

Legal Needs of Children

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Background

In 1999-2000 there were over 48,000 children involved in Florida's child protection system and over 100,000 children were referred to the Department of Juvenile Justice. In addition to these direct actions children's lives are impacted by our judicial system through actions related to custody, visitation, child support, civil commitment and domestic violence. Children are also found as parties in tort, contract, probate, and other civil actions and as witnesses in criminal and civil actions. In each instance, the status of the child in the litigation and the manner of representation of the child's interests has independently evolved through statutes, common law, and court rules.

The independent evolution of these systems of representation has resulted in confusion in the legal community, in guardians ad litem services and in the courts as to how a child should be represented and what is the role of the various players such as parents, attorneys, guardians, attorneys ad litem, guardians ad litem, next friend or others who attempt to protect the child and the rights of the child in our legal system.

Representation of children in Florida has evolved in several different ways. In 1967 the U.S. Supreme Court ruled that where a child was to lose his or her liberty in a delinquency case the child was entitled to legal representation.¹ Based on that decision Florida has provided counsel to represent children in delinquency cases and the debate has raged nationally as to whether children in other actions should similarly be allowed to have their interests represented by independent counsel. In 1999 and 2000 bills filed in the Legislature attempted to modify representation for children in dependency proceedings by providing for representation of a child's interest under an American Bar Association model. That model provides for representation of the child as a client in the same manner as an adult client. Advocates of a guardian ad litem system of child representation strenuously objected to this model for the dependency court. In the 2000 session s. 39.4086, F.S., was enacted to establish an attorney ad litem pilot project in the 9th judicial circuit. This pilot project allows the judges in that circuit to determine in dependency cases when it is appropriate to appoint an attorney ad litem to represent the articulated wishes of the child so long as those wishes are consistent with the safety and well being of the child. A progress report on the pilot project is due annually to the Legislature on October 1.

On May 3, 2001, the Florida Supreme Court issued an order accepting the Family Court Steering Committee's recommendations for a model family court using the unified family court process. The order addressed the organization, policies, procedures, staffing, resources, and linkages to community services needed to assist children and families involved in litigation. One of the major components of the unified family court is to bring together all family related actions for a set of

¹ Gault, 378 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967).

litigants to hear them before a single judge or team of judges. This will bring together proceedings in delinquency, dependency, and family law allowing litigants and their attorneys to address several issues in one court.

During the 2001 interim the President of the Senate directed staff of the Senate Judiciary Committee to further investigate the issue of child representation, report to the Legislature on the status of representation and make recommendations for clarifying the roles of participants in the process.

Methodology

In preparing this report staff has extensively reviewed case law and academic and legal analyses of the representation of children covering the last thirty years. Additionally, staff attended CLE classes over three days to hear from nationally recognized professionals representing children and to hear from Florida lawyers and guardians ad litem actively working in this area of law. Staff has attended court hearings and spent one day with a guardian ad litem visiting clients, a foster home and the Department of Children and Families. Staff has interviewed numerous individuals working in the area of child representation including the Secretary of the Department of Children and Families, judges and hearing officers handling family law and dependency cases, guardians ad litem, attorneys providing representation, directors of guardian ad litem programs, program attorneys, and legal aide attorneys.

Findings

A Child's Legal Rights In the Context of the Family

The Rights of Family Under the U.S. Constitution and Laws In the United States

When the newly formed United States was drafting a set of laws under which the new nation would function, the founding fathers naturally looked to the laws the colonies currently operated under, or the laws of England.

English law did not generally interfere with family relationships except to protect the orderly transfer of property such that it retained its value for purposes of taxation to the crown and to prevent vagrancy, crime and the burden of the poor on society.²

The law provided the mechanism for orderly transfer of property to the eldest heir. Where that heir was a minor then the law provided for the appointment of a guardian ad litem. The guardian's predominant function was to ensure the land remained with the rightful heir and remained productive until the heir could take possession and manage the property himself. This guardian did not particularly bother with the child but was most concerned with the proper care and management of the property.³

In order to combat vagrancy, crimes by the poor, and the burden the poor imposed on society, the law provided for the state to take charge of these poor children and their families and place them in work houses or place the children in apprenticeships. Through this mechanism the poor children were removed from the streets and ostensibly made productive citizens.⁴

Other than these two major areas the government left families to manage their own affairs and discipline and raise their children without interference.⁵

The United States adopted this philosophy of British law and provided in its constitution a right of privacy to the individual and the family that requires extraordinary circumstances for the state to abridge those rights. Under the 14th amendment parents have a basic right to be free from governmental interference in the common occupations of life, including the right to marry, establish a home and to bring up children. These were found to include raising and instructing the

² Jean Koh Peters, *Representing Children In Child Protective Proceedings: Ethical and Practical Dimensions*, pp. 235-251 (Lexis Law Publishing) 1997.

³ Id.

⁴ Id.

⁵ Id.

children.⁶ The family is also protected under the Due Process Clause, which provides protections to those liberty interests so rooted in the traditions and conscience of our people as to be ranked as fundamental.⁷ Protection of the rights of the family has also been found in the ninth amendment. The rights of a family fall within those fundamental personal rights that are protected from abridgment by the Government though not specifically mentioned in the Constitution.⁸

The constitutional right to have and raise children free from government interference includes certain responsibilities to protect the welfare of the children.⁹ Where a natural parent demonstrates a sufficient commitment to his or her child the parent is entitled to raise the child free from undue state interference.¹⁰ Along with the right to control the education of their children parents are charged with the “high duty, to recognize and prepare [the child] for additional obligations.”¹¹

Where the parent is meeting his or her obligations to the child, this right to have and raise children may not be interfered with by government action except where there is a reasonable relation to some purpose within the competency of the state to effect.¹² The Supreme Court has carefully examined any governmental intrusion on choices concerning the family to determine the governmental interests advanced and the extent to which those governmental interests are served by the challenged regulation.¹³

Florida courts have also recognized the right of parents to have the custody, fellowship and companionship of their children.¹⁴ However, this right of the parents must be limited to protect the ultimate welfare or best interest of the child.¹⁵ The child’s right to be free of physical and emotional violence “at the hands of his or her most trusted caretaker”¹⁶ will override the right of parents to their children. However, this does not mean that when the child objects to the parent’s decision or when the decision may entail some risk the state has the right to intercede.¹⁷

⁶ *Meyer v. Nebraska* 262 U.S. 390, 43 S.Ct. 625, 67 L. Ed. 1042 (U.S. 1923).

⁷ *Snyder v. Massachusetts*, 291 U.S. 97, 105, 54 S. Ct. 330, 332, 78 L.Ed. 674 (1934), *Michael H. v. Gerald D.* 491 U.S. 110, 109 S. Ct. 2333 105 L.Ed. 2d 91 (1989).

⁸ *Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 1688, 14 L.Ed. 2d 510, (1965), *Hodgson v. Minnesota*, 497 U.S. 417, 110 S. Ct. 2926, 2943 111 L.Ed. 2d 344 (1990).

⁹ *Lehr v. Robertson*, 463 U.S. 248, 103 S. Ct. 2985, 2991 77 L.Ed. 2d 614, (1983).

¹⁰ *Hodgson v. Minnesota*, 497 U.S. 417, 110 S. Ct. 2926, 2943 111 L.Ed. 2d 344 (1990).

¹¹ *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S. Ct. 571, 573, 69 L.Ed. 1070 (1925), *Prince v. Massachusetts*, 321 U.S. 158, 64 S. Ct. 438, 88 L.Ed. 645 (1944).

¹² *Meyer v. Nebraska* 262 U.S. 390, 43 S.Ct. 625, 626 67 L.Ed. 1042 (U.S. Neb. 1923).

¹³ *Hodgson v. Minnesota*, 497 U.S. 417, 110 S.Ct. 2926, 2943, 111 L. Ed. 2d 344 (1990).

¹⁴ *Sparks v. Reeves*, 97 So. 2d 18 (Fla. 1957), *Padgett v. Department of Health and Rehabilitative Services*, 577 So. 2d 565 (Fla. 1991).

¹⁵ *Id* at 570.

¹⁶ *Id* at 570.

¹⁷ *Parham v. J.R.*, 442 U.S. 584, 99 S. Ct. 2493, 61 L. Ed. 2d 101 (1979).

The Constitutional Rights of a Child

In conjunction with the parental controls and responsibilities the courts have recognized that a minor also has individual constitutional rights. Minors as well as adults are protected by the Constitution and have those rights provided and protected by the Constitution.¹⁸ However, a government's authority over minors "reaches beyond the scope of its authority over adults."¹⁹

The Court in *Bellotti v. Baird*,²⁰ provided extensive analysis of the rights of children and the exercise and protection of those rights in the court system. The court recognized three reasons for concluding that the constitutional rights of children cannot be equated with those of adults: "the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing."²¹

The Court's concern for the vulnerability of children is demonstrated in its decisions dealing with minors' claims to constitutional protection against deprivations of liberty or property interests by the State. With respect to many of these claims, we have concluded that the child's right is virtually coextensive with that of an adult.

These rulings have not been made on the uncritical assumption that the constitutional rights of children are indistinguishable from those of adults. Indeed, our acceptance of juvenile courts distinct from the adult criminal justice system assumes that juvenile offenders constitutionally may be treated differently from adults.

Second, the Court has held that the States validly may limit the freedom of children to choose for themselves in the making of important, affirmative choices with potentially serious consequences. These rulings have been grounded in the recognition that, during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them. ...

Third, the guiding role of parents in the upbringing of their children justifies limitations on the freedoms of minors. The State commonly protects its youth from adverse governmental action and from their own

¹⁸ *Cary v. Population Services, International*, 431 U.S. 678, 97 S. Ct. 2010, 52 L.Ed. 2d 675 (1977), *Prince v. Massachusetts*, 321 U.S. 158, 64 S. Ct. 438, 443 87 L.Ed. 645 (1944).

¹⁹ *Cary v. Population Services, International*, 431 U.S. 678, 97 S. Ct. 2010, 52 L.Ed. 2d 675 (1977), *Prince v. Massachusetts*, 321 U.S. 158, 64 S. Ct. 438, 443, 88 L.Ed. 645 (1944).

²⁰ *Bellotti v. Baird*, 443 U.S. 622, 99 S. Ct. 3035, 61 L.Ed. 2d 797 (1979).

²¹ *Id* at 3043.

immaturity by requiring parental consent to or involvement in important decisions by minors. But an additional and more important justification for state deference to parental control over children is that ‘the child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.’ Pierce v. Society of Sisters, 268 U.S. 510, 535, 45 S. Ct. 571, 573, 69 L. Ed. 1070 (1925). This affirmative process of teaching, guiding, and inspiring by precept and example is essential to the growth of young people into mature, socially responsible citizens.

Properly understood, then, the tradition of parental authority is not inconsistent with our tradition of individual liberty; rather, the former is one of the basic presuppositions of the latter. Legal restrictions on minors, especially those supportive of the parental role, may be important to the child’s chances for the full growth and maturity that make eventual participation in a free society meaningful and rewarding.²²

The Right of the Child to Representation

The court’s struggle with how to blend protections for the integrity of the family, the rights of the parent and the rights of the child has resulted in rules related to the status of a child in the court system and the type of representation to which that child is entitled that varies depending on the type of action before the court.

In Florida, the analysis begins with how the child got to court. In order for any person to exercise the right of access to our courts guaranteed by the Florida Constitution, a person must have the capacity to sue. The courts have held that minors do not generally have that capacity. The 5th DCA in *Kingsley v. Kingsley*,²³ stated “as a general rule, states may require a minor to wait until the age of majority before being permitted to exercise legal rights independently.” Criteria such as age limits are not considered unconstitutional unless they unduly burden the minor’s pursuit of a fundamental right.²⁴

When the child is seeking to access the courts the child must overcome this issue of capacity to sue. When the child and his or her parents share an interest in the issue before the courts, the courts will allow the parents to represent the interest of the child.²⁵ Only when the interests of the parent and the child are determined to be adverse is there an issue of due process for the child.²⁶ The particulars of how

²² *Bellotti v. Baird*, 443 U.S. 622, 99 S. Ct. 3035, 61 L. Ed. 2d 797 (1979)

²³ *Kingsley v. Kingsley*, 623 So. 2d 780 (Fla. App. 5 Dist. 1993)

²⁴ *Kingsley v. Kingsley*, 623 So. 2d 780 (Fla. App. 5 Dist. 1993).

²⁵ *Mistretta v. Mistretta*, 566 So. 2d 836 (Fla. App. 5 Dist. 1990)

²⁶ *Id.*

these issues are addressed are governed by the Florida Rules of Procedure adopted by the Florida Supreme Court, Florida Statutes, and case law.

Current Representation of a Child in Florida

Civil Actions Under the Florida Rules of Civil Procedure

The courts have addressed the ability of children to bring a civil action before the courts by providing a minor access to the courts through a legal guardian or next friend.

When an infant or incompetent person has a representative, such as a guardian or other like fiduciary, the representative may sue or defend on behalf of the infant or incompetent person. An infant or incompetent person who does not have a duly appointed representative may sue by next friend or by a guardian ad litem. The court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order, as it deems proper for the protection of the infant or incompetent person.²⁷

The courts have held that this appointment of a guardian or next friend is required to provide procedural protection of a minor's welfare and to provide for the orderly administration of justice.²⁸ Further, the courts have held that these protections cannot be provided simply by giving the minor his or her own counsel.²⁹

Because of these limitations on the child's right to sue in Florida, the statute of limitations does not begin to run on the rights of a child to bring an action until such time as the child reaches majority or the parent or legal guardian of the minor, in his or her capacity as next friend, knew or reasonably should have known of the infringement of the child's legal rights.³⁰

The role of the person appointed as guardian, guardian ad litem, or next friend is to conduct the litigation on behalf of the minor and look after the interests of the minor including determining if an attorney should be retained.³¹ However, the guardian, guardian ad litem, or next friend may be required to seek approval of the

²⁷ Rule 1.210, Florida Rules of Civil Procedure.

²⁸ Kingsley at 784.

²⁹ Id at 784.

³⁰ Drake v. Island Community Church, Inc., 462 So. 2d 1142, 1144 (Fla. 3d DCA 1984), pet. for rev. denied, 472 So. 2d 1181 (Fla. 1985), S.A.P. v. State Dept. of Health and Rehabilitative Services, 704 So. 2d 583 (Fla. App. 1 Dist. 1997).

³¹ Garner v. I.E. Schilling Co., 174 So. 837 (Fla. 1937).

court in certain matters related to the litigation, as it is the duty of the court to protect the best interest of the child.³²

Part XII of chapter 39, F.S., defines guardian ad litem “for purposes of all civil and criminal proceedings brought pursuant to these rules.” The term “guardian ad litem” is defined to include a certified guardian ad litem program, a duly certified volunteer, a staff attorney, a contract attorney, or a certified pro bono attorney working on behalf of a guardian ad litem or the program; a staff member of a program office; a court appointed attorney; or a responsible adult who is appointed by the court to represent the best interests of a child in a proceeding as provided for by law, who is a party to any judicial proceeding as a representative of the child, and who serves until discharged by the court.

Section 61.402, Florida Statutes, requires a guardian ad litem in a family law case to be either a citizen certified by the Guardian Ad Litem Program or an attorney who is a member in good standing of The Florida Bar.

In appointing a guardian ad litem or next friend for the child that person may be a parent or guardian, other family member, or other representative either paid or non-paid. The statutorily created guardian ad litem programs do not often provide representation in civil cases directly controlled by these procedural rules.

In most civil proceedings such as personal injury and probate cases a parent or legal guardian acting as next friend represents the child. The parent or guardian then hires legal representation for the child and parent or guardian. The legal representative then takes direction from the parent or guardian as it relates to the case unless the court authorizes the child to act on their own behalf for purposes of the legal action under rule 1.210, Florida Rules of Civil Procedure. Where appropriate the guardian of the child or the parent pays for representation by the next friend and pays for legal representation.

These general rules of representation are altered in probate actions where Florida Statutes have specifically provided how the court must address the representation of children. In a probate action where the minor is a beneficiary of an estate, s. 731.303, F.S., provides for representation of the minor’s interests. Where the minor is not represented, he or she is bound by orders of the court to the extent that another party (such as a parent or guardian) having the same or greater quality of interest in the proceedings represents the minor’s interests. Thus, a minor’s parent may represent a minor where the parent’s interest in the estate is the same or greater than the child’s interest. Where the court determines that representation of the minor’s interests is inadequate, the court may appoint a guardian ad litem to represent the minor’s interests.

³² *Brown v. Ripley*, 119 So.2d 712 (Fla. 1 Dist. 1960).

Actions Brought Under the Family Law Rules of Procedure

Actions related to family matters include most domestic and repeat violence actions, dissolution of marriage, annulment, support unconnected with dissolution of marriage, paternity, child support, custodial care of or access to children, adoption, proceedings for emancipation of a minor, declaratory judgment actions related to premarital, marital, or post-marital agreements, injunctions for domestic and repeat violence, and all proceedings for modification, enforcement, and civil contempt in these actions.

Where a child is a party under rule 12.210, Family Law Rules of Procedure, a child is an incompetent as provided in rule 1.210, Florida Rules of Civil Procedure, and must be represented by a guardian, guardian ad litem, or next friend. Though this is the general rule, the child is not a necessary party in a dissolution or custody case.³³ However, in an action for dissolution of marriage, modification, parental responsibility, custody, or visitation the court may appoint a guardian ad litem or attorney where the court finds it is in the best interest of the child.³⁴ The court may appoint the guardian ad litem to act as the next friend for the child, the evaluator, or the investigator. This person may not be appointed to act as an attorney or an advocate for the child but must act in the child's best interest. When the court appoints legal counsel for a child that individual is to act as an attorney or an advocate for the child.³⁵ Where the action involves a verified allegation of child abuse, abandonment, or neglect, which the court has determined to be well founded, a guardian ad litem must be appointed.³⁶ When a guardian ad litem is appointed they are a party to any judicial proceeding from the date of the appointment until the date of discharge.³⁷

Section 61.404, F.S., provides that the guardian ad litem is to maintain as confidential all information and documents received pursuant to the guardian's authority under s. 61.403 (2), F.S., (relating to court orders to obtain records related to the child or parent's, or other interested parties). The only place such documents may be disclosed is in a report to the court that is served on both parties; however, this disclosure is discretionary for the guardian ad litem.

The activities that may be performed by the guardian ad litem are spelled out in s. 61.403, F.S. The guardian ad litem may investigate the allegations of the pleadings affecting the child, including interviewing the child, witnesses, or any other person having information concerning the welfare of the child. In hearings, the guardian ad litem may address the court, and make written or oral recommendations to the court. The guardian ad litem must file a written report

³³ Rule 12.210, Florida Family Law Rules.

³⁴ Section 61.401, Florida Statutes,

³⁵ Section 61.403, Florida Statutes.

³⁶ Section 61.401, Florida Statutes.

³⁷ Section 61.401, Florida Statutes.

that may include recommendations and a statement of the wishes of the child. Finally, the guardian ad litem must submit his or her recommendations to the court regarding any stipulation or agreement, whether incidental, temporary, or permanent, which affects the interest or welfare of the minor child.³⁸

Through counsel the guardian ad litem may petition the court for orders allowing the guardian ad litem to inspect records or documents pertaining to the child, the child's parents or guardian or anyone else with whom the child resides. The guardian, through counsel, may request the court to order expert examinations of the child, the child's parents or other interested parties and the guardian ad litem may assist the court in obtaining impartial expert examinations.

Additionally, the guardian ad litem, acting through counsel, may file such pleadings, motions, or petitions for relief, as the guardian ad litem deems appropriate or necessary in furtherance of the guardian's function. The guardian ad litem is also, through counsel, entitled to be present and to participate in all depositions, hearings, and other proceedings in the action, and through counsel may compel the attendance of witnesses.

The proper role of the guardian ad litem in actions brought under chapter 61, F.S., was discussed in *Perez v. Perez*, 769 So. 2d 389 (Fla. App. 3 Dist. 1999) rev. denied, 763 So.2d 1044 (Fla. 2000). The appellate court explained that guardians ad litem are not to advocate for children in these proceedings as provided in s. 61.401, F. S., but are "required to act in the best interests of children even if this conflicts with the children's wishes, and the guardian ad litem must serve as independent fact investigators."³⁹ The court found that the guardian ad litem's filing of motions and a brief at the appellate level conflicted with that role.⁴⁰ Further, the court found that the guardian ad litem was not a party at the appellate level under rule 9.020, Florida Rules of Appellate Procedure, where the child is not a party to the action and the guardian ad litem is thus prohibited from appearing in appellate proceedings.⁴¹ It does not appear that the court considered the impact of rule 9.360, Florida Rules of Appellate Procedure, on the guardian ad litem's role. That rule provides that a guardian ad litem retains his or her status in the court unless others are appointed or substituted.

In actions brought pursuant to the family law rules of procedure such as dissolution of marriage, custody, child support, visitation, and domestic violence the parties retain private counsel and the court may appoint private guardians ad litem. However, the court may appoint a guardian ad litem program to represent a child in these proceedings. Section 39.822, F.S., provides the parties may be required to pay for representation by a guardian ad litem program; however,

³⁸ Section 61.403, Florida Statutes.

³⁹ *Id* at 394.

⁴⁰ *Id* at 394.

⁴¹ *Id* at 394.

program standards prohibit the programs from accepting payment.⁴² At this time most programs are refusing family law cases where there are not allegations of abuse or neglect because of the difficulty in meeting the needs of children in dependency proceedings.

Florida Rules of Juvenile Procedure

Actions related to delinquency, dependency, and children and families in need of services are governed by the Florida Rules of Juvenile Procedure. The right of a child to representation, the party status of the child and the determination of the competence of the child to participate in representation vary under these rules according to whether the action is governed by the rules for delinquency, children and families in need of services or dependency. Each area of the rules provides distinct guidance on these issues in conjunction with related statutory provisions.

Delinquency

In delinquency proceedings, the court has jurisdiction over the child and the child's parent(s) or guardian⁴³ and both the child and parent(s) or guardian (when they can be located) must be given notice at each stage of the process unless they are present when the action is docketed.⁴⁴ If the child's parent(s) cannot be located, evades or fails to obey the summons, or are located in another state, the court must appoint a guardian ad litem, if appropriate.⁴⁵ There is no guidance in the statute or court rules regarding when it is appropriate to appoint a guardian ad litem or the duties or authority of the guardian ad litem when appointed. However, it does not appear that the guardian ad litem has party status.

The child is constitutionally entitled to legal representation when the action will involve relinquishing the child's liberty interest.⁴⁶ Section 985.203, F.S., provides every child with a right to counsel at all stages of the delinquency proceeding. During the intake process the juvenile probation officer must inquire of the child whether the child understands his or her right to counsel and right against self-incrimination.⁴⁷ Rule 8.165, Florida Juvenile Rules of Procedure, sets forth the duties of the court in providing counsel to a child. The court is required to advise the child of his or her right to counsel at each stage of the hearing unless the child is already represented.

The child may waive counsel in writing. The right to counsel may not be waived where it appears that the party is unable to make an intelligent and understanding

⁴² Section 39.822, F.S.

⁴³ Section 985.201, F.S.

⁴⁴ Section 985.219 F.S. (service of petition), 985.207 F.S. (when the child is taken into custody), rule 8.015, Juvenile Rules of Procedure (notice of arraignment), 985.226 F.S. (when the child is transferred to adult court).

⁴⁵ Section 985.218(7) F.S., Rule 8.170, Florida Rules of Juvenile Procedure.

⁴⁶ Gault, Application of, 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967).

⁴⁷ Section 985.21 F.S.

choice because of mental conditions, age, education, experience, the nature or complexity of the case, or other factors.⁴⁸ In determining whether a waiver of right to counsel complies with the rule the court must inform the minor of the benefits and rights he or she is relinquishing and the danger and disadvantages of representing him or her self, the court must determine whether the choice was made voluntarily and intelligently, and finally the court must determine if any unusual circumstances exist that would preclude the juvenile from exercising his or her right to represent him or her self.⁴⁹

In cases of delinquency and children and families in need of services the minors are advised of their right to counsel and where the parent, guardian or child is not indigent they may retain private counsel. Where the parent, guardian or child qualifies, the court will appoint the public defender's office or conflict counsel to represent the child where the right to counsel is not waived. According to the public defender's offices approximately 250 staff in the public defender's offices assist with representation of children in delinquency proceedings.

Where the court has reason to believe that the minor may be incompetent to proceed with the hearing (this is different from the determination regarding counsel) the court must stay all proceedings until a determination of competency is made.⁵⁰ Pursuant to s. 985.223(f), F.S., the child is competent to proceed if the child has sufficient present ability to consult with counsel with a reasonable degree of rational understanding and the child has a rational and factual understanding of the proceedings.

The child or any parent or legal guardian or custodian of any child may appeal from an order of the court affecting a party under chapter 985, F.S.⁵¹

Families and Children in Need of Services

Chapter 984, F.S., was enacted to assist families having serious problems with their children by providing them with an array of services designed to preserve the unity and integrity of the family and to emphasize parental responsibility for the behavior of their children.⁵²

For proceedings under the Florida Rules of Juvenile Procedure for families and children in need of services, rule 8.610, Florida Rules of Juvenile Procedure, and s. 984.03(41), F.S., define the parties to the action to include the petitioner, the child, the parent, the guardian ad litem where appointed, and the custodian of the child. Rule 8.615, Florida Rules of Juvenile Procedure, requires that all parties shall be noticed of the right to counsel and counsel must be provided as required

⁴⁸ See also s. 985.203 F.S.

⁴⁹ *B.F. v. State*, 747 So. 2d 1061 (Fla.App 5 Dist. 2000).

⁵⁰ Section 985.223 F.S.

⁵¹ Section 985.234 F.S.

⁵² Section 984.04, F.S.

by law. A written waiver of the right to counsel will not be accepted where it appears that the party is unable to make an intelligent and understanding choice because of mental condition, age, education, experience, the nature or complexity of the case, or other factors.

Rule 8.617, Florida Rules of Juvenile Procedure, and s. 984.17, F.S., provide that at any stage of the proceeding any party may request, or the court may appoint, a guardian ad litem to represent any child alleged to be in need of services or from a family in need of services. The guardian ad litem must be an attorney or other responsible adult. He or she must investigate the allegations of the petition and file a written report with the court stating the wishes of the child and the guardian's recommendations. The guardian ad litem is to be present at all court hearings, and is to represent the interest of the child until jurisdiction of the court over the child terminates.⁵³ Additionally, the guardian ad litem is to perform such other duties and responsibilities as the court may direct.⁵⁴ Lay guardians are specifically prohibited from practicing law.⁵⁵

Section 984.24, F.S., provides that the state, any child, or the family, guardian ad litem, or legal custodian of any child affected by an order of the court may appeal to the district court of appeal as provided in Florida Rules of Appellate Procedure.

Dependency

Florida dependency proceedings are governed by federal requirements, ch. 39, F.S., and Florida Rules of Juvenile Procedure. In rule 8.210, Florida Rules of Juvenile Procedure, and s. 39.0015(51), F.S., a party is defined to include the petitioner, the child, the parent(s) of the child or the legal custodian if there is no parent, the department, and the guardian ad litem or the representative of the guardian ad litem program when the program is appointed. The guardian ad litem must be a responsible adult and may or may not be an attorney, or a certified guardian ad litem program.⁵⁶

Section 39.402, F.S., and rule 8.305, Florida Rules of Juvenile Procedure, require that a guardian ad litem be appointed for each child at a shelter hearing unless the court finds that representation is unnecessary. Though the child is a party in a dependency case the court has held that the proceeding should not necessarily be held up by the lack of a representative for the child.⁵⁷ The duties and

⁵³ Fla. R.Juv.P. 8.617.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ Fla. R.Juv.P. 8.215.

⁵⁷ *W.R. and B.R. v. DCF*, 701 So. 2d 651 (Fla. App. 4 Dist. 1997), (failure to have a guardian was not found to be fundamental error where Guardian ad litem program was appointed but only provided in court/administrative guardian as opposed to guardian assigned to represent interests of the children) *Fischer v. HRS*, 674 So. 2d 207 (Fla. App. 5 Dist. 1996) and *E.F. v. HRS*, 639 So. 2d 639 (Fla. App. 2 Dist. 1994). However, see

responsibilities of a guardian ad litem appointed in a dependency proceeding are set out in rule 8.215, Florida Rules of Juvenile Procedure. The guardian ad litem is to gather information concerning the allegations of the petition and to file a written report unless excused by the court. The report must include a summary of the guardian ad litem's findings, a statement of the wishes of the child, and the recommendations of the guardian ad litem. The report is to be provided to all parties and the court at least 72 hours before the hearing for which the report is prepared. The guardian is to be present at all court hearings, and is to represent the interests of the child until the jurisdiction of the court over the child terminates or the guardian ad litem is excused by the court. The rule also provides the guardian ad litem is to perform other duties consistent with the scope of the appointment. Further, the guardian ad litem is to participate in the development of the case plan pursuant to s. 39.601(1)a. F.S.

The guardian ad litem also has a role in the judicial review process. Section 39.701, F.S., provides for judicial review of the status of a child in the dependency system every 6 months while under the jurisdiction of the court. To facilitate the court's efforts to determine the action to be taken with regard to the child during a judicial review the court may rely on information provided to the extent of their probative value, even though the information is not competent in an adjudicatory hearing. This hearing will review compliance of the parties with the case plan, the status of the child, the appropriateness of the child's placement and other relevant information. Based on the information provided the court makes specific findings relative to action in the case such as continued out of home placement, filing for termination of parental rights, etc.

In determining the manifest best interest of the child the court is to consider, among other items, the guardian ad litem's or child's legal representative's recommendations.⁵⁸

Florida statutes then provide for the appointment and role of the guardian ad litem in other specific dependency court proceedings under chapter 39. Section 39.807, F.S., requires the appointment of a guardian ad litem to represent the best interest of the child in any termination of parental rights proceedings. The guardian ad litem must be present at all court hearings to represent the best interest of the child and is to present a report to the court recommending what is in the best interest of the child.⁵⁹

In dependency actions and where the child has been called as a witness in a criminal action the court usually appoints a guardian ad litem program to represent

Vestal v. Vestal, 731 so. 2d 828 (Fla. App. A5 Dist. 1999) (Where no guardian was ever appointed and there was no other entity such as DCF involved sufficiently to protect interest of child court found failure to appoint a guardian ad litem was reversible error).

⁵⁸ Section 39.810(11), F.S.

⁵⁹ Section 39.701, F.S.

the child. There are currently 21 guardian ad litem programs in the state. These programs operate with funding received from state general revenue, county general revenue, Family Court Trust Fund, Voices for Children Foundation, and other grants or donations. Current funding is approximately \$12.6 million dollars.⁶⁰ The programs are governed by standards adopted by the Florida Supreme Court and are assigned to the chief judge of each circuit for day-to-day supervision. Generally, each program has a state funded director, at least one state funded attorney and several volunteer coordinators who oversee the work of the volunteer guardians ad litem. These volunteers are generally not attorneys and there are not sufficient volunteers to meet the need for guardians ad litem. Some circuits have retained staff guardians and additional staff attorneys through either local or grant funding.

The 9th Judicial Circuit, covering Orange and Osceola Counties, is operating a pilot project that provides a staff model of a guardian ad litem representation in Osceola County and an enhanced volunteer attorney guardian ad litem model in Orange County. The Orange County program is the only guardian ad litem program in the state run by the Legal Aid Society. The judges in both counties may appoint attorneys to provide direct representation to children where the judge determines appropriate. The Orange County guardian ad litem program is operated privately by the Orange County Legal Aid Society and uses attorneys as the guardian ad litem. Several of the programs including Dade, Broward, and Palm Beach Counties, have arrangements with either a legal aide office, the Lawyers for Children Program or some other private entity to represent children when it is determined that the program can not meet that child's legal needs.

Other programs such as Team Child at the University of Florida, and clinics at Florida State University College of Law, Nova Southeastern University, and the University of Miami are providing representation for children. Some of these programs provide representation to children who cannot afford private counsel and who do not qualify for the guardian ad litem programs either because of the type of legal issues of the child or because no dependency proceeding has been filed so the guardian ad litem program cannot be appointed.

⁶⁰ Estimated Guardian Ad Litem Program funding;

General Revenue	\$7,271,647
County Revenue	3,100,000
Family Court Trust Fund	696,500
Voices for Children	692,500
9 th Cir. Pilot Prjt.	535,000
Other	350,000

Models Used by Florida or Other States to Provide Representation to a Child

Models of Representation

Guardian ad Litem Representation

Guardian ad litem representation can be provided by court appointment of a person as guardian ad litem outside of an organized guardian ad litem program or court appointment of a program. Generally, the court appoints an independent guardian ad litem in civil cases and appoints a guardian ad litem program in family, delinquency, and dependency cases. The guardian ad litem then provides representation to the child in accordance with the court order and statutes governing the specific action. No statutory direction is given to the guardian ad litem regarding representation in delinquency or civil actions and in family cases the guardian ad litem is simply an investigator for the court.

Where a private individual is appointed there are not specified qualifications beyond what may be required in the specific statute and there is generally no background check required. Some statutes require the guardian ad litem to be an attorney and others do not specify any qualifications.

For a guardian ad litem program the general model of representation includes:

- The program assigned to a case by the court.
- As soon as an individual is available a volunteer lay guardian is assigned to the case and supervised by a volunteer coordinator.
- The assigned guardian ad litem should attend all hearings, depositions, case planning conferences and other activities related to the case.
- When available and depending on the method of operations of the program and program workload the program attorney may attend some or all hearings, depositions, case planning conferences, or other legal activities with the lay guardian ad litem.
- The guardian ad litem is also responsible for visiting the child on a regular basis, interviewing the parents, the child, siblings, teachers, medical professionals, agency social workers, foster families or custodians of the child, witnesses to abuse and anyone else involved in the case. The guardian ad litem is to obtain pertinent documents and is to receive copies of all filings and documents in the case.
- The guardian ad litem is to prepare a report for the disposition hearing, for judicial review hearings, and the termination of parental rights hearing. The guardian is to be available to testify at the adjudicatory hearing and the termination of parental rights hearing and should be available to attend all the hearings.

- As provided in the order of appointment the guardian ad litem may represent the child in proceedings related to special education needs, as a witness in a criminal proceeding or in other proceeding related to the child's welfare or safety.

Each guardian ad litem volunteer must pass a background check and take at least 30 hours of mandatory training prior to being assigned to a case. This training provides detailed information on the role, responsibilities and activities of the guardian ad litem. Once trained the volunteer is generally assigned to only two cases at a time.

Currently there are over 5,000 active volunteers in Florida's guardian ad litem programs. However, interviews with program administrators and staff of the Office of State Courts Administrator indicated that the pool of volunteers has not grown at a rate to allow the assignment of a guardian ad litem in every case assigned to the program. In calendar year 2000 the guardian ad litem programs provided representation to 7,024 cases. However, this has provided representation to only 58 percent of the cases to which the court appointed the guardian ad litem programs and only 36 percent of the petitions for dependency have a guardian ad litem assigned.

The many dedicated guardians ad litem bring a wide range of skills and knowledge to the children they represent. They can provide much more than a report to the court. They often are the person to question a placement, identify continuing abuse, find out where the child's personal belongings are, make sure the child sees a doctor or dentist, and often are the person who takes the time to explain the legal process to the child and who asks the child what they want or need. When the dependency process was less lawyer directed these lay volunteers were able to provide their information to the courts in an informal setting not driven by legal motions and objections. While the lay guardian ad litem has continued to be extremely effective in gathering and evaluating information related to the child and in providing the child with independent support, the legal representation of the child has become much more complex and the guardians ad litem are finding they need greater legal assistance in representing the child.⁶¹

The lay guardian ad litem is faced, after 30 hours of training, with making life-altering recommendations related to a child when recommending what is in the "best interest" of the child for living arrangements, visitation, and finally termination of parental rights. The training manual defines "best interest" as:

Preservation of the child's physical safety and emotional well-being; permanent placement in a nurturing home environment that will foster the child's healthy growth and development; and protection from further

⁶¹ Guardian ad Litem Program, Proposed Revision to Model of Representation, Models of Representation Workgroup. August 2000.

*harm by virtue of the child's involvement in the legal or child welfare system.*⁶²

The guardian ad litem must not bring his or her personal social or economic expectations to the evaluation of what is required to preserve the child's safety and emotional well-being and the guardian ad litem must put aside what he or she might consider preferable in a nurturing home environment and evaluate the situation for that specific child. Staff was told of instances where inexperienced guardians ad litem based recommendations for termination of parental rights on physical environment issues without full consideration of the strength of family relationships and the risk to the child of remaining in an out of home placement.

Additionally, the guardian ad litem does not advocate for the wishes of the child even though they are required to present those wishes to the court. In those cases where there is a strong disagreement between the child and the guardian ad litem the disappointed child may feel they are not truly represented in the process. Anecdotally, however, staff was told that this very seldom happens.

This guardian ad litem model is generally used by the 21 guardian ad litem programs in Florida. However, the role of each program is heavily influenced by the circuit judge with oversight of the program. Across Florida the program services vary from strong advocacy programs to programs providing best interest reports as in impartial observer. Most programs do have at least one program attorney to provide representation in court hearings to the extent possible. In discussions with several program directors and staff from the Office of the State Courts Administrator, it appears most programs assign only one or two cases to a volunteer and would prefer that a volunteer coordinator oversee no more than 35 to 40 volunteers, yet in some areas this is greatly exceeded. Attorneys in some programs are attempting to provide representation on hundreds of open cases.

Attorney ad Litem Representation

The Attorney ad litem model of representation usually involves legal representation with a best interest of the child standard. The attorney is appointed by the court to provide legal representation to the child but that legal representation must advocate for what is in the "best interest" of the child even if that is not what the child wants. For the attorney to represent the best interest of a child the attorney may be placed in a position of violating Florida Bar Rules requiring the lawyer to abide by the client's decisions concerning the objectives of representation.⁶³ So long as the child's best interest and express interest coincide no ethical conflict arises for the lawyer. However, when the lawyer's assessment

⁶² Florida GAL Training Manual, rules and Responsibilities of the Guardian ad Litem page 2.

⁶³ Rule 4-1.2 Scope of Representation, Rules Regulating the Florida Bar.

of what is in the best interest of the child diverges from the expressed interests of the child the lawyer cannot zealously assert the client's position⁶⁴ and represent to the court a conflicting position regarding the best interest of the child. This can be somewhat mitigated by representing the child as an incompetent under rule 4-1.14.⁶⁵ Even this rule, however, requires the attorney to provide traditional attorney client representation to the extent possible and does not clearly allow the lawyer to provide representation based on a "best interest" standard. Further, where the child strongly disagrees with the recommendations of the attorney ad litem the child may feel he or she is not adequately represented. Anecdotally, however, staff was informed this conflict seldom arises.

Having the same individual act as guardian ad litem and attorney of record in the case poses other issues. In dependency cases the guardian ad litem is required to file a report and may be required to testify in the case. This is not the role of a traditional attorney and will result in the attorney ad litem being required to perform conflicting roles.

Concerns also arise as to whether the traditional attorney client privilege attaches to conversations between the child client and the attorney ad litem. If the attorney client privilege attaches the attorney may be faced with deciding whether he or she must withhold information, which directly impacts the best interest of the child, or whether the attorney ad litem may reveal these conversations in order to represent to the court what is in the best interest of the child.

The American Bar Association has not supported this model of representation because of the ethical conflicts and representation conflicts it presents for the attorney.⁶⁶ Currently, thirteen other states do use this model of representation.⁶⁷

Traditional Client Directed Representation

The attorney representing a child who does not have a guardian ad litem or next friend to make decisions related to the case must provide representation under rule 4-1.14, Client Under a Disability.⁶⁸ That rule requires the lawyer to maintain a normal attorney client relationship to the extent possible where the client's ability to participate in the case is impaired. Only when the attorney determines the client cannot act in his or her own best interest may the lawyer seek the appointment of a guardian ad litem or take other protective action with respect to a client. When representing children, the lawyer is faced with a potential range of abilities from the infant to a sophisticated teenager. When assigned a child client the attorney

⁶⁴ Chapter 4, Rules of Professional Conduct Preamble: a Lawyer's Responsibility, Rules Regulating the Florida Bar, 2001.

⁶⁵ Rule 4-1.14 Client Under a Disability, Rules Regulating the Florida Bar, 2001.

⁶⁶ American Bar Association Standards of Practice For Lawyers Representing a Child in Abuse and Neglect Cases. Commentary to Definition A-2.

⁶⁷ See Appendix A

⁶⁸ Rules Regulating The Florida Bar. See Appendix B.

must evaluate each client to determine to what extent he or she has the maturity and understanding to act in a normal attorney client relationship. Rule 4-1.14 then requires the attorney to treat the child as he or she would an adult client to the extent that the child can understand and make decisions. The comment to the rule recognizes that where the attorney cannot under the rule seek appointment of a guardian ad litem the attorney may be forced to act as de facto guardian. Where the expressed interests of the child are clearly not in the best interest of the child the attorney must advocate for those expressed interests and hope that the court in determining the best interest of the child will disregard the child's request. Attorneys providing this representation indicated that they have seldom, and for some never, had a problem with a child wanting something that was clearly not in his or her best interest when he or she was well counseled by the attorney.

To assist in the representation of children under this model the American Bar Association issued recommended standards of practice for attorneys representing children in abuse and neglect cases. State and local bar associations and courts may opt to adopt these standards for representation and in some cases they have become de facto standards of practice in the field. Florida has not adopted any specific rules for representation of children beyond Rule 4-1.14, Rules Regulating the Florida Bar.

The American Bar Association Standards of Practice for Lawyers Representing a Child in Abuse and Neglect Cases (ABA Standards)⁶⁹ defines a "child's attorney" as a lawyer who provides legal services for a child and who owes the same duties of undivided loyalty, confidentiality, and competent representation to the child as is due an adult client. These standards contemplate representation of the child's *expressed interest*, in all cases except for those children with exceptional problems such as children with limited language development, mental retardation, or serious mental illness. Section B-3 of the ABA Standards rejects the idea that children of certain ages are incapable of effectively participating in representation on their behalf. In cases when an attorney ad litem is unable to ascertain the child's express interests, the attorney may seek the advice and consultation of experts and other knowledgeable people in making the determination.

According to the ABA Standards, a lawyer appointed as "guardian ad litem" for a child is an officer of the court appointed to protect the child's interests without being bound by the child's expressed preferences. In those circumstances in which a child is unable to express a position (as in the case of a preverbal child) or the child may not be capable of understanding the legal or factual issues involved,

⁶⁹ In February 1996, the American Bar Association (ABA) House of Delegates adopted standards of practice for lawyers representing children in abuse and neglect cases. The standards were developed by a committee within the ABA's Family Law Section in an attempt to provide guidance in this area. The non-binding standards emphasize the need for specially trained lawyers and the use of multidisciplinary resources, particularly regarding issues of child development.

the child's attorney should continue to represent the child's legal interests and request appointment of a guardian ad litem. This limitation distinguishes the scope of independent decision-making of the child's attorney and a person acting as guardian ad litem.

The ABA Standards recognize that there may be occasions when a child's expressed preferences would be injurious to the child. The standards state that if the child's attorney determines that the child's expressed preference would be seriously injurious to the child (as opposed to merely being contrary to the lawyer's opinion of what would be in the child's best interest), the lawyer may request appointment of a separate guardian ad litem and continue to represent the child's expressed preference, unless the child's position is prohibited by law or without any factual foundation. The child's attorney shall not reveal the basis of the request for appointment of a guardian ad litem, which would compromise the child's position.

There are currently only 5 states using this model of representation.⁷⁰ A modified version of this model of representation is, however, being used in the Dade County Lawyers for Children America providing pro bono representation with private funding. That program represents mostly older children or children with multiple cases or complex cases referred from the guardian ad litem program. Generally, the pro bono attorney assumes all responsibility for the case but there is an option to retain a guardian ad litem when needed.

In Palm Beach County the legal aid office is providing representation to children aged from newborn to 3 years old who are placed in licensed foster homes as well as their siblings regardless of their age. The project goal is to see that these children are given a safe, loving and permanent home.⁷¹ The project is designed to provide legal representation and advocacy to 210 children and their siblings.⁷² The grant from the Children's Services Council of Palm Beach County provides for over 12 staff members. There are two supervising attorneys and four staff attorneys as well as support staff, paralegals, a permanency planner and a part time accountant. The caseload of each attorney is estimated to be 35 cases.

Finally, studies have found that models that provide solely attorney representation with no lay component may more fully meet the legal needs of the child but tend not to provide the same investigative and child oriented services provided by a guardian ad litem.⁷³

⁷⁰ Appendix A.

⁷¹ Legal Aid Society Of Palm Beach County Foster Children's Project Description

⁷² *Id.*

⁷³ Final Report on the Validation and Effectiveness Study of Legal Representation Through Guardian ad Litem, Prepared for U.S. Dept. of Health and Human Services. 1993, Reviews of Court Appointed Special Advocate (CASA) Evaluations/Reviews of CASA and GAL Programs/Models with Process and /or Outcome Measures, CASA.net.

Attorney and Guardian ad Litem Blended Models

Currently eighteen states are using some form of a blended model.⁷⁴ In most instances the child is represented by a guardian ad litem who is directed to represent the best interest of the child and by an attorney directed to represent the wishes of the child and provide traditional advocacy for the child. In some states the appointment of the guardian ad litem is dependent on a determination that the child is incompetent to work with the appointed attorney. In these states the court either makes a determination regarding the competency of the child at the time of appointment of representation or the attorney representing the child requests the appointment of a guardian ad litem upon determining that the child is incompetent to assist in the litigation. In some states the attorney is mandated to request the appointment of a guardian ad litem and in others the attorney has discretion in requesting that appointment.

The 9th Judicial Circuit Pilot Project

Section 39.4086, F.S., established the attorney ad litem pilot project in the 9th Judicial Circuit, which is composed of Orange and Osceola Counties. The pilot project endeavors to evaluate the method, merits and cost of providing representation for children in dependency proceedings. Attorneys ad litem may be appointed for children at the court's discretion or upon motion of a party. Attorneys ad litem represent the child's wishes for purposes of proceedings under Chapter 39, so long as the child's wishes are consistent with the child's safety and well-being. The attorney ad litem must in all circumstances fulfill the same duties of advocacy, loyalty, confidentiality, and competent representation that are due an adult client. The appointment of an attorney ad litem occurs in addition to the mandated appointment of a guardian ad litem, who is assigned to advocate for the best interest of the child.

The first annual report of the pilot project was submitted to the Legislature in early October. That report provides an overview of the project, the work that is being performed by Osceola County and Orange County and an overview of the three models of representation being evaluated. The pilot project did not fully begin until February of this year. The short time frame has not provided an opportunity for significant results from the programs beyond those experienced prior to implementation of the pilot project. Additionally, the Office of State Courts Administrator, which is charged with evaluating the pilot project, is still designing a method for analyzing and assessing the impact of the pilot project models.

(The National CASA organization collected information on reviews of CASA and GAL programs and published summaries of the reviews and the outcomes on the CASA website. For the most part these studies validated the U.S. Dept. of Health and Human Services 1993 study results.)

⁷⁴ Appendix A.

To date, funding for the pilot project has been used to ensure that every child in the dependency system in Osceola County and most of the children in Orange County have a guardian ad litem and to provide attorneys ad litem where the court deems independent representation appropriate. In Orange County the Legal Aid Society provides guardian ad litem representation by using pro bono attorneys to represent the child's best interest. Supplemental funding has been provided to hire staff attorney support for the volunteer guardians ad litem. In Osceola County, the State of Florida Guardian ad Litem Program represents children using a team approach that combines the work of case coordinators, volunteers, and program attorneys to represent the best interest of the child. Pilot project funding was used to hire additional case coordinators and attorneys to ensure 100% representation of children with professional staff. Where the court determines that attorney ad litem representation is appropriate the pilot project is providing funding to Barry University School of Law to provide representation through three full time attorneys with assistance from other faculty members.

The Orange County Guardian ad Litem Program is providing representation to over 3000 children at this time. The pilot project has allowed the program to expand its representation of the best interest of the child including adding an attorney to represent medical needs of children. Each volunteer guardian ad litem is encouraged to take at least 2 cases but many take 5 to 10 cases. Because the guardian ad litem is an attorney he or she may file motions and petitions and provide legal representation for the best interest of the child.

The Osceola County Guardian ad Litem Program has been able to meet all requests for representation and has been able to provide increased legal support for the guardians. With a combination of professional and volunteer staff the program is able to provide continuity of representation for children while taking advantage of the abilities of volunteer staff. The addition of legal staff has allowed the program to ensure an attorney is present whenever legal representation would assist the child.

The attorney ad litem program with Barry University School of Law is currently providing legal representation to 101 children. These children were selected by the judges based on each judge's assessment of the value of providing independent counsel. No criteria were established for appointment of an attorney ad litem. This was done to allow a case-by-case evaluation that could later be used to determine the effectiveness of representation and then develop criteria for appointment. The judges are using a form order to appoint an attorney ad litem that calls for an explanation of why the appointment is being made. The attorney ad litem program is paying two staff attorneys \$40,000 each, two secretaries \$20,000 each, a research assistant \$4,500 and there are three law faculty positions working part time with the program at \$102,700. The litigation account to pay for experts, depositions and other litigation related costs is \$911. In addition, the

program has expenses for malpractice insurance, overhead, office supplies, phones, office space, travel, and training totaling \$57,200.

Conclusions and Recommendations

Conclusions

The focus of legal representation for children should remain on the basic goals of preserving the integrity of the family, protecting the constitutional right of parents to raise their children free from government interference and within the context of those two goals protecting the right of children to be free from abuse and neglect. These protections can only be preserved through ensuring all parties are accorded due process in legal proceedings.

However, a child's rights and interests are independent of his or her parents and at times those rights and interests are adverse to the rights and interests of the parents. Where the interests are not adverse, the parent has a duty to the child to make decisions in the best interest of the child related to the child's rights and interests. This should generally result in the parent acting as next friend to the child in litigation or assisting the child in the legal process through retaining counsel or working with appointed counsel. Where the court determines that the child and the parents' interests are adverse or the parents refuse or are unable to protect the child's rights and interests, the court has a duty to protect the best interest of the child. In these circumstances, there should be a clear process in statute and court rule as to the rights of a child to representation in legal proceedings, the type of representation to be provided, the role and responsibilities of the representative, how the representative should be compensated, and the structure and responsibilities of a publicly funded system of representation

Every child should have a right to representation in legal proceedings whether by their parents or guardian or a court appointed representative. Where the parents are unable or unwilling to provide adequate representation the courts must protect the best interest of the child through ensuring that a child's rights and interests are represented. Florida statutes currently provide for legal representation in all criminal and juvenile proceedings. Court rules require representation in all civil proceedings. Florida statutes should be amended to ensure representation is required in all dependency proceedings and in those family law proceedings where the court determines the child's interests are adverse to the parent's interests and thus independent representation is appropriate. Only through adequate representation can the state ensure that children are not forgotten or overlooked in legal proceedings, left to languish in abusive or neglectful homes or foster care, left without support from parents, or inappropriately placed in juvenile detention or treatment centers.

The type of representation provided must consider the constitutional rights of the child along with the age, maturity, and capacity of the child to participate in their representation. Children in the legal system vary in age and maturity from the

newborn infant to mature 17 year olds. Further, the U.S. Constitution has been interpreted to ensure a right to counsel for children in certain juvenile and criminal proceedings. The law providing for representation of children must provide sufficient flexibility to address these issues. The current attorney representation process in juvenile and criminal court augmented with a guardian ad litem where the child's parents or guardian are not available ensures compliance with the constitutional requirements for representation in these proceedings. In civil proceedings, the court needs the flexibility to recognize the ability of the child to participate in his or her representation and court rules should allow the court to appoint an attorney to represent the child without a next friend or guardian ad litem where appropriate. In family law and dependency proceedings, the child's interests are generally adverse to the parents or guardians interests and thus the need for an advocate system for the child is critical. A guardian ad litem model with legal representation for the guardian ad litem augmented by the authority to appoint counsel to represent the child where appropriate ensures that the rights of children are protected and often that the child is physically safe. It is in the family and dependency systems where the greatest risk to the physical well being of the child occurs and thus the greatest protections for the child should be provided.

Just as the type of representation must vary according to the proceeding in which the child appears, the role of the representative must accommodate the requirements of the proceeding. However, variation in the role of the child's representative should be minimized to ensure consistent representation in all proceedings. Where an attorney is appointed to represent a child the attorney should be able to provide representation within the ethical rules and law binding all attorneys and the court must ensure that the child client is capable of participating in his or her representation as required by those rules. Where the child needs additional protection or does not have the capacity to assist in his or her representation the court must appoint a guardian ad litem having legal representation to represent the best interest of the child. The function of the guardian ad litem in civil cases should be limited to actions directly related to advocacy in the case. In family and dependency cases the advocacy may be much broader to ensure the child is safe and receiving needed services in addition to participating in litigation of issues such as custody, visitation, shelter care, or termination of parental rights.

Because children are an extremely vulnerable population, the courts have accepted a special duty to ensure their rights and best interests are protected. Where law or the court orders independent representation the appointed representatives must be compensated unless they are volunteers. Where the child or the parents can afford to pay for representation then they should be required to compensate the court appointed representatives. Where the child or parents cannot afford to pay for representation or the parents refuse to pay, the state must have a process in place to provide representation.

The major components essential for effective representation of children in Florida include:

- Use of a guardian ad litem model to ensure that representation is available for every child in the dependency system and every child the court determines needs representation in the family law and civil system.
- Attorneys to provide legal representation in delinquency cases and that representation should only be waived after consultation with an attorney.
- A guardian ad litem or parental representation in those delinquency cases where the court determines that the child is incompetent to participate in representation. Where a guardian ad litem already represents the child in other proceedings that guardian ad litem should be appointed to represent the child in the delinquency case where the court determines a guardian ad litem should be appointed. Where the child is competent to participate in his or her representation the guardian ad litem should be appointed to assist the child and counsel.
- Clear statutory direction regarding the role of the guardian ad litem in the various types of proceedings.
- A process for the appointment of independent counsel to represent the child in family law and dependency proceedings when the court determines that the child is competent to participate in representation and the court determines that because of the complexity of the case or other legal issues related to the child better representation of the child can be provided by independent counsel.
- A government funded public advocacy office to provide representation to children who meet specified indigency criteria or the court determines cannot be otherwise represented. This office should provide guardian ad litem representation of the best interest of the child with both lay guardians ad litem and attorney representation.

Recommendations

Clarify the Child's Right to Representation in Specific Cases and Clarify the Type of Representation to be Provided

Family Law Actions

In a family law case the court should not interfere with the parents' right to direct their child unless the court determines the child's interest are adverse to the

interests of the parents. Where the interests are determined to be adverse a guardian ad litem and an attorney or just an attorney should be appointed. Where the court, after interviewing the child, determines the child is of an age and maturity to participate in his or her representation the court may find the child competent and enter an order as to representation to protect the child under rule 1.210 (b), Fla. Rules of Civil Procedure. Where the court determines the child is not of an age or maturity to participate in his or her own representation a guardian ad litem should be appointed to represent the best interest of the child. Where the guardian ad litem is not from the Office of Public Advocacy the guardian ad litem should have the authority to retain counsel. Where the Office of Public Advocacy is appointed, counsel should be provided through that program. When a guardian ad litem is appointed they should be made a party to the action along with the child and both should have a right to appeal any ruling of the court related to the interest of the child.

Juvenile Law Actions

Delinquency and Children and Families in Need of Services

In delinquency proceedings the child should be provided representation through an attorney either retained by the child or the child's parents or provided by the state. No child should be allowed to waive counsel until after the child has had the opportunity to be advised by an attorney. Where the court finds the child competent to stand trial but not competent to participate in his or her defense the court may appoint a guardian ad litem or the child's parents to assist in representation. Where there is a guardian ad litem in any other proceeding, to the extent possible, the same guardian ad litem should be appointed in the delinquency action. When a child has a guardian ad litem appointed in another case and the court determines the child does not need a guardian ad litem in the delinquency action the guardian ad litem may assist counsel for the child in obtaining information related to the child's circumstances and needs and in counseling the child regarding the delinquency case.

Dependency Proceedings

The court should be directed to appoint the Office of Public Advocacy or other guardian ad litem having legal representation for each child having an issue before the dependency court unless the court specifically ensures the child has other adequate representation. The appointment of the Office of Public Advocacy or other guardian ad litem having legal representation must be made at or before the shelter hearing and representation by a guardian and an attorney or an attorney and other appropriate staff from the Office of Public Advocacy must be present during the shelter hearing. The court may find that the child has the maturity and intelligence to work within a traditional attorney client relationship and that counsel the child has retained privately is providing adequate representation. Further, the court may determine that because of the complexity of the case or because of other significant legal issues a child should be appointed independent

counsel rather than or in addition to a guardian ad litem. The court may appoint the Office of Public Advocacy to represent the child until a determination of eligibility can be made and where appropriate arrangements for private counsel can be made. Under no circumstances should a child not be represented by an attorney or a guardian ad litem having counsel at any shelter hearing.

Other Civil Actions

Generally, in civil proceedings the court should appoint outside counsel and a guardian ad litem or next friend where the suit is not brought pursuant to rule 1.210, Florida Rules of Civil Procedure.

In probate proceedings, the role of the guardian ad litem should remain as it currently is. The representation should be provided under the same criteria as for any other action with recovery for expenses of the guardian and any legal counsel paid from the estate where appropriate.

Clarify and Place in Statute the Role and Responsibilities of the Guardian ad Litem Representing Children

Generally, the role of the guardian ad litem and counsel representing children is to ensure that the court has sufficient information related to the child to rule on the “manifest best interest of the child.” Representation should be focused on advocacy for the child and where appropriate the child should be involved and consulted in all decisions related to the action or actions impacting the child. Every child should be afforded the opportunity to attend all hearings, mediations or other proceedings related to the case except where the child is not of an age or capacity to understand the proceedings or to participate in decision making related to the proceeding. Every child should, however, have the right to refuse to attend any proceeding except delinquency proceedings and children and families in need of services proceedings unless the court determines the child’s presence is necessary.

In cases involving civil issues the guardian ad litem should represent the best interest of the child as required by the legal action in which they are appointed. The guardian is to be an advocate for the child in the litigation and should take appropriate action to protect the interest of the child.

In cases involving dependency, family law, and delinquency the guardian ad litem should represent the “best interest” of the child after investigation and discussion with the child and legal counsel and after giving significant weight to the informed wishes of the child. In performing the investigation and in accordance with the court appointment the guardian ad litem should:

- Visit and where appropriate discuss the case with the child, where appropriate observe the child’s interactions with parents, siblings, foster parents or family placement, proposed permanent placement when there is

one and, for young children, their socialization skills at school or other care facilities.

- Conduct interviews related to issues in the case including where appropriate, the child's parents or guardians, custodians, teachers, foster families, medical professionals treating or evaluating the child, parents or other care takers or proposed adoptive parents, Department of Children and Families or Department of Juvenile Justice staffs, law enforcement involved in the case and other persons the guardian ad litem and the attorney may determine appropriate.
- Obtain the legal, social, and medical or psychological reports relevant to understanding the facts of the case and the status and conditions of the child and other participants in the proceeding.

To the extent that the child is competent to participate in representation in any manner, the guardian ad litem and the attorney should consult with the child prior to all hearings, court appearances, and other proceedings. All proceedings should be explained to the child in language appropriate to the child's age, education and comprehension, and the child should be offered the opportunity to attend all proceedings.

Prior to each hearing the guardian ad litem should prepare a report containing information on all observations, documentation obtained, and all factual information the guardian ad litem determines the court should have to make a best interest determination related to the child regarding the issues before the court. This report should be discussed with and reviewed by the lawyer retained by the guardian ad litem or assigned to the case, discussed with the child to the extent the child can understand the information contained in the report, and where the Local Office of Public Advocacy is providing representation⁷⁵ the report may be discussed with other representatives of the office as required by the office procedures. After reviewing the report and consulting with the child and where appropriate other Local Office of Public Advocacy staff, the lawyer and the guardian ad litem shall determine the best manner in which to provide the court with all information necessary for the court to know the child, the expressed interests of the child, and for the court to make a determination of what is in the best interest of the child in accordance with law. The guardian ad litem must be prepared to present the court with a recommendation as to the best interest of the child based on the requirements of law and what the child would want if he or she could, using adult judgment and knowledge, evaluate the available information and make a request of the court.

⁷⁵ This report recommends the creation of the Office of Public Advocacy. The function and structure of the office is described in detail beginning on page 34.

The guardian ad litem with assistance of counsel should petition the court for resolution of issues identified in any investigation or in representation of the child. The guardian ad litem, in representing the best interest of the child, must actively petition the court for expeditious resolution of issues related to the case and to the child.

At any time that the guardian ad litem or the attorney determine that the expressed interests of the child differ from what the guardian ad litem has determined to be in the best interest of the child the guardian ad litem assisted by counsel shall bring this difference to the courts attention at the next scheduled hearing. In a report to the court the guardian ad litem shall advise the court of the issues between the child and the guardian ad litem, whether the child wants independent counsel, and whether the child wants the guardian ad litem to continue even where independent counsel is appointed. Where the Local Office of Public Advocacy has been appointed, the director of the office should meet with the child separately from the guardian ad litem to determine whether the child wants the office to continue to provide representation and whether the child wants independent counsel. The Local Office of Public Advocacy should then provide the court with a report independent of the report filed by the guardian ad litem related to representation of the child. The court shall review the information provided, shall interview the child, unless the child does not wish to be interviewed, and after holding a hearing, shall determine whether the child should be provided independent counsel and whether the guardian ad litem should continue to represent the best interest of the child.

The court may also, upon motion of any party or on motion of the court, assign independent counsel to a child where the court determines that due to the complexity of the pending case or other legal actions or due to other issues related to the well being of the child the child would be better represented by independent counsel. If the child is represented by the Office of Public Advocacy the court must specify in its order what representation will be provided by that office, what representation will be provided by independent counsel and whether the Office of Public Advocacy will be responsible for providing independent counsel. If the child is not represented by the Office of Public Advocacy the court may appoint a guardian ad litem in addition to private counsel where the court determines the child is not able to otherwise participate in his or her representation.

The guardian ad litem shall provide to the court all information the guardian ad litem determines necessary for the court to act in the best interest of the child. However, the guardian ad litem may claim attorney client privilege on behalf of the child. Where the guardian ad litem or the child is called as witness in the case they may claim privilege as to conversations between the guardian ad litem and the child. However, the child has no privilege as to what the guardian ad litem determines is necessary for the court to determine the best interest of the child in relation to the safety and well being of the child.

The Office of Public Advocacy must certify all guardians ad litem who are not parents of the child. Where the guardian ad litem is not appointed through an Office of Public Advocacy the certification must include a background check and the provision of information related to the functions of a guardian ad litem. The Office of Public Advocacy shall specify additional training for guardians ad litem appointed through the local offices of public advocacy.

In addition to the general structure of guardian ad litem representation the statutes and court rules should be amended to recognize that the law relating to each specific type of proceeding should specify the rights and responsibilities of the child, the guardian ad litem and the attorney. These provisions should set out the party status of the guardian ad litem or Office of Public Advocacy and the child, they should address confidentiality and evidentiary issues as needed, and should clearly specify the role of the guardian ad litem or child's attorney in the proceeding.

Provide Additional Flexibility to the Courts in Appointing Representation to Children

In order to expand the available representation of children the courts must have the ability to provide the representation most appropriate to the needs of the child and to look beyond the publicly funded guardian ad litem programs for both attorneys and guardians ad litem. The court should have the authority to appoint guardians ad litem other than those approved and trained by a guardian ad litem program or a Circuit Office of Public Advocacy. The Office of Public Advocacy should provide background checks and either abbreviated training or, at a minimum, information packets for these court appointed guardians ad litem. Additionally, in making the decision to appoint a private guardian ad litem the court should assess the ability of the child, the child's parents or guardian or other interested persons to pay for either the guardian ad litem and legal representation or at least legal representation for a volunteer guardian ad litem. This process will allow family members or friends of the child to provide representation, instead of a publicly funded office, thus providing a more interested and involved advocate for the child. Additionally, the court should have the ability to allow a child to be represented by counsel without a guardian ad litem or next friend where the court has determined the child has the ability to participate in his or her representation and such representation would be in the best interest of the child. This allows the court to recognize the range of needs of children in the court system and to recognize the range of understanding and abilities of those children. Providing this flexibility to the courts should expand the pool of representatives for children, provide representation that can be more effective because of a direct interest in the child and reduce the cost to the state to provide representation.

Establish the Statutory Framework for Oversight and Coordination of Representation for Indigent Children

To ensure that every child has representation regardless of their ability to pay for a guardian ad litem and legal representation the legislature should create an Office of Public Advocacy. The state level office should consist of a small staff to develop policy and guidelines, to assist in developing training materials, and to consolidate assessment functions for the circuit offices. The Office of Public Advocacy should be located within the judicial branch and the Justice Administrative Commission should provide budget and administrative oversight of the office in the same manner they provide those services to the public defenders and state attorneys. There is currently one full time equivalent position allocated to this function by the State Courts Administrators Office.

A small state level office providing oversight to the local programs will ensure consistent representation to children throughout the state instead of the 20 circuit models of representation that exist now that are dependent on the chief judges perception of what representation of children by a guardian ad litem program means. Additionally, consolidating these programs with a coordinated oversight will facilitate budgeting for consistent levels of advocacy for children and consistent performance standards and measures throughout the state.

The state office should be directed to document the need for child advocacy throughout the state and report annually to the legislature on the need and the cost to adequately provide advocacy for children in the court and education system. The report should include information on the type and level of advocacy provided in prior years by both public entities and private entities providing pro bono services. This office should also develop performance measures and standards for program services throughout the state while providing local programs with sufficient flexibility to structure programs to take full advantage of pro bono and volunteer services.

The state office should establish representation requirements commensurate with those established for representation by a public defender. However, where the parents or persons who have custody of the child cannot or will not provide adequate representation the court may appoint the Office of Public Advocacy. When the court appoints the office the order must require the parents to pay for the services rendered either in full or on a reduced fee arrangement based on ability to pay.

The state office should also establish a not for profit direct support organization to assist the office with the solicitation of funds to provide independent legal services to children, where appropriate to support the costs of litigation or provide special services to the local offices of public advocacy, to assist in recruiting and recognizing volunteers and to provide funding for the needs of children that are not currently funded through the foster care or family care funding systems.

A Local Office of Public Advocacy should be established in each judicial circuit. Each local office should consist of an administrator, attorneys (either staff or pro bono or both), social workers, volunteer coordinators, volunteers and support staff based on the level of representation needed in that circuit. These staff positions currently exist in every circuit in the 21 guardian ad litem programs⁷⁶ in the state which are currently staffed with 181 staff and over 4,500 volunteers and there are approximately 250 positions allocated in the public defenders offices to delinquency representation. The administrator in each office should be very knowledgeable and well versed in the legal process and the legal representation of children in administrative and court proceedings as well as discovery and mediation processes. Guardians ad litem may be drawn from the professional staff or volunteers or a combination of those.

The offices should provide and coordinate the provision of representation to children in each aspect of court where private counsel is not available to the child. The offices should provide representation to every child not otherwise represented who is appearing in dependency or delinquency court. Representation should be provided as requested by the court and in accordance with statutory criteria where a domestic violence injunction has been filed related to violence against the child, and in disputed custody, visitation, and child support cases and where the child is called as a witness in a criminal case.

Where the Office of Public Advocacy is appointed to represent a child a staff or volunteer guardian ad litem should be appointed along with legal support provided by a designated office attorney.

The offices should enter into contracts with the Legal Aid Offices, university law school programs or other local entities willing to assist in providing volunteer guardians ad litem, pro bono legal representation to the guardians ad litem in the same manner as office staff attorneys or those persons willing to provide independent legal representation to children through pro bono activities or paid representation.

Fiscal Analysis

This report calls for extensive substantive legal and procedural changes to the guardian ad litem program as well as adjustments in staffing models. A fiscal analysis will require consideration of these program and staffing changes once the bill is reviewed by the Department of Children and Families, the courts, the current guardian ad litem programs, and the public defenders. To facilitate the implementation of the program a phase in is recommended. However, current staffing of the guardian ad litem programs, the public defenders, and the position

⁷⁶ See Appendix C.

in the Office of State Courts Administrator should be consolidated in the Office of Public Advocacy to ensure consistent representation of children.

Appendixes

Appendix A

CHILD REPRESENTATION STATE-BY-STATE ANALYSIS⁷⁷

Updated: October 9, 2001

This chart details how each state provides representation for children in the dependency system. The analysis is based primarily on each state's statutory structure. Research for this chart began with the Appendix B of Professor Jean Koh Peters book, *Representing Children in Child Protective Proceedings: Ethical and Practical Dimensions*. Her research was updated and supplemented. If there is anecdotal data that suggests the practical applications of these laws differ from the statutory structure, this anecdotal data is noted. However, there has not been a comprehensive analysis of case law or court rules to develop this chart.⁷⁸

The primary basis for categorizing each state is the role assigned to the child advocate. If the advocate is given the responsibility to advocate for the child's best interest, the state falls into a guardian ad litem category, either attorney or non-attorney.⁷⁹ If the advocate is given the responsibility to advocate for the child's wishes or is silent on the role, the state falls into the Attorney category. If the state permits the appointment of a secondary advocate but primarily requires only the appointment of the other type of advocate, the state is categorized based on the primary model followed. If a state requires the appointment of two advocates, one who represents the wishes of a child and another that represents the best interest of the child, it is categorized as a state that requires the appointment of both attorney and guardian ad litem.⁸⁰

⁷⁷ Copyright Professor Gerard F. Glynn, Barry University School of Law, 6441 East Colonial Drive, Orlando, FL 32807, 407-275-4451, gglynn@mail.barry.edu.

⁷⁸ A comprehensive list of citations relied upon to develop this chart is available upon request.

⁷⁹ Most statutes defining the role of an advocate as one focusing on the best interest of the child require a report on the child's wishes in addition.

⁸⁰ Many states require the appointment of an attorney for a child facing detention or mental health commitment. *See e.g.* ARIZ. REV. STAT. § 8-221(C); ARK. CODE ANN. § 9-27-316(d). If this is the only basis for the appointment of an attorney, the state will not be categorized as a state which appoints both types of advocates.

Although this structural description is helpful in evaluating the types of representation, this analysis does not indicate the quality of any of these models. Although statutes may require the appointment of advocates in every case, often in practice only a percentage of children receive any type of representation. The quality of representation is impacted by the level of salary or compensation and training of the children's representative regardless of the type of representation provided. Also, experienced practitioners often suggest that the distinctions between these philosophical options are irrelevant if one is a good advocate. If one is a good advocate, the best interest decision will be influenced partially by the child's wishes and the child's wishes will only be expressed after the child has been counseled about the best interest considerations.

State	Non-attorney Guardian ad litem	Attorney Guardian ad litem	Attorney and Guardian ad litem	Attorney
Alabama		X		
Alaska	X			
Arizona			X ⁸¹	
Arkansas		X		
California		X		
Colorado		X		
Connecticut				X
D.C.		X		
Delaware	X			
Florida	X			

⁸¹ According to Jean Koh Peters book, the appointment of both types of advocates is rare. Children are usually appointed only attorneys who represent the child's wishes.

State	Non-attorney Guardian ad litem	Attorney Guardian ad litem	Attorney and Guardian ad litem	Attorney
Georgia	X ⁸²			
Hawaii	X			
Idaho	X			
Illinois	X			
Indiana	X			
Iowa		X		
Kentucky		X		
Louisiana				X
Mass.			X	
Maine	X			
Maryland				X
Michigan			X	
Minnesota			X	
Mississippi			X	
Missouri		X		
Montana	X			
Nebraska		X		
N.H.			X	

⁸² The statutes in Georgia rely on lay guardian ad litem in dependency cases, but requires the appointment of an attorney at the termination of parental rights stage. According to Jean Koh Peters book, the attorneys in these termination cases perform the role of a guardian ad litem.

State	Non-attorney Guardian ad litem	Attorney Guardian ad litem	Attorney and Guardian ad litem	Attorney
New Jersey				X
New Mexico			X	
New York				X
N.C.	X			
N.D.			X	
Ohio			X	
Oklahoma			X	
Oregon	X			
Penn.			X	
Puerto Rico		X		
Rhode Island		X		
S.C.			X	
S.D.			X	
Texas			X	
Utah		X		
Vermont			X	
Virginia		X		
V.I.			X	
Washington	X			
West Virginia			X	
Wisconsin			X	

Appendix B

RULE 4-1.14 CLIENT UNDER A DISABILITY

- (a) **Maintenance of Normal Relationship.** When a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability, or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.
- (b) **Appointment of Guardian.** A lawyer may seek the appointment of a guardian or take other protective action with respect to a client only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest.

Comment:

The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client is a minor or suffers from a mental disorder or disability, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, an incapacitated person may have no power to make legally binding decisions. Nevertheless, a client lacking legal competence often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. Furthermore, to an increasing extent the law recognizes intermediate degrees of competence. For example, children as young as 5 or 6 years of age, and certainly those of 10 or 12, are regarded as having opinions that are entitled to weigh in legal proceedings concerning their custody. So also, it is recognized that some persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions.

The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect. If the person has no guardian or legal representative, the lawyer often must act as de facto guardian. Even if the person does have a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.

If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. If a legal representative has not been appointed, the lawyer should see to such an appointment where it would serve the client's best interests. Thus, if a disabled client has substantial property that should be sold for the

client's benefit, effective completion of the transaction ordinarily requires appointment of a legal representative. In many instances, however, appointment of a legal representative may be expensive or traumatic for the client. Evaluation of these considerations is a matter of professional judgment on the lawyer's part.

If the lawyer represents the guardian as distinct from the ward and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct. See rule 4-1.2(d).

Disclosure of client's condition

Rules of procedure in litigation generally provide that minors or persons suffering mental disability shall be represented by a guardian or next friend if they do not have a general guardian. However, disclosure of the client's disability can adversely affect the client's interests. The lawyer may seek guidance from an appropriate diagnostician.

Appendix C

Current Guardian Ad Litem Staffing

21 Guardian Ad Litem Programs:

Active Volunteers	4,512
Case Coordinators	104
Program Attorneys	25.5
Support Staff	30.5
Assistant Program Coordinators	7
Program Coordinator	13
Senior Deputy Court Administrator	1