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# Effective Representation of Children by the Guardian *ad Litem*: An Empirical Investigation

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Guardians *ad litem* (GALs), designated to represent children's best interests in civil abuse and neglect proceedings, fulfill the role with little direction. This project was designed to develop guidelines for GALs based on the available legal and social science literature as well as empirical surveys of both GALs and persons working closely with them. Data from interviews, questionnaires, and literature reviews were analyzed, and a comparison of the practice of GALs in Iowa with norms derived from the literature survey was made. A training manual was developed to help insure effective representation of children by GALs. This research represents one of the first to examine empirically the behavior of GALs and to make such a comparison with literature and statutes.

In compliance with the Child Abuse Prevention and Treatment Act (42, U.S.C. ss.5101-06 (1974)), most states provide legal representation for children in civil abuse and neglect proceedings. Although the guardian *ad litem* (GAL) is designed to represent the child's best interest, the act does not address the role or functions of the GAL, or his/her relationship to the court: nor does the act define the child's "best interests"; these determinations are left to the discretion of the states. A person appointed as a GAL, whether an attorney or not, has little

guidance from statutes, rules, or case law.

## Design of the Project

The first phase of the project was a survey of the legal and social science literature addressing the role and function of the GAL. Statutes of all 50 states relating to the function of the GAL in child abuse, neglect, dependency, and custody cases were examined as was case law relating to the role of the GAL or attorneys for children. A second phase examined the role of the GAL in the state of Iowa. A questionnaire was developed and sent to *all* juvenile judges, juvenile referees, county attorneys, and public defenders in the state. This questionnaire elicited descriptions of the role

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of the GAL, a listing of the five most essential activities of the GAL, and a checklist of the desirable activities to be performed by GALs. A list of all GALs for the responder's county or district and the names of those GALs who do an exemplary job were also solicited.

The data from the questionnaire were analyzed and a protocol for interviewing GALs was developed. This protocol used information from various sources including the literature, the questionnaire, and input from an advisory board of professionals working in various aspects of family law. The protocol was then employed in face-to-face interviews with a sample of 48 GALs who were randomly selected from the lists provided by the respondents to the questionnaire.

The sample was stratified into four groups based on county population: 10,000 and under; 10,000 to 20,000; 20,000 to 50,000; and over 50,000. Four GALs in each group of 12 were selected from the lists of "exemplary" GALs; thus, the 48 interviewees were comprised of 16 "exemplary" and 32 "ordinary" GALs. The interviewer was blind to the status of the interviewees: all 48 were attorneys, and interviews were conducted in their offices.

Data from these interviews were examined for differences between not only "exemplary" and "ordinary" GALs but for differences between urban and rural practices, and types of cases handled by different GALs as well. Another aspect of the data analysis addressed a comparison of the practice of GALs in Iowa with the norm derived from the literature survey. The final phase of the proj-

ect involved the development of a prototype of a training manual for GALs. The manual included factual information on many issues involved in abuse, neglect, and custody cases, and also provided a framework for GALs to use in determining the best interests of an individual child as well as some guidelines for insuring effective representation of children.

### Literature and Law—A Review of the Issues

The issue that recurs most often in discussions of the role and function of the GAL is the *dual role conflict* or the expectation that the GAL will simultaneously fulfill the role of advocate for the child's "best interest" and the role of attorney for the child who is bound to advocate the wishes of a child old enough for a considered judgment. Eleven states either statutorily provide for, or by statutory construction permit, or require, the person appointed to act simultaneously as attorney and GAL. Although by definition, the roles of legal counsel and GAL are different, many courts find nothing inherently improper in requiring a GAL who is a lawyer to serve in a dual role. A few courts, however, have recognized the conflict and have expressed concern over inadequate representation and the constitutional implications of counsel's neglect of attorney duties.

Although most statutes and case law support the view that a GAL must be an active advocate as well as neutral investigator, the majority of jurisdictions require advocacy of the child's best inter-

est rather than the child's expressed wishes. This contrasts with current literature, which urges active inclusion of the child's wishes in any judicial proceeding and suggests that children *ought* to participate in legal matters affecting their lives.<sup>1-3</sup> This position seeks to minimize the risk to the child from arbitrary decisions made on his or her behalf and suggests that a GAL who represents a child's "best interest" tends to follow the often biased opinions advanced by child protective agencies.<sup>2-5</sup>

The language of both the IJA/ABA Juvenile Justice Standards and the Model Code of Professional Responsibility implies a preference for a separation of the functions identified with the roles of GAL and attorney; however, the Ethical Considerations of the Code suggest that, in some circumstances, it is not unethical for a lawyer to act in the dual capacity and make decisions on behalf of the minor. Some commentators suggest that in place of his or her own opinion regarding the child's needs, the lawyer should use expert opinion in seeking to balance the child's assessed needs with the child's desires and wants.<sup>3,5-8</sup> Supporters of this view weigh the benefit that the child derives from having legal representation against the financial burden imposed by separate representation.<sup>5,9,10,11</sup> Critics of this view see a conflict for the attorneys appointed; specifically, they point out that, unlike the GAL, attorneys are to present evidence through their witnesses and are prohibited by professional ethics to offer personal knowledge or opinions to the court.<sup>12,13</sup>

The proper procedure when a GAL/attorney believes that there is a role conflict is withdrawal from one of the roles, usually the GAL. In Iowa, which mandates appointment of counsel and GAL, the same person may serve as both. However, by statute, the court may appoint a separate GAL, if the appointee feels s/he cannot properly represent both the child's legal and "best" interests.

Several other issues are raised repeatedly in the literature; these are discussed briefly below:

***The Need for an Attorney as GAL***

Most commentators<sup>2,5,8</sup> contend that the child's representatives should be attorneys and must be trained in the complexities of law to be viewed as equals to the attorneys for the petitioner and respondent.<sup>14</sup> Some commentators have expressed concern about the quality of representation provided by volunteers without training in either law or child development;<sup>15</sup> others have suggested that attorneys also need special training in child development to successfully ascertain and represent a child's best interest.<sup>16,17</sup>

***The Need for Early Appointments***

There is general agreement among commentators that both the time of onset and the length of appointment significantly influence the GAL's contribution to child protection proceedings.<sup>3</sup> At the filing of the petition, the child protection agency usually has established substantial evidence of abuse and has determined which course of action it considers will best serve the child and the family. To protect the child against possible arbitrary action, the GAL must

have ample opportunity to investigate the child's situation and prepare for preliminary hearings.<sup>18</sup> An early appointment not only facilitates adequate representation but may facilitate a settlement by early negotiation with social workers and parents, which best serves the child's interests.<sup>19,20</sup> Most state statutes are either vague or silent with regard to when the appointment should attach, or vest the courts with considerable discretion regarding the timing of appointments. Iowa law recognizes the need for early appointments and provides for such at the filing of the petition (IA Code Ch. 232.103(2)).

***The Need for Extended Appointments***

The welfare of a child adjudicated abused or neglected requires representation beyond the dispositional hearing. The GAL must have the opportunity to appeal a decision adverse to the child's best interest, to monitor the effectiveness of the case plan or dispositional order, and to attend review hearings. Most commentators urge retention of the GAL until permanency is achieved when the child is adopted, placed in long term foster care, or returned home.<sup>8,17,21</sup> Statutes in all but four states (Colorado, Florida, Ohio, Oklahoma) are silent on the duration of the GAL's appointment.

***The Duties of the GAL*** There are no uniformly defined duties for the GAL; specification of duties tend to be influenced by the role the GAL is expected to perform, which in turn tends to be governed by the status of the appointee as attorney or volunteer. Most often mentioned in the statutes, the case law, and the literature is the duty to conduct

a thorough investigation of the facts. This investigation should include some visits, observation of, and private interviews with the child and the child's caretakers. Although an investigation is needed to discern the child's immediate, near future and long term needs, most urgent is a determination of immediate danger, and whether the child needs to be temporarily removed from the home.<sup>14,16,17,19</sup> The GAL must have access to all records, reports, and confidential information that s/he feels are relevant, and nine states expressly provide for such access.

The development of placement and treatment options requires consultation with, or evaluation of reports from, non-legal experts such as psychologists, social workers, physicians, and school personnel. The synthesis of the information gained through investigation should direct the GAL's course of action. Some commentators suggest that the GAL has an affirmative obligation to determine whether court action is in the child's best interest and, if it is not, to seek dismissal.<sup>19</sup> Even when proceedings commence, it may be in the child's best interest to seek a swift resolution of the legal dispute through cooperative non-adversarial means.<sup>16,20</sup> The GAL's presence at all hearings is of the utmost importance.<sup>22</sup> However, the duties which s/he performs vary widely among jurisdictions. Few states provide explicit guidelines; most statutes are silent on the activities of the GAL during the post-dispositional phase; commentators urge that the GAL remain active and vigorous until permanency is attained.<sup>14,17,21</sup>

## Results of the Questionnaire and Interviews

*The Questionnaire* The questionnaire was sent to *all* juvenile judges, juvenile referees, county attorneys, and public defenders; 86 were returned and used in the analyses. County size and role of the respondent were used in the analyses and four statistically significant findings were noted for these variables. First, there were heavier case loads in the larger counties. Second, judges and referees had more years of experience in family law than did other respondents. Third, public defenders had larger case loads than other respondents; fourth, in the larger counties, GALs were used more in criminal proceedings against perpetrators.

Of most interest were the responses to the open-ended questions. The most common responses for the role of the GAL included: representing the child's best interests; an active, independent role for the GAL; informing and advising the court; attending all hearings. County attorneys appeared to be more aware of the real and potential conflict of lawyers placed in the dual role of attorney/GAL. Overall, the potential for conflict was recognized by 46 percent of the respondents.

The most essential activities of the ideal GAL included (in order of popularity): representing the child's best interest, recommending solutions to the court, investigating the child's situation, protecting the legal rights of the child, developing trust/rapport with the child, explaining the process to the child, meeting periodically with the child, reviewing

reports submitted to the court and counsel, participating in permanency planning, reporting the child's wishes to the court, monitoring the child's progress, reviewing the work of other professionals, and cooperating with other professionals.

The questionnaire was broad-based with many open-ended questions. Nonetheless, the responses reflected many of the activities described in the literature as well as the confusions regarding the proper role of the GAL. Although an active, independent role was envisioned by most for the GAL, this advocacy necessarily conflicts with the traditional GAL function of advising the court as a neutral observer that others envisioned. Recommending solutions to the court was seen as going hand-in-hand with protecting the legal rights of the child. Although reporting the child's wishes was also mentioned, it did not appear to reflect the role of "zealous advocate of the child's wishes" espoused in the literature.

*The Interviews* Forty-eight attorney/GALs were randomly selected for personal interviews. They were queried about their views of what the GAL role *actually* and *ideally* entails. Two parameters were considered in the examination of the variables derived from the interviews; one was the population of the GAL's county and the other was whether the GAL had been considered "exemplary" or "ordinary" by respondents to the questionnaire.

Few statistically significant differences were found. GAL's from counties with populations over 50,000 were more

likely to consider personnel turnovers in the child protection agency a problem. Most important, however, was the finding that there were more similarities than differences in what GALs do, regardless of county size. The comparison of "exemplary" and "ordinary" GALs also yielded few statistically significant differences. The "exemplary" group was more likely to elicit expert testimony in a medical neglect case than were their "ordinary" counterparts; the "exemplary" group was also more likely to mention "making efforts to ensure adoption" and "monitoring the case" as a part of their routine follow-up of a ChINA (Child In Need of Assistance) case. The results indicate there is considerable uniformity in the beliefs and activities of the GALs in Iowa. Even though it is possible that the open-ended questions were too broad for differences to emerge, the consistency of the responses speaks against this interpretation.

A second part of the interview involved descriptions of the activities carried out in a typical ChINA case. The majority of respondents mentioned activities listed earlier. Specifically, 85 percent reported interviewing the child; 77 percent reported reviewing file reports or documents; 71 percent reported contacting the child protective case worker; 71 percent reported contacting other professionals; and 65 percent reported interviewing or contacting parents or parents' attorney. Some of the activities urged by commentators were less frequently mentioned. Visiting the child in his home or placement was reported by

24 percent; personally interviewing witnesses was reported by 40 percent; seeking evaluations was mentioned by 13 percent; and mediating stipulations was mentioned by four percent. The most described and consistently agreed upon function of the GAL in the literature is that of investigator. The activities given above suggest that the investigative function is considered part of the regular activities of the GAL in Iowa as well.

When asked what the "ideal" GAL would do, 58 percent mentioned more investigation, followed by spending more time with the child (38%), meeting/interviewing the parents (29%), getting evaluations by professionals (25%), and being an advocate for the child (15%). In response to the question eliciting the most important functions of the GAL, fact gathering/investigation was mentioned by 54 percent. Forty-five percent mentioned determining the needs/best interests of the child and 38 percent mentioned being an advocate for the child. Other important functions mentioned included: being thoroughly informed/prepared, getting the best interest information before the judge, making an independent judgment, considering what the child wants, taking an active role in the hearings, good rapport with the child, friend of the court, and knowing the options for the child.

Although the GALs' description of their activities and functions was similar to the perceptions of those responding to the questionnaire, the GALs appeared to perceive of their role less as a "neutral friend of the court" and more as an advocate for the child's welfare. Like the

questionnaire respondents, there did not appear to be support for the role espoused in the literature of "zealous advocate for the child's wishes." Similarly, the confusion in case law on the dual role of GAL and attorney was also evident in the interview responses. Specifically, 35 percent considered the roles of attorney and GAL the same in ChINA proceedings; 54 percent considered the role of the GAL was to present the child's best interest, whereas only four percent mentioned advocating the child's wishes. However, 35 percent did cite the role of the attorney was to advocate the child's wishes, while 13 percent mentioned advocating for the best interest. A potential conflict in having both roles was mentioned by 42 percent.

The interview included questions about post-dispositional or follow-up activities. The interviewees mentioned the following activities: reviewing reports (71%), preparing for/attending review hearings (46%), making contact with the child (42%), monitoring the situation (46%), and taking action if a problem arises (50%).

### **Discussion**

The role and functions of the GAL are not sufficiently defined by either case law or statutes to insure that children receive more than nominal representation. Appointees cannot turn to either source for guidance to determine what they should do when representing the interests of young clients. The courts and commentators also voice these concerns and turn to legislatures to make the decisions about who should be appointed,

when the appointment should attach, how long it should last, and what authority and responsibilities the GAL should have.

Iowa is among the jurisdictions that provides appointees with minimal direction. Nonetheless, the GALs in Iowa envision and actualize their role in a manner consistent with the urging of the majority of commentators: i.e., they conduct an independent investigation of the child's situation, make a determination of the child's best interest, and advocate or recommend that interest. However, some activities that commentators urge as important for vigorous representation are not undertaken by many of the GALs who were interviewed.

The commentators' view of the GAL as advocate of a mature child's wishes was also not reflected in these data. This was an issue on which respondents appeared to have disagreement or confusion. Although this may reflect case law confusions and lack of specificity in the statutes, real ambiguities were expressed in the perception of the role of the GAL. One interviewee made the comment: "I am an impartial observer, just as the judge is." And another made the comment: "I am the child's advocate."

Special training for GALs was also a topic of much discussion. Even though there are few situations in which lawyers are asked to assume more responsibility than in child abuse cases, the juvenile courtroom is often perceived as a training ground for young lawyers.<sup>23</sup> Model legislation advises lawyers against accepting employment in matters in which

they are incompetent.<sup>24</sup> The attorneys interviewed also felt the need for further training and believed that written materials would be the most useful format for training. This project developed a handbook that is currently made available to attorneys in Iowa by the Supreme Court through their county law libraries. A detailed description of this manual is beyond the scope of this paper.\*

### Conclusion

The research presented here involved a small but representative sample of attorneys active in the protection of children in the State of Iowa. Although it cannot be overemphasized that real ambiguity exists in the attorneys' perceptions of their role as GAL, it was a study in which attorneys looked at themselves as professionals and evaluated how they function in different contexts. As such, it was encouraging to note that attorneys in Iowa take the role of GAL seriously and are keenly aware of the impact they can make in the lives of the children they represent. Additional studies are needed to explore the differences in the role of the GAL when involved in adversarial and nonadversarial proceedings, in representing children in CHINA, custody and termination proceedings, and in deciding how to resolve the dual role conflict.

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\*Inquiries about the manual should be addressed to: Iowa Lawyers Trust Account Commission (IOLTA) of the Supreme Court of Iowa, State Capitol Building, Des Moines, IA 50319. Copies of the research questionnaire and interview protocol may be obtained from the senior author.

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### References

1. Hardin M: Some reservations about the role of the guardian *ad litem* in 1980. Proceedings of the National Guardian *ad litem* Policy Conference, Warrenton, VA, 1980 (Rev. ed. July 1982), pp 226-31
2. Ramsey SH: Representation of the child in protection proceedings: the determination of decision making capacity. *Fam L Q* 17:287-326, 1983
3. Redeker JR: The right of an abused child to independent counsel and the role of the child advocate in child abuse cases. *Vill L Rev* 23:521-46, 1978
4. Guggenheim M: The right to be represented but not heard: reflections on legal representation for children. *NYU L Rev* 59:76-155, 1984
5. Long L: When the client is a child: dilemmas in the lawyer's role. *J Fam L* 21:607-40, 1983
6. Model Code of Professional Responsibility, EC 7-7 (1974)
7. Standards Relating to Counsel for Private Parties, (IJA-ABA Juvenile Justice Standards Project) 3.1, 6.1 (1979)
8. Kelly R, Ramsey SH: Do attorneys for children in protection proceedings make a difference? *J Fam L* 21:405-55, 1982-83
9. Bross DC: Helping prevent the abused child from becoming a grownup abuser. *Judges J* 24:10-15, Fall 1985
10. Johnson CL: Statutory provisions regarding the guardian *ad litem* mandate: some findings from a regionwide survey of judges in the Southeast. *Juv & Fam Ct J* 30 (Aug):15-20, 1979
11. Comment, Protecting the interests of children in custody proceedings: a perspective on twenty years of theory and practice in the appointment of guardians *ad litem* (authored by RT Makaitis). *Creighton L Rev* 12:23-55, 1978
12. Horowitz R, Davidson H (Eds.): *Legal Rights of Children*. Colorado Springs, Shepard's/McGraw-Hill, 1984
13. Wiig JK: Functions of the guardian *ad litem* in child abuse and neglect proceedings in Los Angeles juvenile court in 1980. National Guardian *ad litem* Policy Conference Proceedings, 96-114
14. Fraser BG: Independent representation for the abused and neglected child: the guardian *ad litem*. *Cal W L Rev* 13:16-45, 1976-77
15. Davidson H: The guardian *ad litem* for the

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- abused child: conceptual influences and unresolved issues in 1980. National Guardian *ad litem* Policy Conference Proceedings, 14-22
16. Duquette DN, Ramsey SH: Using lay volunteers to represent children in child protection court proceedings. *Child Abuse Neglect* 10:293-308, 1986
  17. Isaacs JL: The role of the lawyer in child abuse cases, in *Helping the Battered Child and his Family*. Edited by Kempe CH, Helfer RE. Philadelphia, JB Lippincott, 1972
  18. Davidson H: Final report, 1980. Proceedings of the National Guardian *ad litem* Policy Conference, Warrenton, VA, (Rev. ed. November 1981). pp 1-10
  19. Besharov DJ: Representing abused and neglected children: when protecting children means seeking the dismissal of court proceedings. *J Fam L* 20:230-9, 1982
  20. Duquette DN: Liberty and lawyers in child protection, in *The Battered Child*. (ed 3 rev) Edited by Kempe CH, Helfer RE. Chicago, University of Chicago Press. 1980
  21. Thomas G: 99 and 44 percent pure agency representation of children's interests in child abuse and neglect cases. in 1980. National Guardian *ad litem* Policy Conference Proceedings, 90-5
  22. Ray-Bettinski C: Should the guardian *ad litem* attend all hearings? case conferences? interviews with the child by all parties? in 1980 National Guardian *ad litem* Policy Conference Proceedings, 199-206
  23. National Council of Juvenile and Family Court Judges (NCJFCJ): Deprived children: a judicial response. 73 recommendations. *Juv & Fam Ct J* (special issue). 37:1-48, 1986
  24. Horowitz R: Who in addition to the judge may determine when a child is entitled to and needs a guardian *ad litem*? in 1980 National Guardian *ad litem* Policy Conference Proceedings, 62-72