STATEMENT IN OPPOSITION TO RESOLUTION #103 BEFORE THE HOUSE OF DELEGATES AUGUST, 2009

I. Introduction

For 51 years, the Family Law Section of this Association has been in the forefront regarding issues before the Family and Juvenile Courts of the nation. The members of the Section are those members of our profession who daily confront the most basic problems of families and individual family members. While many lawyers stay far away from Family and Juvenile Courts, choosing to litigate in many other areas, family and juvenile law lawyers and judges who comprise the Family Law Section observe unique human problems. They do so not as a mere academic exercise by those unfamiliar with these problems. Mindful of its unique responsibilities to advise this Association on matters of its expertise in such matters, it is the collective and unanimous conclusion of the Council of the Family Law Section to urge rejection of Resolution 103 proposed by the Litigation Section, a proposed ABA Model Act Governing the Representation of Children in Abuse, Neglect and Dependency Procedures (hereafter "The Litigation Model").

As will be set forth in this Statement, the overriding policy position of the Litigation Model requires any lawyer appointed to represent a child in an abuse, neglect or dependency proceeding to zealously advocate for and to be directed solely and exclusively by the wishes of the child no matter its age, even when the wishes of the child are contrary to the child's best interests. In other words, for example, the controlling principle under the Litigation Model is that the wishes of an abused or neglected child who desires to be returned to an abusive parent must be the controlling feature of the attorney's representation in all instances whether or not such wishes of the child are in the child's best interest or even contrary to the safety of the child.

Purportedly relying upon the Rules of Professional Conduct, the Litigation Model views children as mere miniature adults and proposes a degree of absolution contrary to prior actions of this Association, contrary to a model act on precisely the same subject already promulgated by the Uniform Laws Commission (UCL, formerly NCCUSL), and contrary to the statutes and case law of a majority of the states as well as the Federal Child Abuse Prevention and Treatment Act (CAPTA).

Resolution 103, in expressly rejecting the concept of a "best interest" role for an attorney for a child in abuse, neglect and dependency proceedings, is bad policy, urges bad law and represents the opinions of a vocal minority claiming to be spokespersons for child advocacy whose opinions have been thoroughly debated and rejected by mainstream child advocacy organizations including the Family Law Section and the UCL.

II. History

In 1996, the House adopted Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases. Thereafter, in 2003, the Family Law Section promulgated and the House adopted "ABA Standards of Practice for Lawyers Representing Children in Custody Cases." These standards include the concept of "best interest lawyers" for a child and remain ABA policy in custody matters. The Custody Standards are not directly affected by Resolution 103 which addresses only Abuse, Neglect and Dependency proceedings.

Following approval of the Custody Standards, in 2003 the UCL was asked by the Joint Editorial Board for Uniform Family Laws (a joint project of the Family Law Section of ABA, the American Academy of Matrimonial Lawyers and the UCL) to draft legislation for consideration by the states. A Uniform Representation of Children in Abuse, Neglect and Custody Proceedings Act was brought to the ABA for approval at its 2007 Midyear Meeting.

The Uniform Act relied heavily upon and comports with the previously adopted Custody Act and the 1996 Standards in Abuse and Neglect Cases.

Shortly before the 2007 Midyear, the Litigation Section voiced opposition, principally based upon the subject of "best interest" representation.

During its work on drafting of the Uniform Act, UCL (then NCCUSL) had heard from a small group who opposed the concept of best interest attorneys for children. The group's concerns were taken into account, but their opposition to best interest lawyering was at odds with the law of most states and was rejected in the final draft. The rejected minority position of this vocal group was thereafter taken to the Litigation Section who opposed the Model Act prior to the 2007 Midyear Meeting in what was styled "An Essay of the Ethics of Representation." The shortcomings and errors of the "essay" were described in several responses from NCCUSL and the Family Law Section. NCCUSL withdrew its Act at the 2007 Midyear in order to attempt to address any misunderstandings or misconceptions about the Uniform Act.

In April, 2007 at the Spring Meeting of the Family Law Section, NCCUSL hosted a meeting of interested parties in an attempt to address the concerns of the children's advocacy community and other interested parties. This meeting was attended by representatives of the Family Law Section, the Section on Litigation, the ABA Commission on Domestic Violence and National CASA (Court Appointed Special Advocates). While every participating organization may not have received all that it desired, the proposed Act was amended based on this meeting. Unfortunately, the minority represented by representatives from the Litigation Section decided to go off on its own, continued its refusal to consider best interest lawyers and submitted Resolution 113(A) for consideration by the House at the 2008 Annual Meeting. The 2008 resolution was

withdrawn, in part due to constitutional prohibitions against Sections offering Model Acts or subjects then under active consideration by the UCL.

2008 Resolution 113(A) and the Litigation Model, current Resolution 103, now before the House are clearly based upon and derived from the UCL Model, often verbatim except the Litigation Model continues its immovable objection to best interest representation in total disregard of the views of the majority of experts in the field of Family and Juvenile Law. The Litigation Model does not comport with ABA policy in the form of the 1996 Standards with respect to lawyers acting as guardians *ad litem* in such cases. The 1996 Standards at Standard A-2 and the UCL Model Act describes such role as "... an officer of the Court appointed to protect a child's best interests without being bound by the child's expressed preferences." The essence of the Litigation Model expressly rejects this role for lawyers.

The NCCUSL Act, now under the label of UCL, supported by the Family Law Section and the other entities involved in the drafting, has been redesignated as a "model" act, thereby eliminating the need to submit it to the House for approval. This Model Act already has been distributed to several states.

Now, despite the existence of a model act already adopted by the UCL, the Litigation Section stubbornly returns to urge its "Model Act" be adopted as ABA policy that is profoundly at odds with the policy espoused by UCL and endorsed by the majority of interested parties.

III. Reasons For Rejection Of 103 As ABA Policy

A. Inconsistency

The Litigation Model draws heavily from the UCL Model Representation of Children in Abuse, Neglect and Custody Act and the ABA Standards of Practice for Lawyers Representing Children in Custody Cases, sometimes verbatim. However, the Litigation Model is diametrically

opposite to the underlying policy critical to the UCL Model Act and the custody standards concerning whether an appointed attorney for a child must be directed in the representation by the wishes of the child or whether the attorney may advocate for the child's best interests when such interests are contrary to the child's wishes or directives. The sole reason for the existence of the Litigation Model is to urge ABA to repudiate best interest lawyering in Abuse, Neglect and Dependency Proceedings despite the recognition of such principle in custody matters.

It is inconsistent for ABA to adopt totally different standards for the representation of children in custody cases versus abuse and neglect matters. The inconsistency should be obvious, especially to anyone who ever represented a child. It makes no difference, for example, if a 2-year old abused child who wishes to return to an abusive family member is the subject of a custody proceeding or the subject of an abuse or neglect proceeding. The appointed attorney must be able to advocate for the child's best interest if the child's best interest is contrary to the child's stated wishes. How can any attorney reasonably be guided by the limitations proposed by the Litigation Model? Children are not merely miniature adults with "diminished capacity" – they are children!

Having two diametrically opposite "Model Acts" simply because the minority wants its own act will do nothing but damage the prestige and credibility of this Association's future efforts to propose adoption of model acts to the states and territories in the future. Confronted with opposing acts regarding abuse, neglect and dependency representation and different acts regarding representation in custody versus abuse, neglect and dependency proceedings, the wisdom of adoption of any future model acts by legislature will be (understandably) diminished.

B. State Statutes and Case Law

In order to assuage the hurt feelings of those whose minority views were rejected, the Litigation Model blindly ignores that the vast majority of state statutes and judicial decisions in both custody and in abuse, neglect and dependency proceedings adopt a view contrary to the policy basis of the Litigation Model regarding best interest lawyering. Statistics posted on the website of FirstStar, a group supporting the Litigation Model, reluctantly acknowledges that at least 40 states require or authorize best interests representation for children, often through the attorney as guardian *ad litem* model.

The most recent case law that supports the conclusion that best interest representation is not only permissible but necessary to ensure that a child will be protected from harmful or abusive situations is the California Court of Appeals decision in *In Re: Kristen B. vs. Elizabeth N.* (2008), 163 Cal. App. 4th 1535, 78 Cal. Rptr. 3d 495. Therein, an attorney appointed to represent a child in an abuse and neglect case advocated a position contrary to the child's wishes when the child recanted statements about sexual abuse. The court stated, in quoting from *In Re: James G.* (2007), 153 Cal. App. 4th 1253, 63 Cal. Rptr. 3d 769, as follows:

> The paramount duty of counsel for minors is not zealously to advocate the client's objectives, but to advocate for what the lawyer believes to be in the client's best interests, even when the lawyer and the client disagree. (Citation omitted). In this regard, minor's counsel may not "act as a mouthpiece" for the child or advocate a position counsel has reason to believe might endanger the child. (Citation omitted). Counsel's paramount duty to serve the minor's best interests rather than the minor's wishes, is reinforced by the fact that appointed counsel for minors routinely serve in a dual role, as both the child's legal counsel and the child's guardian *ad litem* under the Federal Child Abuse Prevention and Treatment Act (CAPTA).

The foregoing clear statement of policy by California is contrary to the Litigation Model and is shared by the vast majority of state decisions in abuse and neglect cases as well as custody matters, a sample of which include decisions from West Virginia [1], Connecticut [2], Massachusetts [3], New York [4], Texas [5], Wyoming [6], Colorado [7], Iowa [8], Montana [9], Arizona [10], and Pennsylvania [11].

The conclusion is obvious – the adoption by ABA of the Litigation Model would be ignored by the states. Proposing such a so-called model act, therefore, as ABA policy, will do harm to our future attempt to have states act favorably, to our future model acts.

C. Federal Child Abuse Prevention and Treatment Act (CAPTA)

The Litigation Model's client-directed model with its narrow and permissive mandate regarding protective action may not satisfy CAPTA as currently written. That act requires the appointment of a guardian *ad litem* who may be a lawyer for every child who is the subject of an abuse or neglect proceeding. The statute mandates that such guardian *ad litem* must investigate and make recommendations concerning the child's best interests. 42 U.S.C. §501 *et seq.*

The case that most directly addresses the role of the child's attorney under CAPTA, *In Re: Charles* (2002), 102 Cal. App. 4th 469, 125 Cal. Rptr. 2d 868, contradicts the position of the Litigation Model. There a child's attorney appointed in an abuse and neglect proceeding was held to satisfy CAPTA since the attorney advocates for the child's best interests. In other words, counsel's duties include best interest representation.

Additionally, the Litigation Model that permits the child to waive the right to counsel is contrary to the mandate under CAPTA for the appointment of counsel in all such cases.

D. Costs

Section 1(c) and (d) of the Litigation Model distinguishes between a "child's lawyer" and a "court-appointed advisor." Section 3 requires the appointment of the child's lawyer (who, under the Litigation Model cannot be the court-appointed advisor) and permits a second person to be appointed to be the advisor, or guardian *ad litem*. Thus, the Litigation Model contemplates the financial burden upon the states to appoint and pay for two persons (and possibly three if the guardian *ad litem* also requires counsel). Recent efforts of UCL to propose legislation for only one mandatory appointment has been met with rejection due to concerns about costs to the state in these economic times.

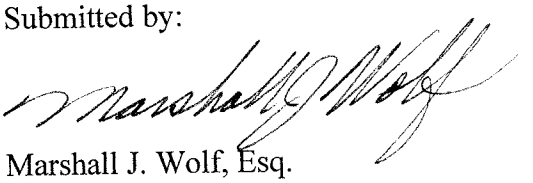
Clearly, such monetary concerns will cause legislatures to ignore the Litigation Model with its multiple persons for whom the state would be required to provide funding. While not, of itself, a reason for rejection of the Litigation Model, such fact of life, along with the other reasons described above would result in the Litigation Model being considered "dead on arrival" as a "Model Act."

V. Conclusion

The preparer of this report is honored to be joining the Commission on Youth at Risk upon the completion of this meeting. There is no child more at risk than an abused or neglected child whose attorney is precluded from advocating the child's best interests by a statute that requires the attorney to limit his or her representation to the wishes and direction of a frightened,

confused child who wishes to return to the abusive or neglectful parent. The Litigation Model that requires such a catastrophic result should be rejected.

Submitted by:



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On behalf of the Section

[1] *In Re Christina W.*, 639 S.E.2d. 770 (W. Va. 2006)

[2] *Schult v. Schult*, 241 Conn. 767, 699 A.2d. 134 (1997), *Carrubba v. Moskowitz*, 274 Conn. 533, 877 A.2d 773 (2005)

[3] *Care & Prot of Georgette*, 439 Mass. 28, 785 N.E.2d. 356 (2003)

[4] *Bluntt v. O'Connor*, 291 A.D.2d 106, 7373 N.Y.S.2d 471 (N.Y. App. Div. 4th Dep't 2002)

[5] *Samara v. Samara*, 52 SW3d 455, 458 (Tex. App. Houston[1st Dist.] 2001, pet denied)

[6] *Clark v. Alexander*, 953 P.2d 145 (Wyo. 1998)

[7] *In Re Marriage of Barnthouse*, 765 P.2d 610, 612 (Colo. App. 1988)

[8] *In the interest of J.P.B.*, 419 N.W.2d 387, 391 (Iowa 1988)

[9] *In Re Marriage of Rolfe*, 699 P.2d 79, 86 (Mont. 1985)

[10] *In Re Appeal in Yavapai Ocunty Juvenile Action*, 140 Ariz. 10, 680 P.2d 146 (1984)

[11] *In Re Davis*, 465 A.2d 614, 632 (Pa. 1983)

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