

MARYLAND JUDICIAL CONFERENCE
COMMITTEE ON FAMILY LAW
CUSTODY SUBCOMMITTEE
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MARYLAND STANDARDS
OF PRACTICE FOR
COURT-APPOINTED
LAWYERS
REPRESENTING
CHILDREN IN CUSTODY
CASES

TEXT AS ADOPTED BY THE MARYLAND
CONFERENCE OF CIRCUIT JUDGES

Revised: September 19, 2005

**MARYLAND STANDARDS OF PRACTICE
FOR COURT-APPOINTED LAWYERS REPRESENTING
CHILDREN IN CUSTODY CASES**

1. INTRODUCTION AND SCOPE

These standards of practice are intended to promote good practice and consistency in the appointment and performance of lawyers for children in cases involving child access decisions in Maryland courts. These standards apply to divorce, custody, visitation, domestic violence and other civil cases where the court may be called upon to decide child custody or visitation issues.

These standards do *not* apply to Child In Need of Assistance (CINA), Termination of Parental Rights (TPR) or adoption cases. The appointment and performance of attorneys appointed to represent children in those cases is governed by the *Guidelines of Advocacy for Attorneys Representing Children in CINA and Related TPR and Adoption Proceedings*.

2. DEFINITIONS AND DUTIES

2.1 Definitions

Courts appointing counsel for a minor child in a case involving child access issues should clearly indicate in the appointment order, and in all communications with the attorneys, the parties and other counsel, the role expected of child counsel. The terminology and roles used should be in accordance with the definitions in this section.

2.1.1 Best Interest Attorney. A court-appointed lawyer who provides independent legal services for the purpose of protecting a child's best interests, without being bound by the child's directives or objectives. This term replaces the term "*guardian ad litem*." The Best Interest Attorney makes an independent assessment of what is in the child's best interest and advocates for that before the court, even if it requires the disclosure of confidential information.

2.1.2 Child Advocate. A court-appointed lawyer who provides independent legal counsel for a child and who owes the same duties of undivided loyalty, confidentiality, and competent representation as are due an adult client. This term replaces the less specific phrase "child's attorney." A Child Advocate should be appointed when the child is in need of a voice in court and may be necessary in relocation cases, in cases where the child is sufficiently mature and sees his or her interests as quite distinct from their parents, when there are allegations of child sexual abuse, etc. A Child Advocate should petition the court to alter his or her role to permit them to serve as a Best Interest Attorney, or to appoint a separate Best Interest Attorney if they find the child does not have considered judgment.

2.1.3 Child's Privilege Attorney. A lawyer appointed in accordance with *Nagle v. Hooks*, 296 Md. 123 (1983), to decide whether to assert or waive, on behalf of a minor child, in a custody action, any statutory privilege. This term replaces the term "*Nagle v. Hooks* Attorney." The court may combine the roles of Child's Privilege Attorney with either of the other two roles.

2.1.4 Considered Judgment. In general, a child is regarded as having considered judgment when that child has the ability to express a reasoned choice about issues that are relevant to the particular purpose for which the attorney is representing the child.

2.1.4.1 Determining Considered Judgment. To determine whether the child has considered judgment, the attorney should focus on the child's decision-making process, rather than the child's decision. The attorney should determine whether the child can understand the risks and benefits of the child's legal position. The attorney should consider the following factors when determining whether the child has considered judgment:

- a) The child's developmental stage including cognitive ability, socialization and emotional and mental development;
- b) The child's reasons for the legal position;
- c) Relevant and available reports such as reports from social workers, psychiatrists, psychologists and schools.

A child may be capable of considered judgment even though the child has a significant cognitive or emotional disability.

In determining considered judgment, the attorney may seek guidance from professionals, family members, school officials, and other concerned persons. The attorney should also determine whether any evaluations are needed and request them when appropriate.

An attorney should be sensitive to cultural, racial, ethnic, or economic differences between the attorney and the child.

2.2 Duties

In addition to their ethical duties as lawyers, and other obligations detailed in this document, Best Interest Attorneys, Child Advocates and Child's Privilege Attorneys also have the duties outlined in this section.

2.2.1 Best Interest Attorney. A Best Interest Attorney determines whether the child has considered judgment and advances a position which the attorney believes is in the child's best interest. In addition, a Best Interest Attorney may perform the following duties in exercising his or her obligation to the client and the court where appropriate:

- a) Meet with and interview the child, and advise the child of the scope of the representation.
- b) Investigate the relative abilities of the parties in their roles as parents.
- c) Visit the child in each home.
- d) Conduct individual interviews with parents and collateral witnesses.
- e) Observe the child's interactions with each parent individually.
- f) Review educational, medical, dental, psychiatric/psychological or other records.
- g) Interview school personnel, childcare providers, healthcare or other professional involved with the child or family.
- h) File and respond to pleadings and motions.
- i) Conduct discovery.
- j) Provide written recommendations and a basis for those recommendations to opposing counsel or parties, and the court, no later than 10 days prior to trial. The Best Interest Attorney should recite the amount of time spent in preparation for the case, the documents examined, and the interviews conducted. The written recommendations should not include hearsay.
- k) Participate in settlement negotiations.
- l) Participate in the trial, calling witnesses and presenting evidence and argument as appropriate.
- m) If a child is to meet with the judge or testify, prepare the child, familiarizing the child with the places, people, procedures, and questioning that the child will be exposed to; and seek to minimize any harm to the child from the process.
- n) A Best Interest Attorney should **not** testify at trial.
- o) When the representation ends, the lawyer should inform the child in a developmentally appropriate manner.

2.2.2 Child Advocate. A Child Advocate determines whether the child has considered judgment and advances the child's desires and wishes in the pending matter. If the Child Advocate determines that the child does *not* have considered judgment, the Child Advocate should petition the court to alter their role to permit them to serve as a Best Interest Attorney, or to appoint a separate Best Interest Attorney. In addition, a Child Advocate may perform the following duties in exercising their obligation to their client and the court where appropriate:

- a) Meet with and interview the child, and advise the child of the scope of the representation.
- b) Investigate the relative abilities of the parties in their role as parents.
- c) Visit the child in each home.

- d) Conduct individual interviews with parents and collateral witnesses.
- e) Observe the child's interactions with each parent individually.
- f) Review educational, medical, dental, psychiatric/psychological or other records.
- g) Interview school personnel, childcare providers, healthcare or other professionals involved with the child or family.
- h) File and respond to pleadings and motions.
- i) Conduct discovery.
- j) Participate in settlement negotiations
- k) Participate in the trial, calling witnesses and presenting evidence and argument as appropriate.
- l) If a child is to meet with the judge or testify, prepare the child, familiarizing the child with the places, people, procedures, and questioning that the child will be exposed to; and seek to minimize any harm to the child from the process.
- m) A Child Advocate should **not** testify at trial.
- n) When the representation ends, the lawyer should inform the child in a developmentally appropriate manner.

2.2.3 Child's Privilege Attorney. A Child's Privilege Attorney determines whether to assert or waive any statutory privilege on behalf of the minor child. Waiver or assertion of privilege should be done by: 1) submitting a written document to the court, prior to the hearing, with copies to all counsel; 2) by filing a line with the court; 3) or on the record at a pretrial proceeding or trial.

A Child's Privilege Attorney may perform the following duties in exercising their obligation to their client and the court, where appropriate:

- a) Meet with and interview the child, and advise the child of the scope of the representation.
- b) Interview collateral witnesses necessary to assist the attorney in determining whether to assert or waive the privilege.
- c) Review educational, medical, dental, psychiatric/psychological or other records.

3. ETHICS AND CONFIDENTIALITY

3.1 Conflicts of Interest

Lawyers who have been appointed to represent two or more children should remain alert to the possibility of a conflict that could require the lawyer to decline representation or withdraw from representing all of the children.

If a conflict develops, the lawyer should bring the conflict to the attention of the court as soon as possible, in a manner that will not compromise the clients' interest.

3.2 Special Ethical Considerations for Child Advocates and Child's Privilege Attorneys

Attorneys appointed to serve as Child Advocates and Child's Privilege Attorneys are bound by the Maryland Rules of Professional Responsibility in all matters.

3.3 Special Ethical Considerations for Best Interest Attorneys

Best Interest Attorneys are bound by the Maryland Rules of Professional Responsibility in all matters, except when the attorney is required to discuss otherwise privileged information. Even outside of an attorney-client relationship, all lawyers have certain ethical duties toward the client, the court, opposing counsel, and the community.

The rules regarding conflicts of interest may not apply to Best Interest Attorneys in the same way that they apply to other attorneys. For example, siblings with conflicting views do not pose a conflict of interest for a Best Interest Attorney because such a lawyer is not bound to advocate a client's objective. A Best Interest Attorney in such a case should report the relevant views of all the children and advocate for the children's best interests.

4. TRAINING

4.1 Required Training

Attorneys appointed to represent children in custody proceedings as either a Best Interest Attorney, Child Advocate or Child's Privilege Attorney are required to complete one mandatory course of at least 6 hours. The course shall include the following topics:

- a) Applicable representation guidelines and standards;
- b) Children's development, needs and abilities at different stages;
- c) Effectively communicating with children;

- d) Preparing and presenting a child's viewpoint, including child testimony and alternatives to direct testimony;
- e) Recognizing, evaluating and understanding evidence of child abuse and neglect;
- f) Family dynamics and dysfunction, domestic violence and substance abuse;
- g) Recognizing the limitations of attorney expertise and the need for other professional expertise. The course may include available professionals who can provide information on evaluation, consultation and testimony on mental health, substance abuse, education, special needs or other issues;
- h) Available resources for children and families in custody disputes.

4.2 Continuing Education

Each court should require attorneys seeking appointments as child counsel to maintain knowledge of current law and complete a specific amount of training over a defined interval.

5. QUALIFICATIONS

5.1 Mandatory Requirements

All attorneys appointed to serve as either a Best Interest Attorney, a Child Advocate or a Child's Privilege Attorney shall:

- a) Be a member of the Maryland Bar in good standing, with experience in family law, or have been approved to represent children through a *pro bono* program approved by the bench; and
- b) Successfully complete the mandatory 6-hour training course specified in Standard 4.1, unless waived by the court.

5.2 Optional Requirements

In addition to the mandatory requirements, courts are encouraged to require attorneys to:

- a) Have at least three years of family law experience, or other relevant experience. (In evaluating relevant experience the appointing court may consider the attorney's experience in social work, education, child development, mental health, healthcare or other related fields.);
- b) Be willing to take at least one *pro bono* appointment as child counsel per year.

6. COMPENSATION

6.1 Uniform Compensation Structure

Each court should develop its own uniform compensation structure for all three types of child counsel: Best Interest Attorneys, Child Advocates, and Child's Privilege Attorneys.

6.2 Providing Counsel When Warranted Regardless of Parties' Economic Status

Courts should ensure that adequate and effective child counsel is appointed in all cases where it is warranted, regardless of the economic status of the parties. Courts should plan adequately in preparing their budgets to ensure they have sufficient funds to cover the costs of child counsel fees when the parties are not able to pay the full cost, or they should develop a *pro bono publico* component to their child counsel program.

6.3 Fee Waiver Process

Each court should apply the same fee waiver procedure, forms, and standard for the appointment of child counsel that is mandated by the *Guidelines for Grant Recipients* for all family services funded by the Family Division/Family Services Program Grants.

6.4 Ensuring Compensation

Each court should take steps to ensure that child counsel are compensated adequately and in a timely fashion, unless they have been asked to serve *pro bono publico*. Courts may use the following mechanisms to ensure attorney compensation:

- a) Require either, both or all parties to deposit a significant retainer amount or a fixed fee determined by the court into an attorney escrow account or the court's registry.
- b) If a party qualifies for a fee waiver, compensate child counsel out of available funds. Apply a cap on compensation if a fee waiver is granted, that is appropriate to the type of counsel being appointed.
- c) Enter a judgment for any unpaid fees.

7. COURTS

7.1 Appointment of Counsel

A court should appoint counsel for a child as soon as practicable if such an appointment is necessary in order for the court to decide the case.

In determining whether to appoint a lawyer the court should consider the nature and adequacy of

the evidence to be presented, other available methods of obtaining information, including social service investigations, and evaluations by mental health professionals, and available resources for payment. Appointment may be most appropriate in cases involving the following factors, allegations or concerns:

- a. Request of one or both parties;
- b. High level of conflict;
- c. Inappropriate adult influence or manipulation;
- d. Past or present child abuse or neglect;
- e. Past or present mental health problems of a child or party;
- f. Special physical, educational or mental health needs of a child that require investigation or advocacy;
- g. Actual or threatened family violence;
- h. Alcohol or other substance abuse;
- i. Consideration of terminating or suspending parenting time, or awarding custody or visitation to a non-parent;
- j. Relocation that substantially reduces the child's time with a parent and/or sibling;
- k. Any other factor that the court considers important.

7.2 Appointment Orders

Courts should make written appointment orders on standardized forms, in plain language understandable to non-lawyers, and send copies to the parties as well as to counsel. Orders should specify the lawyer's role (Best Interest Attorney, Child Advocate, Child's Privilege Attorney) and any other duties or responsibilities required by the court.

The order should authorize the lawyer's reasonable access to the child, and to all otherwise privileged or confidential information about the child, without the necessity of any further order or release. Health and mental health records that would otherwise be privileged or confidential under state or federal laws should be released to the lawyer only in accordance with those laws.

7.2.1 Duration of Appointment. The appointment order should state that the appointment of counsel terminates upon entry of a final custody order, unless otherwise provided.

7.3 Whom to Appoint

Courts should appoint only lawyers who have agreed to serve in child custody cases in the assigned role, and have been trained in accordance with Section 4 of this document. In making appointments, the court should fairly and equitably distribute cases among all qualified attorneys, keeping in mind the attorney's availability and caseload size. Before asking an attorney to provide representation to any child *pro bono publico*, the court should consider whether and how many other similar cases the attorney has recently accepted on a *pro bono* basis

from the court.

7.4 Physical Accommodations

Courts should provide lawyers representing children with seating and work space comparable to that of other lawyers, sufficient to facilitate the work of in-court representation, and consistent with the dignity, importance, independence, and impartiality that they ought to have.

IN THE CIRCUIT COURT FOR _____ COUNTY, MARYLAND

_____	*	
Plaintiff	*	
v.	*	Case No.: _____
_____	*	
Defendant	*	

* * * * *

ORDER APPOINTING COUNSEL FOR CHILD(REN)

This matter having come before the Court, it is this _____ day of _____, 2005, by the Circuit Court for _____ County, Maryland

ORDERED, that _____, telephone number _____, is hereby appointed as a Best Interest Attorney in accordance with the Maryland Standards of Practice for Court-Appointed Lawyers Representing Children in Custody Cases. A Best Interest Attorney is a court-appointed lawyer who provides independent legal services for the purpose of protecting a child's best interests, without being bound by the child's directives or objectives. It is further

ORDERED, that _____, telephone number _____, is hereby appointed as a Child Advocate pursuant to the Maryland Standards of Practice for Court-Appointed Lawyers Representing Children in Custody Cases. A Child Advocate is a court-appointed lawyer who provides independent legal counsel for a child and who owes the same duties of undivided loyalty, confidentiality, and competent representation as are due an adult client. It is further

ORDERED, that _____, telephone number _____, is hereby appointed as a Child(ren)'s Privilege Attorney pursuant to the Maryland Standards of Practice for Court-Appointed Lawyers Representing Children in Custody Cases. A Child(ren)'s Privilege Attorney is a lawyer appointed in accordance with *Nagle v. Hooks*, 296 Md. 123 (1983), to decide whether to assert or waive, on behalf of a minor child in a custody action, any statutory privilege. It is further

ORDERED, that the parties shall fully cooperate with the attorney appointed herein in the performance of the duties instructed by this Court. It is further

ORDERED, that the attorney appointed herein shall have reasonable access to the child(ren) and to all otherwise privileged or confidential information, including but not limited to any protected health information, about the child(ren), without the necessity of any further Order of Court. The attorney's access to privileged and confidential information shall be without the necessity of a signed release, including medical, dental, psychiatric/psychological, social services, drug and alcohol treatment, law enforcement and educational records and information. It is further

- ORDERED, that the attorney appointed herein shall provide:
 - (*Best Interest Attorney*) Written recommendations to be filed on or before _____ . It is further
 - (*Child's Privilege Attorney*) A written document/line asserting or waiving the privilege, to be filed on or before _____ . It is further

ORDERED, that the attorney appointed herein shall be compensated as follows:

Payment into attorney's trust account. Plaintiff is hereby directed to pay the attorney appointed herein, for deposit into the attorney's trust account, the sum of _____ (\$_____) within 10 days of the date of this Order as an initial contribution towards the attorney's fees in performance of the services identified herein. The attorney is authorized to draw from the trust account as the fee is earned, upon submission of an itemized monthly statement to the court, counsel, and any unrepresented party.

Payment into attorney's trust account. Defendant is hereby directed to pay the attorney appointed herein, for deposit into the attorney's trust account, the sum of _____ (\$_____) within 10 days of the date of this Order as an initial contribution towards the attorney's fees in performance of the services identified herein. The attorney is authorized to draw from the trust account as the fee is earned, upon submission of an itemized monthly statement to the court, counsel, and any unrepresented party.

Final allocation of fees shall be determined by the Court at a hearing on the merits of this case or upon the Petition of the attorney appointed herein.

The attorney appointed herein shall submit a bill for services to the Court at the conclusion of the case, or upon earlier motion.

The attorney appointed herein shall provide representation on a pro-bono basis.

The attorney appointed herein shall be compensated in accordance with the Memorandum of Understanding and any subsequent directives issued by this Court.

Absent further Order of this Court, the attorney appointed herein shall not be required to participate in any appeal in this matter.

Although the minor child(ren) are not parties to this action, the attorney appointed herein shall be entitled to engage in discovery as part of the performance of the duties assigned herein, and to file motions or seek order as appropriate in the fulfillment of the duties appointed herein. It is further

ORDERED, that within ten (10) days of the date of this Order, counsel for Plaintiff, or Plaintiff shall provide to the attorney appointed herein copies of all pleadings and papers filed in the above action and any correspondence between the parties or counsel for the parties. It is further

ORDERED, that within ten (10) days of the date of this Order, each party is provide the attorney appointed herein the names and known addresses and telephone numbers of any and all mental health providers who have evaluated or treated the child(ren) and anyone else with whom the child(ren) may have a privilege pursuant to the Statute. It is further

ORDERED, that the attorney appointed herein shall not have any ex parte communications with the Court. In addition, the attorney/client privilege shall be respected at all times. As such, the attorney appointed herein may not speak to the parties without the prior permission of their respective attorneys, and the attorneys for

the parties may not speak with the child(ren) without the prior permission of the attorney appointed herein.

Judge