

Family Law Quarterly
Spring, 2008***145** REPORT AND WORKING DRAFT OF A MODEL ACT GOVERNING THE REPRESENTATION OF CHILDREN IN ABUSE, NEGLECT, AND DEPENDENCY PROCEEDINGS (AUGUST 2008)

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The participation of counsel on behalf of all parties subject to juvenile and family court proceedings is essential to the administration of justice and to the fair and accurate resolution of issues at all stages of those proceedings. [\[FN1\]](#)

Abuse and neglect cases literally affect a child's entire future in that they decide where a child lives, who the child will live with, and whether the child will have access to his or her family. Clearly, a child's interest in these proceedings is of fundamental importance. However, the level to which children are entitled to and involved with their legal representation in court varies not only from state to state, but from case to case, and all too often, from hearing to hearing. The root of these inconsistencies lies in the lack of uniform standards for the legal representation of children, coupled with the lack of sufficient training necessary for attorneys to provide adequate representation to their child clients.

The legal representation of children is a "robust, growing specialty" both in the United States and around the world. [\[FN2\]](#) In 2004, the American ***146** Bar Association (ABA) recognized child welfare law as a legal specialty. [\[FN3\]](#) Many states now require that a lawyer be appointed to a child in an abuse and neglect proceeding, but some require that the child's lawyer be 'client directed' and others require the lawyer to act as a guardian ad litem whereby the attorney is charged with the duty of protecting and serving the "best interest" of the child "without careful delineation of the distinctions between the ethical responsibilities of a lawyer to the client and the professional obligations of the lay guardian ad litem as a best interests witness for the court." [\[FN4\]](#)

The states' use of different statutory language and mandated roles for child representation has led to much confusion within the field. Child welfare advocates over the past two decades have been diligent in their zeal to improve and enhance legal representation by developing several sets of guidelines and standards in an attempt to provide some consistency among state laws. In spite of this, however, there is still no established binding legal authority defining the role attorneys should play in representing children, the type of training that will sufficiently prepare them, or the duties and responsibilities entrusted to each one.

The proposed *Working Draft of a Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings (Working Draft)* focuses on the representation of children in abuse and neglect cases and is consistent with both the *ABA Standards on the Representation of Children in Abuse and Neglect Cases (ABA Abuse and Neglect Standards)* [\[FN5\]](#) and the *ABA Model Rules of Professional Conduct (ABA Model Rules)*. While there are a number of different thoughts around the country on the role of lawyers for children in abuse and neglect cases, any model act adopted by the ABA must conform to standards and rules already established by the ABA.

***147** In 1996, the American Bar Association adopted the *ABA Abuse and Neglect Standards*. Under the *Standards*, a lawyer should advocate the child's articulated preference, but if a child will not or does not express a preference, the lawyer should advocate the child's legal interests determined by objective criteria. [\[FN6\]](#) The *ABA Abuse and Neglect Standards* take the position that a child's disability as a result of immaturity is incremental and issue-specific. Although these Standards state a preference for a client-directed "child's attorney" model, they also

provide for the appointment of an attorney as a guardian ad litem to protect the child's interests. [\[FN7\]](#)

Central to this *Working Draft* is the mandate contained in Section 3 which requires that a lawyer be appointed “for each child who is the subject of a petition in an abuse, neglect, dependency, termination of parental rights or post termination of parental rights proceeding.” [\[FN8\]](#) Consistent with the *ABA Model Rules*, the child's lawyer should form an attorney—client relationship which is “fundamentally indistinguishable from the attorney—client relationship in any other situation and which includes duties of client direction, confidentiality, diligence, competence, loyalty, communication, and the duty to advise.” [\[FN9\]](#)

The attorney—GAL model that some states currently use is inherently flawed since nothing in an attorney's training or experience as a lawyer prepares him or her to make a decision on what is in the best interests of a particular child. Children's lawyers are not social workers or psychologists and should not be treated as such. Instead, children's lawyers, like all lawyers, need to be guided by the *ABA Model Rules*. To the extent that courts need information about what is in the child's best interest, the court should use a court appointed advisor or an expert, subject to the rules governing all court experts.

The *Working Draft* defines the “court-appointed advisor” as “an individual, not functioning or intended to function as a lawyer, appointed by the court to assist in determining the best interests of the child.” [\[FN10\]](#) The advisor may be a Court Appointed Special Advocate (CASA) or other person who has received training specific to the best interest of the child. The *Working Draft* endorses and in no way restricts the widespread use of CASAs to fulfill the role of court-appointed advisor. [\[FN11\]](#)

***148** Providing children in abuse and neglect cases with a client-directed “traditional” lawyer is consistent with the thinking of national children's law experts. A conference on the representation of children was held at Fordham Law School in 1995 entitled Ethical Issues in the Legal Representation of Children. The conference examined the principles set out in the then-proposed abuse and neglect standards promulgated by the ABA, and conferees clearly recommended that lawyers for children should act as lawyers, not as guardian ad litem. [\[FN12\]](#) The co-sponsors and participants at the Fordham Conference included national children's law organizations and many ABA entities as well. [\[FN13\]](#)

In 1996 the ABA adopted the *ABA Abuse and Neglect Standards*. The National Association of Counsel for Children (NACC) issued its own revised version of the *ABA Standards* in which it endorsed most of the ABA guidelines but also emphasized the counseling function of the child's lawyer. [\[FN14\]](#)

Ten years later in 2006, children's law experts gathered again at a conference at the University of Nevada, Las Vegas (UNLV), to review the state of legal representation of children. Like the Fordham Conference, the UNLV participants produced a set of recommendations (UNLV *149 Recommendations). [\[FN15\]](#) The *UNLV Recommendations* encourage lawyers to seek to empower children by helping them develop decision-making capacity. Regarding the role of the attorney, the *UNLV Recommendations* strongly support client-directed representation for children capable of making considered decisions, [\[FN16\]](#) but for children who have diminished capacity, the *UNLV Recommendations* propose detailed guidelines to guide the lawyer's exercise of substituted judgment. [\[FN17\]](#) Again, the list of co-sponsors and participants included nationally respected children's law organizations and many ABA entities. [\[FN18\]](#)

In August 2005, the ABA House of Delegates adopted policy regarding foster care reform. The ABA affirmed that children in abuse and neglect cases should receive lawyers. The policy also stated that children should receive notice of and the opportunity to participate in their own abuse and neglect case (Section 9 of the *Working Draft* is based in part on that ABA policy). [\[FN19\]](#)

Consistent with the *ABA Abuse and Neglect Standards*, ABA policy, and the recommendations of national

children's law experts, Section 4 of this *Working Draft* mandates that an attorney, acting in a traditional role, should be appointed for every child who is the subject of an abuse or neglect proceeding. [FN20] Attorneys can identify legal issues regarding their child clients, use their legal skills to ensure the protection of their clients' rights and needs, and advocate for their clients. The *Working Draft* requires lawyers to complete a thorough and independent investigation and participate fully in all stages of the litigation. Lawyers for children, as lawyers for any client, have a role as a counselor to their clients and should assist their clients in “exploring the practical effects of taking various positions, the *150 likelihood that a court will accept particular arguments, and the impact of such decisions on the child, other family members, and future legal proceedings.” [FN21]

Lawyers for children allow children to be participants in the proceedings that affect their lives and safety. Children who are represented by lawyers often feel the process is fairer because they had a chance to participate and to be heard. Consequently, children are more likely to accept the court's decision because of their own involvement in the process.

“The mandate for appointment of an attorney for every child in an abuse or neglect proceeding is consistent with trends across the United States. Currently, more than half the states require the appointment of an attorney or an attorney/guardian ad litem by statute or case law, and all but about a dozen states regularly appoint attorneys for children as a matter of practice whether or not required to do so by state law. [FN22] Moreover, at least one federal district court has held that appointment of counsel for every child in the state foster care system is constitutionally required as a matter of procedural due process.” [FN23] While appointing lawyers for every child in an abuse and neglect case under this *Working Draft* may impose additional financial costs for those states not currently providing lawyers, the liberty interests involved in these proceedings greatly outweigh the cost to the state. [FN24]

Requiring lawyers to represent children in abuse and neglect cases is also consistent with federal law. “The federal *Child Abuse Prevention and Treatment Act (CAPTA)* requires the appointment of a ‘guardian ad litem’ for a child as a condition of receiving federal funds for child abuse prevention and treatment programs, but the role and identity of that representative are largely undefined.” [FN25] Most experts agree that the provision of *151 a child's lawyer is consistent with the requirement found in CAPTA. [FN26]

The National Conference of Commissioners on Uniform State Laws, now the Uniform Law Commission (ULC), attempted to bring clarity to these issues through their adoption of the *Uniform Representation of Children in Abuse, Neglect, and Custody Proceedings Act (ULC Act)*. [FN27] The *ULC Act* targets two very different kinds of cases, child custody cases which take place between two parents who each want custody of their child and in which there is no state intrusion, and abuse and neglect cases in which the state has intervened into a family due to allegations of abuse and neglect, and where the state itself is asking the court for custody of the child. While the *ULC Act* contains some excellent provisions, it is fundamentally flawed.

Within their Act, ULC rejects the hybrid attorney—guardian ad litem role. [FN28] Instead ULC provides two alternative models of attorneys for children, the child's attorney and the best interest attorney. According to the *ULC Act*, “the child's attorney has a traditional lawyer—client relationship with the child and is bound by the ordinary ethical obligations governing that relationship.” [FN29] In contrast, “[t]he best interests attorney is also in an attorney—client relationship with the child but, in contrast with the child's attorney, is not bound by the child's expressed wishes in determining what to advocate.” [FN30] The court decides which type of attorney to appoint in each individual case.

The best interest attorney is a flawed model which has no basis within the *Model Rules*. As stated above, nothing in a lawyer's training or background gives the lawyer the ability to determine a child's best interests, this is solely within the domain of the court (or a qualified expert). The *ULC Act* asserts that a best interest attorney is in an attorney—client relationship with the child; however, the best interest lawyer is not directed by the client, as required by Model Rule 1.2, which directs a lawyer to abide by a client's decisions concerning the objectives of representation. Additionally, the *ULC Act* does not comport with the requisites of Model Rule 1.14, because the Act requires the

attorney to take certain actions contrary to the child's express objectives, including a request for the *152 appointment of a best interests advocate or a best interests attorney. However, Model Rule 1.14 does not require the attorney to seek the appointment of a guardian ad litem. Moreover, the circumstances under which the attorney may seek the appointment of a guardian ad litem under Rule 1.14 are narrower than under the Act.

The *ULC Act's* best interest lawyer would violate Model Rule 1.6, which contains an injunction against the disclosure of confidential information without the informed consent of the client, a violation that is compounded by the use of confidential information adverse to the client without informed consent in violation of Rule 1.8. Model Rule 1.7 prohibits a concurrent conflicting representation; however, the *ULC Act* allows a single lawyer to simultaneously represent one sibling in a traditional relationship and a second sibling as a best interests "lawyer."

As opposed to the *ULC Act*, the drafters of the *Working Draft* started with the default presumption of capacity for all children and included standards of practice for lawyers for when that presumption has been overcome. Some children (including infants, preverbal children, and children who are mentally or developmentally challenged) may be unable to be counseled at all. These child clients should be considered the exception, not the rule, and the structure of representation for children as a whole should be based upon a theory of competence and capacity. An attorney must enter into representation of a child, treating the child client as he or she would another adult to every extent possible. The attorney should give the child frank advice on what he or she thinks is the best legal remedy to achieve his or her expressed wishes. This decision should not be based on the attorney's mores or personal opinions; rather, it should focus on the attorney's knowledge of the situation, the law, options available, and the child's wishes.

The representation of infants and young children has gained attention in this debate and merits special consideration. Like all children in these proceedings, young children are entitled to proceedings that fully examine and address their needs, including *inter alia* their physical, behavioral and developmental health and well-being, their education and early learning needs, their need for family permanency and stability, and their paramount need to be safe from harm. The court should seek informed information and evidence from qualified experts and other professionals on these several complex and diverse topics. In addition to the proscriptions against lawyers testifying or serving as witnesses, most lawyers are not trained to themselves serve as experts nor to render opinions on these matters. Like the several state-law constructions presently authorizing a best-interest role for lawyers, the *ULC Act* empowers and requires lawyers to serve as the *153 source decision-maker of "what is in the child's best interests." The *Working Draft* seeks to remove lawyers from this problematic role while ensuring that the court receives all the information that a young child needs the court to have.

A state's law regarding abuse and neglect proceedings should be designed to provide children involved in an abuse and neglect case with a well-trained, high-quality lawyer who is well-compensated and whose caseload allows for effective representation. Lawyers for children are essential for ensuring that the children's legal rights are protected. "Unless children are allowed by lawyers to set the objectives of their cases, they would not only be effectively deprived of a number of constitutional rights, they would be denied procedures that are fundamental to the rule of law." [\[FN31\]](#)

In preparing this *Working Draft*, the drafters have taken into consideration the enormous contributions of various organizations and advocates in defining standards of representation, most notably that of the ABA, the NACC, ULC, participants in the Representing Children in Families UNLV Conference, and the states themselves.

[\[FN1\]](#). IJA/ABA JOINT COMM'N ON JUVENILE JUSTICE STANDARDS, STANDARDS RELATING TO COUNSEL FOR PRIVATE PARTIES, 11 (1980) (Standard 1.1) (emphasis added).

[\[FN2\]](#). Bruce A. Green & Annette Appell, [Representing Children in Families—Foreward](#), 6 NEV. L.J. 571, 590 (2006). See generally Marvin Ventrell, [The Practice of Law for Children](#), 66 MONT. L. REV. 1 (2005); Barbara Ann Atwood, [Representing Children: The Ongoing Search for Clear and Workable Standards](#), 19 J. AM. ACAD. MA-

TRIM. LAW. 801 (2005). The U.N. [Convention on the Rights of the Child, Nov. 20, 1989, 28 I.L.M. 1448 \(1989\)](#), recognizes the child's right of participation, either directly or through a representative, in proceedings affecting the child's interests. *See* Article 12. That right of participation has fueled interest in the role of children's representatives in many of the nations that have ratified the Convention. For a detailed survey of different approaches to child representation throughout the world, *see Yale Law School Representing Children Worldwide Project* (2005), www.law.yale.edu/rcw [hereinafter *Representing Children Worldwide*]. A summary of this research can be found at Jean Koh Peters, [How Children Are Heard in Child Protective Proceedings, in the United States and Around the World in 2005: Survey Findings, Initial Observations, and Areas for Further Study](#), 6 NEV. L.J. 966 (2006).

[FN3]. The American Bar Association authorized the National Association of Counsel for Children (NACC) to award legal specialty certification in child welfare law in 2004. *See* Ventrell, *supra* note 2, at 18.

[FN4]. UNIF. REPRESENTATION OF CHILDREN IN ABUSE, NEGLECT, & CUSTODY PROCEEDINGS ACT, NAT'L CONF. OF COMM'RS OF UNIF. STATE LAWS (ULC), Prefatory Note (2007) [herein after ULC ACT], at http://www.law.upenn.edu/bll/archives/ulc/rarccda/2007_final.htm. *See* Atwood, *supra* note 2, at 188-91; Howard A. Davidson, [Child Protection Policy and Practice at Century's End](#), 33 FAM. L.Q. 765, 768-69 (1999). For information about different state practices see *Representing Children Worldwide*, *supra* note 2.

[FN5]. Am. Bar Ass'n, *ABA Standards on the Representation of Children in Abuse and Neglect Proceedings* (1996), <http://www.abanet.org/leadership/2006/annual/onehundredfourteen.doc>.

[FN6]. *Id.* at Standard B-4(1), (2).

[FN7]. *Id.* at Standard A-2.

[FN8]. WORKING DRAFT OF A MODEL ACT GOVERNING THE REPRESENTATION OF CHILDREN IN ABUSE, NEGLECT & DEPENDENCY PROCEEDINGS § 3 [hereinafter WORKING DRAFT].

[FN9]. *Id.* at § 7(c) cmt. (referring to ABA Model Rules 1.2, 1.6, 1.3, 1.1, 1.7, 1.4 and 2.1).

[FN10]. *Id.* at § 1.

[FN11]. The Court Appointed Special Advocate is a lay volunteer who advocates as a nonlawyer on behalf of a child in child abuse and neglect proceedings. Volunteers are screened and trained at the local level, but all CASA programs that are affiliated with the National CASA must comply with the standards issued by that organization. *See* www.nationalcasa.org. In addition, many states have established their own standards to ensure that the volunteers representing children are competent and possess relevant training and experience. *See generally* Michael S. Piraino, *Lay Representation of Abused and Neglected Children: Variations on Court Appointed Special Advocate Programs and Their Relationship to Quality Advocacy*, 1 J. OF CENTER FOR CHILD. & CTS. 63 (1999). The Office of Juvenile Justice and Delinquency Prevention of the United States Department of Justice is authorized to enter into cooperative agreements with the National CASA Association to expand CASA programs nationally. *See* 42 U.S.C. § 13013 (2005 & Supp. 2006). One of the key strengths of the CASA program is that a CASA volunteer generally represents only one child at a time. Moreover, an attorney for the child working in tandem with a CASA volunteer can provide a powerful "team" approach in juvenile court. In addition, CASA volunteers may have access to the CASA program's own legal representative for legal advice.

[FN12]. [Recommendations of the Conference on Ethical Issues in the Legal Representation of Children](#), 64 FORDHAM L. REV. 1301 (1996) [hereinafter *Fordham Recommendations*] (stating that attorney must follow child's expressed preferences and attempt to discern wishes in context in developmentally appropriate way if child is incapable of expressing viewpoint).

[FN13]. Co-sponsors included the Administration for Children, Youth and Families, U.S. Department of Health and Human Services; ABA Center on Children and the Law, Young Lawyers Division; ABA Center for Professional Responsibility, ABA Section of Criminal Justice, Juvenile Justice Committee; ABA Section of Family Law; ABA Section of Individual Rights and Responsibilities; ABA Section of Litigation Task Force on Children; ABA Steering Committee on the Unmet Legal Needs of Children; Juvenile Law Center; National Association of Counsel for Children; National Center for Youth Law; National Council of Juvenile and Family Court Judges; Stein Center for Ethics and Public Interest Law, Fordham University School of Law.

[FN14]. See generally NACC, *Recommendations for Representation of Children in Abuse and Neglect Cases* (2001).

[FN15]. See generally [Recommendations of the UNLV Conference on Representing Children in Families: Children's Advocacy and Justice Ten Years after Fordham](#), 6 NEV. L.J. 592-687 (2006) [hereinafter *UNLV Recommendations*].

[FN16]. As stated in the *UNLV Recommendations*, “[c]hildren's attorneys should take their direction from the client and should not substitute for the child's wishes the attorney's own judgment of what is best for children or for that child.” *Id.* at 609.

[FN17]. *Id.* at 610. Although a lawyer should protect the legal interests of a child who lacks capacity to communicate a position, the *UNLV Recommendations* also propose that the lawyer formulate goals that reflect what the child would want if the child could express a position. *Id.*

[FN18]. Co-sponsors of UNLV included the ABA Center on Children and the Law, Young Lawyers Division; ABA Center for Professional Responsibility; ABA Child Custody and Adoption Pro Bono Project; ABA Section of Family Law; ABA Section of Litigation; Home at Last, Children's Law Center of Los Angeles; Juvenile Law Center; National Association of Counsel for Children; National Center for Youth Law; National Council of Juvenile and Family Court Judges; National Juvenile Defender Center; Stein Center for Law and Ethics, Fordham University School of Law; Support Center for Child Advocates; and Youth Law Center.

[FN19]. ABA, *Foster Care Reform* (2005), <http://www.abanet.org/child/foster-reform.doc>.

[FN20]. Federal law has long authorized the discretionary appointment of counsel for Indian children subject to the Indian Child Welfare Act. See [25 U.S.C. § 1912\(b\)](#) (2000).

[FN21]. WORKING DRAFT § (7)(c)(1) cmt.

[FN22]. *Representing Children Worldwide*, *supra* note 2. According to that 2005 Survey, more than 30 states currently require the appointment of an attorney or an attorney/guardian ad litem, and an additional half dozen states routinely appoint lawyers for children as a matter of practice even though not required by law to do so. *Id.*

[FN23]. ULC ACT, *supra* note 4 at Prefatory Note. In [Kenny A. ex rel. Winn v. Perdue](#), 356 F. Supp. 2d 1353 (N.D. Ga. 2005), the court held that every child in foster care within the state was entitled to appointed counsel as a matter of procedural due process under the Georgia state constitution. Significantly, the Georgia constitutional provision tracks the federal Due Process Clause, and the court relied on interpretations of the Due Process Clause in the U.S. Constitution in its analysis.

[FN24]. [Moore v. City of Cleveland](#), 431 U.S. 494, 503 (1977) (recognizing that there is a liberty interest in maintaining familial relationships protected by the due process rights of the Fourteenth Amendment).

[FN25]. ULC ACT, *supra* note 4 at Prefatory Note. See [42 U.S.C.A. § 5106a\(b\)\(2\)\(A\)\(xiii\)](#) (2003), which requires states to have “provisions and procedures in every case involving an abused or neglected child which results in a judicial proceeding, a guardian ad litem, who has received training appropriate to the role, and who may be an attorney or a court appointed special advocate who has received training appropriate to that role (or both), shall be appointed to represent the child in such proceedings—(I) to obtain first-hand, a clear understanding of the situation and needs of the child; and (II) to make recommendations to the court concerning the best interests of the child.”

[FN26]. [Report of the Working Group on the Best Interests of the Child and the Role of the Attorney](#), 6 NEV. L.J. 571, 687 (2006).

[FN27]. See generally ULC ACT, *supra* note 4.

[FN28]. *Id.* at Prefatory Note.

[FN29]. *Id.*

[FN30]. *Id.*

[FN31]. Martin Guggenheim, [A Paradigm for Determining the Role of Counsel for Children](#), 64 FORDHAM L. REV. 1399, 1423-24 (1996).

42 Fam. L.Q. 145

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