the abuse and neglect context, however, we seem to think the adversarial system should be set aside in favor of “protecting” the child (although we may not be sure the child actually needs protection), even if that means that we allow the court the authority to appoint someone (in this case, the guardian ad litem) to help the court find the truth. Moreover, critics of this approach note that the guardian ad litem, who is freed from any need to follow a client's express objectives regarding the case, may simply rely on personal values when deciding what is in the child's best interests. [\[FN31\]](#)

Others also have noted the confusion that may be created when a guardian ad litem is appointed. [\[FN32\]](#) *URCANCPA* authorizes the appointment of a best-interests attorney who must simultaneously act as an attorney for the child and who owes all the duties imposed when an attorney—client relationship is formed, but who is not bound by the child's express objectives and may use the information obtained from the child without disclosing that the child was the source of the information. [\[FN33\]](#) Setting aside the *110 inherent contradiction in the role, it is curious to think that any client would feel free to disclose confidential or sensitive information to a guardian ad litem, much less understand the nature of the representation that would be provided. [\[FN34\]](#) Additionally, the appointment of a lay or attorney guardian ad litem forces the child to deal with yet another adult in a situation that is at best, disruptive and at worst, deeply traumatic. [\[FN35\]](#) However, even if the guardian ad litem has a continued role to play in these processes, the guardian cannot serve as a substitute for client-directed lawyering.

Proponents of *URCANCPA* nevertheless fall back on the notion that the child is not capable of directing the lawyer and thus has no need for an attorney at all—at least not one who is client-directed. Under this view, much is made of the infant as client and the suggested absurdity in an attorney-client relationship under such conditions. It is an example of the exception swallowing the rule for it is an inconvenient fact that at least two-thirds of the children in state care are over the age of seven. [\[FN36\]](#) Of course, it could be argued that no child, regardless of age, has the capacity to direct her lawyer. However, no state takes such a position (and to do so would run afoul of certain policy choices like the decision to hold ever younger children criminally accountable for their actions, for to suggest that these children lack the capacity to direct their lawyers would make their subsequent adjudications or convictions a sham). Thus, whether a child has the capacity to form an attorney—client relationship is a case-by-case determination that is left to the sound discretion of the attorney under Rule 1.14; but, as we have seen, *URCANCPA*'s drafters have unilaterally rewritten the rule. [\[FN37\]](#)

It is difficult to understand the resistance to client-directed lawyering for children. Perhaps the most generous explanation lies within a common misperception about the child as a client. Much of the problem stems from our visions of childhood and of children's capabilities (that children are somehow less capable and more irrational) and

this seems to directly contradict our understanding of what we, as attorneys, must require of our *111 clients. Yet what do we really expect of our clients? On some levels, we may actually require more of our child clients because when thinking about children as clients, we tend to overestimate the abilities of adult clients and underestimate the abilities of child clients.

The paradigmatic adult client, with whom we contrast the child client, is a myth. That myth, that the client is an autonomous, capable, and rational decision maker with whom we can engage in rational discourse, proclaims that the client will make choices that are sensible—and, not coincidentally, often the ones with which the lawyer agrees. The reality, of course, is quite different. We all know adult clients who are not rational decision-makers and who may often reach decisions with which we may disagree. Yet we do not necessarily conclude that the adult client is no longer entitled to counsel, simply because his behavior deviates from the paradigm.

Why is it, then, that client-directed lawyering for the child seems to generate such a negatively visceral reaction? There are at least two reasons: first, we may feel more responsibility for decisions made by child clients. That is, we may believe that we have a greater obligation to ensure that our juvenile clients do not express objectives that we think do not serve our conception of their best interests. The child does not have diminished capacity per se simply because the child is making a “bad” choice or a “wrong” decision. It is the child who must live with the choice—not the lawyer—assuming, of course, that the court, too, goes along with the client's expressed preference, for it is the court making the choice—not the child client. Second, the difference between a child client and an adult client lies not with the client's capacity for understanding but on the lawyer's ability to help the client understand his options. What this means is that the lawyer must commit her time, that precious commodity, to helping the client fully realize his options and their consequences. Client-directed advocacy does not mean that the lawyer must abdicate her counseling function; Model Rule 2.1 expressly recognizes the lawyer's obligation to provide candid advice to her client. [FN38] With adults, it may be easier for us to convince ourselves that they have grasped the issues and have made a thoughtful decision. But because we feel more responsibility for children, we may find it harder to let them make a “bad” choice.

However, once we embrace the idea that lawyering for children must be client-centered and client-directed, we overcome many of the objections*112 about children as clients. This may explain why so many child advocacy organizations oppose *URCANCPA*; [FN39] it is very clear to those of us who do provide direct legal representation to children that representing children as zealous advocates is not only theoretically and actually plausible but that there is inherent value in ensuring that the child has an advocate for his express preferences. It is indisputably good that the child's voice is heard without an adult filter, not only because it gives the child a sense of having participated in the decision-making process but also because it adds a dimension to the court's understanding of the facts that otherwise might be lost. Moreover, there is a significant difference between telling the court what a child wants and advocating for that preference in a forceful and persuasive way. A client-directed lawyer is thus in the best position to ensure that the child's voice is heard and taken seriously.

But more importantly, a client-directed and client-centered lawyer for the child is best able to articulate the child's express preferences in the language of rights. As other commentators have noted, children do have rights—constitutional, statutory, procedural, and substantive—that often remain unarticulated and unexplored. It is axiomatic that the lawyer for the child is in the best position to advocate for those rights, particularly when the nature and scope of the rights may not be resolved as a matter of law. Nor can it be argued that the other parties will advocate for such rights; obviously, such advocacy may run counter to the objectives of the other parties (thus precluding *their* lawyers from making these arguments). Legal doctrine, too, may prevent other parties from raising these issues. For example, courts have held that other parties (most notably parents) may lack standing to raise the argument that the child's rights have been violated.

The value of a client-directed lawyer for the child cannot be underestimated. As I have said before, the value of rights lies in their potential to remedy powerlessness. [FN40] Thus to have a right is to have the power to challenge political and legal hierarchies that have served to oppress and subordinate the interests of the rights holder. [FN41] Moreover, having a right creates a zone of respect and certain behavioral boundaries that discourage casual en-

croachment. [FN42] Rights thus are a tool of the powerless to capture *113 the attention of powerful elites and to command their respect, they provide access to legal and political systems and decision makers, and they create remedies for rights infringement. [FN43] It thus is the lawyer for the child who is in the best position to insist that the child's rights are respected, valued, and considered.

It should come as no surprise then, that those with considerable expertise in representing children oppose *URCANCPA*. [FN44] They represent a broad *114 cross section of individuals representing children directly as lawyers and as guardians ad litem, as well as policy groups and associations. They include such national organizations as the National Association of Counsel for Children, National Court Appointed Special Advocates, and the American Bar Association Section of Litigation. Similarly, children's law centers, law school clinics, legal services organizations, law professors, and other groups working on behalf of children have joined in opposing *URCANCPA*. These organizations note that *URCANCPA* undermines the child's right to independent counsel, does away with the mandate of client-centered confidentiality, is inconsistent with existing state law, and eliminates the child's right to define the representation. [FN45]

Moreover, *URCANCPA* contradicts the policy and standards of the American Bar Association and the explicit findings of the Fordham Conference on Ethical Issues in the Legal Representation of Children [FN46] and the UNLV Conference on Representing Children in Families. [FN47] The underlying philosophy of the *American Bar Association Standards of Practice for Representing Children in Abuse and Neglect Cases*, [FN48] for example, is that the child's representative should be a lawyer. "[T]he [Standards] take the position that lawyers should be appointed as lawyers and act as lawyers irrespective of the age of the client...." [FN49] The clear *115 consensus of the participants at the Fordham Conference was that a "lawyer should always be a lawyer and should not be forced into a hybrid role...." [FN50] Similarly, the participants at the UNLV Conference, held ten years later, "unequivocally reaffirmed" the principle of client-directed representation for the child. [FN51]

It is astonishing that ULC continues to promote an act that so clearly contradicts the consensus of those with expertise in representing children, the policies of the many and varied professional organizations who represent lawyers and child advocates, and a vast number of academics. Moreover, *URCANCPA* runs counter to the legal trend to provide children with independent legal counsel in abuse and neglect proceedings. But what is most disturbing about *URCANCPA* is the apparent disregard for the rights of children and the crucial role that client-directed lawyers play in securing and protecting those rights. *URCANCPA* is not a model we should embrace.

[FNal]. Professor of Law and Director, Center for Interdisciplinary Law & Policy Studies and Director, Justice for Children Project, The Ohio State University Michael E. Moritz College of Law. The views expressed herein are solely those of the author. In the interests of full disclosure, I am a member of the Children's Rights Litigation Section Working Group. The Working Group had worked with members of the Uniform Law Commission (ULC) drafting committee to effect changes to the Uniform Representation of Children in Abuse, Neglect, and Custody Proceedings Act (*URCANCPA*). When those efforts failed, ULC sponsored a resolution seeking American Bar Association approval of *URCANCPA* at the Association's Midyear Meeting in February 2008. The Litigation Section vociferously opposed ULC, as did the American Bar Association Standing Committee on Ethics and Professional Responsibility. Because of "perceived conflicts between various ABA policies related to the Uniform Representation of Children in Abuse, Neglect and Child Custody Proceedings Act (ULC), therefore withdrew that Act to provide time for resolving the perceived conflicts in ABA policy." *Authors's Note*: On May 3, 2008, members of the ULC drafting committee appeared before the ABA Standing Committee on Ethics to ask for potential "fixes" to the Model Rules so that any conflict between the Rules and *URCANCPA* would be eliminated. The Standing Committee declined to "fix" the Model Rules and voted unanimously to oppose *URCANCPA*. In response, UCL withdrew its resolution seeking ABA approval of the Act.

[FN1]. See Uniform Representation of Children in Abuse, Neglect, and Custody Proceedings Act (hereinafter *URCANCPA*), <http://www.law.upenn.edu/bll/archives/ulc/rarccda/2007.final.htm>. (last visited Mar. 7, 2008).

[FN2]. *See infra* notes 45-52 and accompanying text.

[FN3]. *See infra* notes 7-19 and accompanying text.

[FN4]. *See infra* notes 20-21 and accompanying text.

[FN5]. *See infra* notes 22-24 and accompanying text.

[FN6]. The American Bar Association Standing Committee on Ethics and Professional Responsibility actively promoted and ensured the adoption of the Model Rules of Professional Conduct, which were the “result of a seven-year project to update and refine the then prevailing ethical standards.” The committee also consults with other American Bar Association entities as well as other groups and organizations on matters of legal ethics. The committee signified its opposition to URCANCPA because, in the view of the committee, it contravened the Model Rules.

[FN7]. MODEL RULES OF PROF'L CONDUCT R. 1.14 (2002).

[FN8]. *Id.* at cmt. 1, available at http://www.abanet.org/cpr/mrpc/rule_1_14_comm.html. “Nevertheless, a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being.”

[FN9]. *Id.* “For example, children 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.”

[FN10]. *Id.* at cmt. 2.

[FN11]. *Id.* at cmt. 6.

[FN12]. *Id.* at 1.14(b) and cmt. 5.

[FN13]. *Id.* at cmt. 5.

If a lawyer reasonably believes that a client is at risk of substantial physical, financial or other harm unless action is taken, and that a normal client—lawyer relationship cannot be maintained as provided in paragraph (a) because the client lacks sufficient capacity to communicate or to make adequately considered decisions in connection with the representation, then paragraph (b) permits the lawyer to take protective measures deemed necessary.

[FN14]. *Id.*

Such measures could include: consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, using voluntary surrogate decision-making tools such as durable powers of attorney or consulting with support groups, professional services, adult-protective agencies or other individuals or entities that have the ability to protect the client. In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, 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.

[FN15]. Section 12 governs the “separate duties of the child's attorney.” URCANCPA § 12. Section 12 contains two alternatives. The first, “Alternative A,” explicitly articulates duties for the child's attorney, which conflict with Model Rule 1.14, although the commentary states flatly that this section is consistent with Rule 1.14. *See id.* at cmt. 5. “Alternative B” simply recognizes that in some jurisdictions, the duties of an attorney may “be prescribed only by court

rule or administrative guideline.” *Id.* at § 12 (Alternative B).

[FN16]. URCANCPA § 12(d)(1)-(3).

[FN17]. *Id.* at § 12(e)(1)-(3).

If, despite appropriate legal counseling, the child expresses objectives of representation that the child's attorney reasonably believes would place the child at risk of substantial harm, the attorney *shall*: (1) request the appointment of a best interests advocate, if a best interests advocate has not been appointed; (2) withdraw from representation and request the appointment of a best interests attorney; or (3) continue the representation and request the appointment of a best interests attorney. *Id.* (Emphasis added.)

[FN18]. Compare MODEL RULES OF PROF'L CONDUCT R. 1.14, with URCANCPA § 12(d)-(e).

[FN19]. See, e.g., FIRST STAR, A CHILD'S RIGHT TO COUNSEL: NATIONAL REPORT CARD ON LEGAL REPRESENTATION FOR CHILDREN (2007) available at <http://firststar.org/research/documents/FIRSTSTARReportCard07.pdf>. See also Jean Koh Peters, Representing Children Worldwide (2005), http://www.law.yale.edu/rcw/rcw/jurisdictions/am-n/usa/united_states/frontpare.htm (last visited Mar. 7, 2008).

[FN20]. See, e.g., Jean Koh Peters, Representing Children Worldwide (2005), http://www.law.yale.edu/rcw/rcw/us_summary_chart.ppt#1 (last visited Mar. 7, 2008) (approximately seventeen states and two U.S. territories mandate the appointment of a child's attorney).

[FN21]. URCANCPA § 4(a). “In an abuse or neglect proceeding, the court shall appoint either a child's attorney or a best-interests attorney.”

[FN22]. “‘Child's attorney’ means an attorney who provides legal representation for a child.” URCANCPA § 2(4). “A child's attorney owes to the child the duties imposed by the law of this state in an attorney—client relationship, including duties of individual loyalty, confidentiality, and competent representation.” URCANCPA § 12(a).

[FN23]. *Id.* at § 2(3).

[FN24]. URCANCPA § 4(b) “In determining whether to appoint a child's attorney or a best-interests attorney, the court *may* consider such factors as the child's age and developmental level, any desire for an attorney expressed by the child, whether the child has expressed objectives in the proceeding, and the value of an independent advocate for the child's best interests.” (Emphasis added.)

[FN25]. “‘Best-interests advocate’ means an individual, not functioning as an attorney, appointed to assist the court in determining the best interests of a child.” URCANCPA § 2(2).

[FN26]. “In an abuse or neglect proceeding: (1) if the court does not appoint a best interests attorney, the court *shall* appoint a best interests advocate before the first court hearing that may substantially affect the interests of the child....” URCANCPA § 5(a)(1) (Alternative A) (emphasis added). Alternative B provides that “[i]n an abuse or neglect proceeding, whether the court appoints a child's attorney or a best interests attorney, the court may appoint a best interests advocate if the court determines that a best interests advocate is necessary to assist the court in determining the child's best interests.” URCANCPA § 5(a) (Alternative B). According to the Legislative Note that follows the section, “[s]tates that want to mandate a best interests advocate when a best interests attorney has not been appointed under Section 4 should adopt Alternative A of this section. States wanting to leave the matter to judicial discretion should adopt Alternative B.”

[FN27]. “As a condition of receiving federal funding for child abuse prevention and treatment programs, states must appoint a ‘guardian ad litem’ for every child who is the subject of an abuse or neglect proceeding.... For those states that interpret CAPTA to always mandate a best interests representative, Alternative A requires a best interests advocate unless the court has appointed a best-interests attorney. Alternative B, on the other hand, would be appropriate for those states that view CAPTA’s requirement as fully satisfied by the appointment of either a child’s attorney or a best-interests attorney.” URCANCPA § 5, cmt. 5.

[FN28]. *Id.* (“states that require appointment of legal ‘counsel’ for children in child protection proceedings have not been held to be out of compliance with CAPTA”).

[FN29]. *Id.*

[FN30]. It is a noncontentious point in the literature that the best-interests standard is indeterminate. The list of citing authorities is almost too long to list. For a nonexhaustive list *see, e.g.*, Robert Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226 (1975); David L. Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477 (1984); Andrea Charlow, *Awarding Custody: The Best Interest of the Child and Other Fictions*, 5 YALE L. & POL’Y REV. 267 (1987); Katherine H. Federle, *Looking for Rights in All the Wrong Places: Resolving Custody Disputes in Divorce Proceedings*, 15 CARDOZO L. REV. 1523 (1994); Michael S. Wald, *Adults’ Sexual Orientation and State Determinations Regarding Placement of Children*, 40 FAM. L.Q. 381 (2006).

[FN31]. *See, e.g.*, Barbara Bennett Woodhouse, *Child Custody in the Age of Children’s Rights: The Search for a Just and Workable Standard*, 33 FAM. L.Q. 815, 821 (1999).

[FN32]. *See, e.g.*, Linda D. Elrod, *Client-Directed Lawyers for Children: It Is the “Right” Thing to Do?* 27 PACE L. REV. 869 (2007); Jane Spinak, *Simon Says Take Three Steps Backwards: The National Conference of Commissioners on Uniform State Law Recommendations on Child Representation*, 6 NEV. L.J. 1385 (2006).

[FN33]. URCANCPA § 13(f). “A best-interests attorney may not disclose or be compelled to disclose information relating to the representation of the child except as permitted by [insert reference to this state’s rules of professional conduct], but the attorney may use such information for the purpose of performing the duties of a best interests attorney without disclosing that the child was the source of the information.”

[FN34]. Spinak, *supra* note 32, at 1395 (quoting the National Association of Counsel for Children).

[FN35]. *Id.*

[FN36]. According to the U.S. Department of Health and Human Services, approximately 36% of children in foster care were under the age of seven in 2005. The mean age of children in care was ten, the median was 10.6. U.S. Dep’t of Health and Human Servs., Admin. for Children and Families, Admin. for Children, Youth, and Families, Children’s Bureau, Adoption and Foster Care Analysis and Reporting System Report, *available at* http://www.acf.hhs.gov/programs/cb/stats_research/afcars/tar/report13.htm.

[FN37]. *See supra* notes 7-19 and accompanying text.

[FN38]. MODEL RULES OF PROF’L CONDUCT R. 2.1 (2002), *available at* http://www.abanet.org/cpr/mrpc/rule_2_1.html. “In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations

such as moral, economic, social and political factors that may be relevant to the client's situation.”

[FN39]. See *infra* notes 45-52 and accompanying text.

[FN40]. Katherine Hunt Federle, [*Children's Rights and the Need for Protection*](#), 34 FAM. L.Q. 421, 437-38 (2000); Federle, *Looking for Rights in All the Wrong Places*, *supra* note 30, at 1595.

[FN41]. Federle, *Children's Rights and the Need for Protection*, *supra* note 40, at 437-38; Federle, *Looking for Rights in All the Wrong Places*, *supra* note 30, at 1597.

[FN42]. Federle, *Children's Rights and the Need for Protection*, *supra* note 40; Federle, *Looking for Rights in All the Wrong Places*, *supra* note 30, at 1598.

[FN43]. Federle, *Children's Rights and the Need for Protection*, *supra* note 40, at 438-40; Federle, *Looking for Rights in All the Wrong Places*, *supra* note 30, at 1598-99.

[FN44]. As of February 10, 2008, the following groups indicated their opposition to URCANCPA:

National Organizations

American Bar Association Section of Litigation

Children's Rights Inc.

First Star

The National Association of Counsel for Children

National CASA

ABA Standing Committee on Ethics and Professional Responsibility

Children's Law Centers

Brooklyn Family Defense Project, NYLSC, New York, NY

Center for Children's Advocacy, Hartford, CT

Center for Children and Families at the University of Florida Levin College of Law

Center for Family Representation, New York, NY

Children's Law Center of Los Angeles

Children's Law Center of Massachusetts

Children's Law Center of Minnesota

Field Center for Children's Policy, Practice, and Research, Philadelphia, PA

JustChildren, Charlottesville, VA

Juvenile Law Center, Philadelphia, PA

Lawyers for Children, New York, NY

Legal Services for Children, San Francisco, CA

Oklahoma Lawyers for Children

Rocky Mountain Children's Law Center, Denver, CO

Support Center for Child Advocates, Philadelphia, PA

Law School Clinics

Child Advocacy Clinic, Columbia Law School, New York, NY

Children's Rights Clinic, University of Texas School of Law

Child Welfare Clinic, William S. Boyd School of Law, Las Vegas, NV

Child Advocacy Law Clinic, University of Michigan Law School

Georgetown University Law Center Juvenile Justice Clinic

Hofstra Child Advocacy Clinic, Hofstra University School of Law, Hempstead, NY

Justice for Children Project, Michael E. Moritz College of Law, Ohio State University

Juvenile Rights Advocacy Project at Boston College Law School

NYU Family Defense Clinic, New York, NY

Suffolk University Law School Child Advocacy Clinic, Boston, MA

The Barton Child Law and Policy Clinic, Emory University School of Law, Atlanta, GA

University of Colorado Law School Juvenile and Family Law Program

Other Organizations

Bar of the City of New York's Council on Children

Center for Interdisciplinary Law and Policy Studies, Michael E. Moritz College of Law, Ohio State University

Citizens Committee for Children, New York, NY

The Legal Aid Society, New York, NY

Legal Information for Families Today, New York, NY

Legal Support Unit of LSNY, New York, NY

The New York City ASFA Implementation Group

NYS Citizen Review Panel for Child Protective Services, New York, NY

The Osborne Association, New York, NY

Prevent International Parental Child Abduction, Houston, TX

Staten Island Legal Services, New York, NY

Texas CASA

[FN45]. *See, e.g.*, Letter from Michael S. Piraino, Chief Executive Officer, National CASA, to Laurel Bellows, Chair, American Bar Association House of Delegates (Feb. 7, 2008) (on file with author); Letter from Karen Freedman, Executive Director, Lawyers for Children, to Catherine Krebs, Director, American Bar Association, Children's Rights Litigation Committee (Jan. 31, 2008) (on file with author); Letter from Marvin Ventrell, President, National Association of Counsel for Children, to Catherine Krebs, Director, American Bar Association, Children's Rights Litigation Committee (Feb. 7, 2008) (on file with author).

[FN46]. [*Recommendations of the Conference on Ethical Issues in the Legal Representation of Children*](#), 64 FORDHAM L. REV. 1301 (1996).

[FN47]. [*Recommendations of the UNLV Conference on Representing Children in Families*](#), 6 NEV. L.J. 592 (2006).

[FN48]. Am. Bar Ass'n, STANDARDS OF PRACTICE FOR LAWYERS WHO REPRESENT CHILDREN IN ABUSE AND NEGLECT CASES (1996), *available at* <http://www.abanet.org/child/repstandwhole.pdf> (last visited Mar. 7, 2008).

[FN49]. Linda D. Elrod, [*An Analysis of the Proposed Standards of Practice for Lawyers Representing Children in Abuse and Neglect Cases*](#), 64 FORDHAM L. REV. 1999, 2001 (1996).

[FN50]. *Id.*

[FN51]. Spinak, *supra* note 32, at 1386-87.

42 Fam. L.Q. 103

END OF DOCUMENT