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DO ATTORNEYS FOR CHILDREN IN PROTECTION PROCEEDINGS MAKE A DIFFERENCE?—A STUDY OF THE IMPACT OF REPRESENTATION UNDER CONDITIONS OF HIGH JUDICIAL INTERVENTION*

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I. INTRODUCTION

Although child abuse and neglect have long existed in our society, the idea that child abuse was a clinically diagnosable syndrome was not widely recognized until 1962.[1] This recognition created renewed

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[1] R. KEMPE & C. KEMPE, CHILD ABUSE 4-6 (1978).

concern over the plight of mistreated children, resulting in a variety of legislative actions directed at the protection of children and prevention of abuse and neglect.[2] Recent legislative efforts in many states have been directed at ensuring the provision of attorneys as guardians ad litem for children in child protection proceedings.[3] Implicit in this legislation are the assumptions that representation would provide a significant benefit to these children and that an attorney is the proper choice for this representative.

Parts II and III of the Article provide brief discussions of the development of the idea that children in protection proceedings need representation and the problems for attorneys in the role of representative. The major focus of the Article, however, is an empirical analysis of the use of attorneys as guardians ad litem in North Carolina, assessing whether or not the presence of an attorney representing the child's interest made any difference in a court's custodial disposition of the case. The standard used in the analysis to gauge effective representation was the ability of the child's attorney to prevent removal of the child from the home and to facilitate the child's return to the home. This standard is based on widely accepted studies which indicate that removal from the home should be a remedy of last resort, used only if less drastic kinds of intervention are not possible, and that delay and uncertainty in custody decisions can be harmful.[4]

This standard could be used to measure attorney effectiveness in North Carolina because of two structural characteristics of that system. First, the North Carolina system was highly interventionist in nature. Children were removed from their homes in nearly nine out of ten cases entering the court system. This figure is extremely high, approximately twice the comparable national statistic.[5] Second, there were virtually no statistically significant relationships found which linked the severity of the problems that brought the child to court with the degree of custodial intervention used by the court.

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[2] For example, in 1963 the Children's Bureau of the Department of Health, Education and Welfare recommended that the states require that child abuse be reported in a central registry; by 1967 all states had adopted reporting legislation. V. FONTANA & D. BESHAROV, THE MALTREATED CHILD: THE MALTREATMENT SYNDROME IN CHILDREN: A MEDICAL, LEGAL AND SOCIAL GUIDE 68 (4th ed. 1979).

[3] *See infra* notes 9-12 and accompanying text.

[4] *See infra* notes 41-48 and accompanying text.

[5] Aber, *The Involuntary Child Placement Decision: Solomon's Dilemma Revisited*, in CHILD ABUSE: AN AGENDA FOR ACTION 156, 159 (G. Gerber, C. Ross, & E. Zigler eds. 1980).

It is important to note that such a standard would not be appropriate in a system in which removal was already a remedy of last resort, nor would it be an appropriate standard for judging attorney performance in an individual case, even in North Carolina. However, this standard can be used for judging attorney effectiveness in a whole population of cases in a highly interventionist system.

Regrettably, the North Carolina study found that for the most part attorneys for children were not only ineffective but even tended to substantially delay a child's return home. An encouraging finding, however, was that those attorneys who spent more hours on their cases did expedite return. These and other findings are presented in detail in Part IV of this Article. Part V makes recommendations for reform based on indications about what kind of representation can make a difference.

This analysis of the use of guardians ad litem in North Carolina has two distinct advantages over other available research treating the issue of representation of children in protection proceedings. First, as was already noted, the fact that the North Carolina system was highly interventionist allowed us to develop an empirical measure of effective representation. Such a measure and the statistical analysis that it made possible are unique in the available research analyzing guardian ad litem behavior. Second, because attorneys were not always appointed in North Carolina and because we are able to statistically control those factors which influenced appointment decisions, we are able to analyze the North Carolina data in a quasi-experimental fashion: that is, we can make estimates about whether, by our standard, the presence of an attorney had any impact. Since legal reforms such as guardian ad litem statutes are normally implemented on a universal and mandatory basis, analysis of their impact is often difficult to carry out. The advantage of the North Carolina data is that it represents a case in which implementation was neither universal nor mandatory and thus allows us to ask the question: Do attorneys for children in protection proceedings make a difference?

II. DEVELOPMENT OF THE REQUIREMENT OF COUNSEL FOR ABUSED AND NEGLECTED[6] CHILDREN

Although courts typically have had the inherent power to appoint

[6] The terms "abuse" and "neglect" have no standard meaning. The laws of some

a guardian ad litem for a child in an abuse and neglect proceeding,[7] they did not usually exercise this discretion.[8] Instead the court was the protector of the child's best interest and represented the child. But in most states, the combination of a variety of factors has resulted in children now being represented by a guardian ad litem in abuse and neglect cases. A majority of states provide for the appointment of an attorney to represent the child.[9]

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states define one term as incorporating the other. In other states the terms are used to define separate and distinct problems. In the discussion which follows "abuse" and "neglect" are considered as one problem, in part because the North Carolina definition operative for the empirical study incorporates abuse into the definition of "neglected child," but primarily because we agree with the assessment that "the terms 'child abuse' and 'child neglect' encompass a wide range of behaviors with multiple causes . . . [which will be defined] not in simplistic, one-dimensional terms, but as sets of symptoms that occur in conjunction with each other and tend to characterize a situation." Besharov, *The Status of Child Abuse and Neglect Perception and Treatment*, Proceedings of the First National Conference on Child Abuse and Neglect (Jan. 1976).

[7] *See* Genden, *Separate Legal Representation for Children: Protecting the Rights and Interests of Minors in Judicial Proceedings*, 11 HARV. C.R. - C.L. L. REV. 565, 585 (1976).

[8] A 1963 survey indicated that lawyers seldom appeared in neglect and dependency proceedings on behalf of either parents or children. Isaacs, *The Role of the Lawyer in Child Abuse Cases*, in HELPING THE BATTERED CHILD AND HIS FAMILY 227 (C. Kempe & R. Helfer eds. 1972).

[9] The following states and the District of Columbia require that an attorney be appointed to represent children in protection proceedings: ALA. CODE § 27-14-11 (1977); COLO. REV. STAT. § 19-10-113 (1981); CONN. GEN. STAT. ANN. § 17-38A(f)(2) (West 1982); D.C. CODE ANN. § 16-2304(B)(2) (1981); FLA. STAT. ANN. § 827.07(16) (Supp. 1981); IDAHO CODE § 16-1618(a) (Supp. 1982); IOWA CODE ANN. § 232.89(2) (West Supp. 1982); KAN. STAT. ANN. § 38-831 (1981); KY. REV. STAT. 208.060(3)(a), (5) (Supp. 1980); MASS. ANN. LAWS Ch. 119, § 29 (Michie/Law Co-op. Supp. 1982); MICH. COMP. LAWS § 722.630 (1981); N.H. REV. STAT. ANN. § 169-C:10 (1981); N.J. STAT. ANN. § 9:6-8.43(a) (West Supp. 1982); N.Y. JUD. LAW § 249(a) (McKinney 1981); OKLA. STAT. tit. 21, § 846(b) (1981); 11 PA. CONS. STAT. ANN. § 2223(a) (Purdon Supp. 1982-83); S.C. CODE ANN. § 20-7-110 (Law. Co-op. Supp. 1981); S.D. COMP. LAWS ANN. § 26-10-12.1 (Supp. 1982); VA. CODE § 16.1-266(A) (1982); W. VA. CODE § 490602(A) (1980); WIS. STAT. ANN. § 48.23 (West Supp. 1982); WYO. STAT. § 14-3-211(A) (1977).

The appointment of an attorney in protection proceedings is provided for, but not required, in the following states: ALASKA STAT. § 09.65.130 (Supp. 1982); CAL. WELF. & INST. CODE §§ 317, 318.5 (West Supp. 1982); GA. CODE ANN. § 24A-3301 (Supp. 1982); ILL. ANN. STAT. Ch. 37, § 704-5 (Smith-Hurd Supp. 1982); IND. CODE ANN. § 31-6-3-4(a) (Burns 1979); LA. CODE OF JUV. PROC. art. 95 (West 1982); MD. CTS. & JUD. PROC. ANN. § 3-834 (1980); MINN. STAT. § 260.155 (1982); MISS. CODE ANN. § 43-21-121 (1981); NEB. REV. STAT. § 43-205.06(1) (1981); N.C. GEN. STAT. § 7A-586 (1982); R.I. GEN. LAWS § 40-11-14 (Supp. 1982); TEX. FAM. CODE ANN. § 11.10 (Vernon Supp. 1982-83); VT. STAT. ANN. tit. 33, § 653(a) (1981); WASH. REV. CODE ANN. § 26.44.053(1) (Supp. 1982).

The most immediate source of this change was the January 1974 enactment of the Child Abuse Prevention and Treatment Act.[10] This legislation made a state's receipt of federal funds for programs under the Act contingent on the state fulfilling certain conditions, including a requirement that the state shall "provide that in every case involving an abused or neglected child which results in a judicial proceeding a guardian *ad litem* shall be appointed to represent the child in such proceedings."[11] Neither the Act nor the Department of Health and Human Services implementing regulations require that the guardian ad litem be an attorney nor is any distinction made between representation in criminal or civil proceedings.

It would be overly cynical to say that those states which enacted guardian ad litem legislation after the passage of the Child Abuse Prevention and Treatment Act did so solely for the purpose of becoming eligible for federal funds.[12] The same forces which had pushed for the federal legislation had also been active in the states, and the other considerations underlying this movement will be addressed next.

One impetus for the representation of children was that as information about child abuse and neglect increased, attention began to shift from the parents' behavior to that of the child. Most abuse and neglect statutes were concerned with parental behavior and allowed intervention when the parents' conduct fell below the required minimum. Thus, for example, a court could have jurisdiction over a child who was "without proper parental care or control"[13] or whose parent "by reason of cruelty, mental incapacity, immorality, or deprivaty . . . is unfit to properly care for such child. . . ."[14] Critics of these statutes argued for neglect laws which focused on specific harms to the child

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In addition to these statutes which are related specifically to protection proceedings, a number of states also have general provisions for the appointment of counsel for children. *E.g.*, ARIZ. REV. STAT. ANN. § 8-255(A), (E) (Supp. 1974-82). Of course attorneys could also be appointed under a general statute which provided for the appointment of a guardian ad litem, even if the statute did not specify that the guardian should be an attorney. *E.g.*, FLA. STAT. ANN. § 827.07(16) (West Supp. 1981).

[10] 42 U.S.C. §§ 5101-06 (1974).

[11] *Id.* § 5103(b)(2)(G).

[12] In North Carolina, for example, appointment was not mandatory in the original legislation and therefore receipt of federal funds was not assured with passage of the legislation. Those persons who were actively lobbying for the legislation had been at work prior to the enactment of the federal law.

[13] GA. CODE ANN. § 15-11-2(8)(A) (1982).

[14] TENN. CODE ANN. § 37-202(6) (Supp. 1981).

rather than on parental behavior.[15] They argued that parental failings might not result in demonstrable harm to the child and, since intervention itself is disruptive and can be traumatic, the state should not use parental fault as a basis for intervention. Judging and punishing parents would not mean that a child was helped; instead the child's condition and needs should be the focus of attention.

Another impetus for the representation of children in abuse and neglect cases was the idea children should have independent representation in any court proceeding where the child had an important interest at stake. Representation was seen as a means of achieving a better result in a case since all points of view would be presented.[16] More importantly, the need for representation was justified by a reliance on the concept of children's rights, which developed in the 1960's.[17] The "children's rights" concept was reflected in various articles, such as one which proposed a "Bill of Rights" for children.[18] The "Bill of Rights" included a recommendation that children have independent representation by counsel whenever their placement was at issue, including even custody proceedings attending divorce. The authors stated that the premise behind their "Bill of Rights" "is that children are people; they are entitled to assert individual interests in their own right, to have a fair consideration given to their claims, and to have their best interest judged in terms of pragmatic consequences."[19]

The Supreme Court's recognition in *In re Gault*[20] that children are entitled to certain protections under the Constitution, including a right to counsel in certain circumstances, provided a precedent for requiring representation for children. Additionally, one of the major problems which the Court identified in *Gault* also existed in abuse and

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[15] National Institute for Juvenile Justice and Delinquency Prevention, Office of Juvenile Justice and Delinquency Prevention, Law Enforcement Assistance Administration, U.S. Dept. of Justice, 6 Abuse and Neglect: Comparative Analysis of Standards and State Practices 22-23 (1977); Wald, *State Intervention on Behalf of 'Neglected' Children: A Search for Realistic Standards*, 27 STAN. L. REV. 985 (1975); Wald, *State Intervention on Behalf of Neglected Children: Standards for Removal of Children from Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights*, 28 STAN. L. REV. 623 (1976) [hereinafter cited as Wald I and II respectively].

[16] *See* Fraser, *Independent Representation for the Abused and Neglected Child: The Guardian Ad Litem* 13 CAL. W.L. REV. 16, 31-33 (1977).

[17] *See* K. KENISTON, ALL OUR CHILDREN, 184 (1977).

[18] Foster & Freed, *A Bill of Rights for Children*, 6 FAM. L.Q. 343 (1972).

[19] *Id.* at 346.

[20] 387 U.S. 1 (1967).

neglect proceedings; namely that representation of the child by the state was not an adequate protection and that unfair, inaccurate adjudications and inappropriate dispositions were made. Various studies pointed out that the state allowed children in state custody to be abused and neglected by leaving them in long term foster care or institutions without opportunities for a permanent home or adequate care.[21] The state's insufficient "protection" of the child lent weight to arguments for an independent voice for the child.

A combination of forces thus supported representation for children in abuse and neglect proceedings, but it was not clear what that representation should entail. Were the child's wishes to be represented or the child's best interest? Should the representatives be attorneys, some other categories of professionals such as psychologists or social workers, or lay persons? This Article focuses on the use of attorneys as representatives during the time that guardians ad litem were required to be attorneys in North Carolina, the site of our empirical study.[22]

The usual justification for the choice of attorneys is that the representative must be trained to deal with the complexity of the legal system.[23] The attorney presumably could deal with the complexity of ascertaining the "best interest" of the child client through his or her investigative skill. Although more attention needs to be directed to the problem of choice and evaluation of different kinds of representatives, these concerns are beyond the scope of this Article.[24]

III. CONFUSION ABOUT THE ROLE OF THE ATTORNEY AS GUARDIAN AD LITEM

Assuming that the guardian ad litem will be an attorney, what role does that attorney play? Most state statutes which require appointment of an attorney do not define the scope of that attorney's respon-

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[21] *See, e.g.*, Mnookin, *Foster Care—In Whose Best Interest?*, 43 HARV. ED. REV. 4 (1973); Wald I, *supra* note 15.

[22] The current North Carolina statute, N.C. GEN. STAT. § 7A-586 (1981) no longer requires guardians ad litem to be attorneys. This change was proposed by a child advocacy group which wished to use lay volunteers as guardians ad litem. Letter from Samuel Streit to Sarah Ramsey, August 21, 1981.

[23] *See, e.g.*, Fraser, *supra* note 16, at 30.

[24] The National Center on Child Abuse and Neglect of the Children's Bureau, Department of Health and Human Services has funded research in this area which will be evaluated by the ABA's National Resource Center for Child Advocacy and Protection.

sibility. Frequently the statutes merely indicate that an attorney will serve as guardian ad litem.[25] Some use very general phrases to explain the attorney's responsibility such as "to represent the interest of the child."[26] A few states are more explicit but the confusion about what role the attorney is to play remains. The North Carolina statute, for example, listed in some detail what the guardian ad litem was to do:

> The duties of the guardian ad litem shall be to make an investigation to determine the facts, the needs of the child, and the resources available within the family and the community to meet those needs; to appear on behalf of the child in the juvenile proceeding and to perform necessary and appropriate legal services on behalf of the child in order to present the relevant facts to the court at the adjudicatory part of the hearing and the possible options to the court at the dispositional part of the hearing; to serve the child and the court by protecting and promoting the best interest of and the least detrimental alternatives for the child at every stage of the proceeding until formally relieved of the responsibility by the court; to appeal, when deemed advisable, from an adjudication or order of disposition to the Court of Appeals. . . .[27]

The North Carolina statute is useful to illustrate the confusion about what the attorney's responsibilities are. One area of confusion is whether or not the attorney should remain neutral in the proceedings, serving primarily as an investigator who will make sure the court has before it the information needed to make decisions, or if the attorney should draw his or her own conclusions about what would serve the child's best interest and then advocate that position. This latter approach would seem to be what the North Carolina legislature expected when it required the guardian ad litem to promote the child's best interest.[28] But does this mean that the attorney is *required* to reach conclusions about the child's best interest? The statutory language about

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[25] *See, e.g.*, CONN. GEN. STAT. § 17-38a(f)(2) (Supp. 1981).

[26] S.D. COMP. LAWS ANN. § 26-10-12.1 (Supp. 1982).

[27] N.C. GEN. STAT. § 7A-283 (1977) (replaced in 1981). The current statute reads as follows:

> The duties of the guardian ad litem shall be to make an investigation to determine the facts, the needs of the juvenile, and the available resources within the family and community to meet those needs; to facilitate, when appropriate, the settlement of disputed issues; to explore options with the judge at the dispositional hearing; and to protect and promote the best interest of the juvenile until formally relieved of the responsibility by the judge.

N.C. GEN. STAT. § 7A-586 (1981).

[28] This approach has been criticized on the basis that the attorney's advocating his or her own view of the child's best interest "would usurp the ultimate factfinding to be made by the court. . . ." Genden, *supra* note 7, at 588-89.

presenting relevant facts and possible options seems to allow the attorney the opportunity to take a more neutral posture if desired.

There is no North Carolina case law which reduces this confusion. One of the few cases in which the neutrality issue has been considered at all is *In re Apel*,[29] a 1978 New York case. In that case the children's attorney (termed a "law guardian" in New York) had reached a conclusion about what disposition was best for the children and was actively trying to ensure that the children would not be returned to their parents. The parents' attorney wanted the law guardian replaced with an attorney who would be neutral. The judge agreed that the law guardian should be neutral at the beginning of the proceeding since "in addition to his role as counsel, advocate and guardian [he] serves in a quasi-judicial capacity in that he has some responsibility . . . to aid that court in arriving at a proper disposition and should, like the judge, be neutral."[30] However, in that case, the attorney had served as the children's law guardian for more than five years through numerous proceedings. The judge ruled that "at some point" the attorney had a right to formulate and advocate an opinion and that therefore the attorney should not be removed.

Another area of confusion surrounding the role of guardian ad litem is what, if any, weight the attorney should give to the wishes of the child. The North Carolina statute in effect at the time of our study stated that the attorney was to "appear on behalf of the child," which might mean that the attorney should represent the child as zealously as any other client.[31] But what should the attorney do if the child's wishes conflict with the attorney's assessment of the child's best interest? Clearly the age and maturity of the child have great bearing on this issue. Perhaps the attorney can avoid this conflict by ignoring wishes of a young child and abiding by the wishes of an older child. This dichotomy might work if the clients were seven months and seventeen years old respectively; but the choice would be less clear with a

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[29] 96 Misc. 2d 839, 409 N.Y.S.2d 928 (Fam. Ct. 1978). The New York Statute does not indicate what the attorney's role should be, saying only that the law guardian is appointed "to represent" the child. N.Y. FAM. CT. ACT § 249 (McKinney Supp. 1982).

[30] 96 Misc. 2d 839, 842-43, 409 N.Y.S.2d 928, 930.

[31] N.C. GEN. STAT. § 7A-283 (1977) (repealed 1979); the amended version of this statute appears at § 7A-586. The North Carolina Code of Professional Responsibility lists zealous representation as one of the lawyer's ethical considerations. NORTH CAROLINA STATE BAR, CODE OF PROFESSIONAL RESPONSIBILITY, Canon 7, EC 7-1, *reprinted in* N.C. GEN. STAT. app. VII (Supp. 1981).

ten year old. The North Carolina Canons of Ethics are too general to provide clear guidance on this point and the legislation does not differentiate responsibility based on a client's age.

Under American Bar Association policy, in a child protection proceeding when the attorney is representing a child who is "capable of considered judgment" the "determination of the client's interest in the proceeding ultimately remains the client's responsibility, after full consultation with counsel."[32] For the client who is so young as to be "incapable of considered judgment" it is recommended that both an attorney and a guardian ad litem be appointed, and that the guardian ad litem direct the case. If no guardian ad litem is appointed, the attorney may remain neutral.

Provision of an attorney and a guardian ad litem did not seem to be what either the North Carolina legislation or even the Federal Child Abuse Prevention and Treatment Act contemplated. Both seemed to expect that the attorney could fill all roles. The regulations promulgated under the Act would even allow the prosecutor to serve as guardian ad litem so long as his "legal responsibility includes representing the rights, interests, welfare and well-being of the child. . . ."[33] A few states do provide for appointment of both an attorney and a guardian ad litem.[34] This approach would avoid what some experts view as a clear conflict of interest when an attorney is trying to fill two roles simultaneously, serving both as a guardian or a substitute parent for the child, and as the child's attorney.[35]

Another source of confusion is what, if any, responsibility the guardian ad litem has to follow up on the dispositional order of the court. This follow-up may be of crucial importance to the child since it could insure that the placement is appropriate, that services are provided to the family, and that the child is not "lost" in the system.

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[32] ABA INSTITUTE OF JUDICIAL ADMINISTRATION/ABA, STANDARDS RELATING TO COUNSEL FOR PRIVATE PARTIES, Part III, 3.1(b)(ii)[b] (1980). These standards were approved by the ABA House of Delegates at the February 1979 Mid-year Meeting.

[33] 45 C.F.R. 1350.3-3(d)(7) (1981).

[34] *See, e.g.*, S.C. CODE ANN. § 20-7-110 (Supp. 1981).

[35] *ABA Project Sponsors Debate over Proper Representation of Child*, 7 FAM. L. REP. (BNA) 2087, 2089 (Dec. 9, 1980). The current statute allows for the appointment of an attorney when the guardian ad litem is not an attorney. Unfortunately, it is not clear whether the attorney is to represent the child, the guardian, or both. *See* N.C. GEN. STAT. § 7A-586 (1981).

Most state statutes do not address this problem. The North Carolina statute was unusual in that it stated that the attorney was to continue to represent the child until relieved of this responsibility by the court. The ambiguity remains, however, since this can be interpreted to mean representation in court proceedings, not in administrative matters.

The North Carolina statute also required the guardian ad litem "to appeal, when advisable, from an adjudication or order of disposition,"[36] but the confusion about roles makes a decision about the grounds for appeal difficult. Should the attorney appeal a decision adverse to his own determination of the child's "best interest?" How should the attorney weigh the potential harm to the child caused by additional litigation against the harm caused by the trial court's erroneous decision?

There is one area of responsibility of the guardian ad litem which seems to be unambiguous, namely that the attorney is to serve in an investigative and factfinding capacity. It is in this capacity, however, that the need for an attorney as representative is most dubious. What does the attorney have to do in the investigative stage? The attorney needs to be able to evaluate whatever medical, psychiatric, or social work reports are available and determine what additional information is needed. The attorney must be familiar with what services are and should be available from social services and the medical and educational systems and should be able to relate these to the needs of his client.[37] Attorneys, however, generally do not have this expertise in the child welfare area and would need to make a major time commitment to develop it.

In summary, confusion surrounds the role of the attorney serving as guardian ad litem. The ABA/IJA Standards would separate the role of the attorney and the guardian ad litem so that the attorney would not be expected to determine what was in the child's "best interests." Yet, respected practitioners in the field do not seem to feel that this division in function is necessary.[38] It is clearly necessary to develop some consensus about what the attorney guardian's role should be, but meanwhile attorneys serving as guardians run the risk of failing

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[36] N.C. GEN. STAT. § 7A-283 (1977).

[37] *See* Duquette, *Liberty and Lawyers in Child Protection*, in THE BATTERED CHILD, 316, 320-22 (R. Helfer & C. Kempe eds. 1980).

[38] *Id.* at 320.

to fulfill their professional responsibilities[39] and the legislative aim of providing a benefit to the child client is frustrated in varying degrees.

Presenting a definite statement of what the role should be is not the purpose of this Article. Instead, we will examine what happened when attorneys were used as guardians ad litem when, confusion notwithstanding, a law providing for their appointment went into effect. We hope that a description of the effect of the presence of attorneys and of the influence of other factors on case disposition will provide useful information for future decisions about the function of the guardian ad litem.

IV. THE NORTH CAROLINA STUDY

A. *Developing a Standard of Effective Representation*

The major question addressed in the North Carolina study was what beneficial effect, if any, representation by an attorney serving as guardian ad litem has on a child's welfare. To answer this question it is necessary to develop a rationale about what constitutes a "benefit" in general as well as in the particular case of the North Carolina sample. In evaluating the effectiveness of an attorney's representation in a criminal case, one can feel fairly assured that a "not guilty" decision would be, at least in the defendant's opinion, a clear benefit and thus a good indicator of representation with positive effect. In evaluating attorney effectiveness with juvenile delinquents, a dismissal is considered positive even though this might mean that children who had committed crimes were released without sanction to the possible detriment of society.[40] But what is an indicant of a benefit to an allegedly abused or neglected child? Removal from the home might provide a cessation of the abuse or neglect, but removal may also cause separation of the child from parents whom the child deeply loves. On the other hand, leaving the child in a home when it is clear that the child will suffer serious harm could not be considered a benefit. Thus simply measuring attorney effectiveness based on whether or not the child was removed from the home, without taking other circumstances into account, would

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[39] Colorado and Florida protect the guardian ad litem from any liability for his actions, so long as he is acting in good faith, but no other states do so. COLO. REV. STAT. § 19-10-113 (1981); FLA. STAT. ANN. § 827.07(16) (West 1981).

[40] *See* W. STAPLETON & L. TEITELBAUM, IN DEFENSE OF YOUTH: A STUDY OF THE ROLE OF COUNSEL IN AMERICAN JUVENILE COURTS 64-65 (1972).

not tell us whether representation achieved a desirable result. There is, however, substantial agreement in principle that removal of a child from his family can be harmful and thus should be a last resort, used only if less intrusive measures would not protect the child from serious harm.[41]

Since this stance against removal represents a shift in the way abuse and neglect cases were traditionally understood a brief elucidation is useful. First, removal may be harmful because of the disruption it causes in a child's relationship with his parents.[42] Although a child's feelings about separation are affected by such factors as age, ability to understand what is happening, relationship with parents and prior life experiences, generally a child feels abandoned, a feeling which includes a sense of loss, rejection, humiliation, and worthlessness. Additionally, children typically have feelings of helplessness. Anger toward parents, self-blame, and a fear of punishment are emotions the child must deal with in his new setting.[43] Not only is the separation a wrenching experience, there is possible harm from the subsequent placement of the child. The most common placement is in a foster home since group homes or institutions are usually viewed as less desirable than foster care.[44] But even in the best of foster homes children may suffer from the ambiguity of their position which "may make it difficult for the child to develop an adequate conception of who he is, where he is, or why he is there—a situation that may have detrimental psychological effects."[45] Children may also suffer from a conflict of loyalty between their attachment to their parents and to foster parents, and from anxiety about when, or if, they will go home. Multiple foster home placements, loss of contact with natural parents, long term stays, excessive caseloads, and high turnover of foster care social workers are not un-

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[41] The Federal government adopted this policy in the Adoption Assistance and Child Welfare Act of 1980 (P.L. 96-272). Under the Act a state could have its federal foster care funds reduced unless the state "has implemented a preplacement preventive service program designed to help children remain with their families." 42 U.S.C. 627(b)(3) (Supp. 1975).

[42] J. GOLDSTEIN, A. FREUD, & A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD 31-34 (1973); N. LITTNER, SOME TRAUMATIC EFFECTS OF SEPARATION AND PLACEMENT (1956).

[43] LITTNER, *supra* note 42, at 8-10.

[44] Gil, *Institutions for Children*, in CHILDREN AND DECENT PEOPLE 53 (Schorr ed. 1974).

[45] Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226, 271 (1975).

common generally, and North Carolina is no exception in these respects.[46]

In addition to the fact that removal and subsequent placement may be harmful, there is no proof that removing a child from neglectful parents and placing the child in foster care has benefits that outweigh this harm. This lack of support for the idea that removal is beneficial is a strong underpinning for a policy against interventionism in families and in favor of parental autonomy.[47] It is also a major basis for the position that effective legal representation of children is one in which attorneys view removal as a remedy of last resort. An extension of this argument would imply that if removal occurs, the attorney should work for a reunion of parents and child as quickly as possible. This is supported by recent research that places much emphasis on the fact that a child's sense of time is different from that of an adult. It has been suggested that children, especially young children, do not have the intellectual or emotional capacity to deal with extended separation from parents. A separation of two months for a child under five may be severely disruptive, for infants and toddlers an even shorter separation may be harmful.[48] As a working hypothesis, we take the position that attorneys working as guardians should consider removal as a remedy of last resort, to be used only if less intrusive measures are not appropriate, and that if a child has been removed the attorney should seek to reunite parents and children in an expeditious fashion.

The next step in assessing the effectiveness of the child's attorney is to consider how appropriate this hypothesis, this standard, is for the North Carolina data. That is, are there good reasons to believe that the standard can be used to measure the impact of representation? We believe that the standard is appropriate for several reasons, but primarily because the North Carolina system was highly interventionist in nature.

At the time of our study, an allegedly neglected child entered the court system when a verified petition was filed with the clerk of court. The petition contained information such as the name and age of the

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[46] Governor's Advocacy Council on Children and Youth, Why Can't I Have a Home? (1978).

[47] *See* Wald I, *supra* note 15, at 1037. Also there is some indication that a showing of harm must be made before a state can constitutionally intervene in the family. Alsager v. District Court of Polk County, 406 F. Supp. 10 (S.D. Iowa 1975).

[48] GOLDSTEIN, FREUD, & SOLNIT, *supra* note 42, at 40-41.

child, the name and last known address of his or her parents, guardian, or custodian, and a statement of the facts which would invoke the court's jurisdiction.[49]

Unlike some states which only allow department of social service personnel or police to file petitions, in North Carolina any person who had knowledge or information about a neglect case could file a petition.[50] The department of social services was the petitioner, either singly (66%), or in combination with a relative or an agency such as a hospital, in 81% of the cases. Parents and other relatives were the next largest group of petitioners (13%), with fathers the petitioners in three percent of the cases and grandparents in six percent. Relatives' requests for court action were identified as the basis for department of social service petitions in an additional two percent of the cases. Police and medical facilities seldom were listed as either the source of the information on which a petition was based or as the petitioner (police two percent; medical five percent).

Once a petition had been filed, the court could remove the child from the home by issuing an immediate custody order prior to the hearing on the merits if it appeared from the petition "that a child is in danger, or subject to such serious neglect as may endanger his health or morals, or that the *best interest* of the child requires that the court assume immediate custody. . . ."[51] (emphasis added). The "best interest" provision in the statute gave the court very broad discretion in deciding whether to issue an immediate custody order since no showing of the likelihood of serious harm was required. The ease of getting an immediate order may help explain why children were removed by immediate custody order in 58% of all cases. A hearing on the merits had to be held within five days after custody of the child was assumed or the child had to be released.[52]

Removal of the child was also relatively easy at the adjudication stage of the proceedings. The North Carolina definition of a "neglected child" was very broad:

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[49] N.C. GEN. STAT. § 7A-281 (Supp. 1977) (replaced by N.C. GEN. STAT. § 7A-560 (1981)).

[50] This statute has been amended so that now only the department of social services can file petitions. N.C. GEN. STAT. § 7A-561 (1981).

[51] N.C. GEN. STAT. § 7A-284(a) (Supp. 1977) (repealed 1979). The current statutory scheme does not allow an immediate custody order to be based on "best interest." *See* N.C. GEN. STAT. § 7A-574 (1981).

[52] *Id.*

> any child who does not receive proper care or supervision or discipline from his parent, guardian, custodian or other person acting as a parent, or who had been abandoned, or who is not provided necessary medical care or other remedial care recognized under state law, or who lives in an environment injurious to his welfare, or who has been placed for care or adoption in violation of law.[53]

Once the court found a child to be "neglected," removal of the child from the home was simply one of the several dispositional alternatives available.[54] There was no requirement that removal be viewed

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[53] N.C. GEN. STAT. § 7A-278(21) (1977). The current statute provides:

> a juvenile who does not receive proper care, supervision or discipline from his parent, guardian, custodian, or caretakers; or who has been abandoned; or who is not provided necessary medical care or other remedial care recognized under State law, or who lives in an environment injurious to his welfare, or who has been placed for care or adoption in violation of law.

N.C. GEN. STAT. 7A-517(21) (1981).

[54] The dispositional statute states:

> The following alternatives for disposition shall be available to any judge exercising juvenile jurisdiction, and the judge may *combine any two of the* applicable alternatives when he finds such disposition to be in the best interest of the child:
>
> (1) The judge may dismiss the case, or continue the case in order to allow the child, parents or others to take appropriate action.
>
> (2) In the case of any child who needs more adequate care or supervision, or who needs placement, the court may:
>
> a. Require that the child be supervised in his own home by the county department of social services, juvenile probation officer, family counselor or such other personnel as may be available to the court, subject to such conditions applicable to the parents or the child as the court may specify; or
>
> b. Place the child in the custody of the county department of social services in the county of his residence, or in the case of a child who has legal residence outside the State, in the temporary custody of the county department of social services in the county where the child is found so that said agency may return the child to the responsible authorities. Any county department of social services in whose custody or temporary custody a child is placed shall have the authority to arrange for and provide medical care as needed for such child.

N.C. GEN. STAT. § 7A-286 (Supp. 1977) (replaced by N.C. GEN. STAT. § 7A-647(1), (2) (1981)). The current statute reads as follows:

> The following alternatives for disposition shall be available to any judge exercising juvenile jurisdiction, and the judge may combine any of the applicable alternatives when he find such disposition to be in the best interest of the juvenile:
>
> (1) The judge may dismiss the case, or continue the case in order to allow the juvenile, parent, or others to take appropriate action.
>
> (2) In the case of any juvenile who needs more adequate care or supervision or who needs placement, the judge may:

as an extraordinary step, used only in serious cases where other remedies would not suffice.

Additionally, once the child had been removed, the statute did not encourage return but rather required that the child "shall *not* be returned . . . unless the judge finds sufficient facts to show that the juvenile will receive proper care and supervision"[55] (emphasis added). The court was required to conduct a periodic review within six months after removal and annually thereafter.[56]

Thus under the North Carolina statutory scheme as it existed at the time of this study, removal of a child from his or her home, even prior to a hearing on the merits, was relatively easy and return was not encouraged. In fact it was found that removal occurred in a large majority (87%) of cases. This figure is high in comparison to national figures. Nationally only one-third to one-half of court proceedings assessing child maltreatment result in removal.[57] This is even more remarkable since a third of the cases of substantiated abuse result in court action in North Carolina, whereas nationally only about 14% proceed to court action.[58] In other words, North Carolina handled fewer cases through agency action alone than was the case in other jurisdictions. This should have resulted in a lower, rather than a higher, removal rate in court proceedings.

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a. Require that he be supervised in his own home by the Department of Social Services in his county, a court counselor or other personnel as may be available to the court, subject to conditions applicable to the parent or the juvenile as the judge may specify; or

b. Place him in the custody of a parent, relative, private agency offering placement services, or some other suitable person; or

c. Place him in the custody of the Department of Social Services in the county of his residence, or in the case of a juvenile who has legal residence outside the State, in the physical custody of the Department of Social Services in the county where he is found so that the agency may return the juvenile to the responsible authorities in his home state. Any department of social services in whose custody or physical custody a juvenile is placed shall have the authority to arrange for and provide medical care as needed for such juvenile.

Id.

[55] N.C. GEN. STAT. § 7A-286 (Supp. 1977) (replaced by N.C. GEN. STAT. § 7A-647 (1981)).

[56] *Id.*

[57] *See* Aber, *supra* note 5, at 159.

[58] U.S. DEPT. OF HEALTH AND SERVICES, NATIONAL ANALYSIS OF OFFICIAL CHILD NEGLECT AND ABUSE REPORTING, 1978, 36 (1980).

The high number of removals coupled with the fact that removal and continued out of home placement were so easy further strengthens the use of removal and speed of return as measures of attorney effectiveness. If the North Carolina statutory scheme had made removal difficult, then the attorney for the child might not have been expected to have a measurable effect in that area.

That there were unnecessary and apparently unjustified removals in the North Carolina system is also borne out by numerous findings, discussed in later sections of this Article, indicating that seriousness of petition problems and potential harm to the child were not criteria which were used systematically by the courts in custodial dispositions. Instead of supporting custody decisions by some standard of seriousness of harm, the courts seem to unconsciously play a form of custodial roulette. These findings further buttress the standard of effective representation that we have proposed, namely that removal, return, and speed of return are reasonable measures for evaluating the effectiveness of attorneys.

Before turning to the analysis, let us consider some of the problems inherent in this measure of attorney effectiveness.

First, the standard might not have been that used by the attorneys in practice. The middle class attorney, confronted with a child client from a multi-problem poverty family, might readily conclude that placement in foster care was to the child's benefit. However, our evaluation would assert that this was not effective positive representation, just as an attorney's representation of a juvenile delinquent resulting in unnecessary detention for a guilty child would be viewed as ineffective.

A second possible criticism is that our standard of effectiveness might mask the diverse activities of attorneys—one attorney might cause a child to be returned while another prevented return, showing no effective net result. Since we do not have information from the attorneys as to what they were trying to accomplish in each case, we have no way of conclusively demonstrating that this is not so. A major factor which militates against this conclusion, however, is the high level of agreement the attorneys had with the department of social services in most cases (88%). This consensus would indicate no effect, rather than one-half positive, one-half negative.

It is important to note that the measure of effectiveness is a probabilistic one phrased in terms of population tendencies rather than

individual cases. Although there undoubtedly were cases in which removal was the proper remedy, the high rate of removals indicates that some could have been prevented. Therefore when the population was looked at as a whole there should have been a statistical tendency for the appointment of an attorney to be associated with a reduction in the removal rate.

B. Methodology

In order to evaluate whether the presence of attorneys had any influence on the custodial disposition of abuse and neglect cases in North Carolina, a statewide random survey was conducted. Sampling was done in two stages. First, a sample of twenty of North Carolina's one hundred counties was drawn and checked for its representativeness. With the assistance of the State Administrative Office of the Courts, access was granted by district court judges to juvenile court records in each of the twenty counties—a response rate of 100%. In the second stage of sampling, information was gathered from randomly selected juvenile court case records for 210 cases involving 375 children.[59] To be included in the population from which the sample was drawn, an abuse/neglect petition had to have been filed between September 26, 1977, and December 31, 1978, the first sixteen months of operation of the guardian ad litem statute. In order to supplement the case data two additional sets of information were collected. It was felt that the analysis would be improved if we could expand the purview of the inquiry beyond the initial question: Do lawyers make a difference?, to the broader question: Are there specific sorts of attorneys who make a difference? Thus an extensive survey of the attorneys who handled the cases in the primary sample was conducted.[60] In addition to case

[59] Because of financial constraints the fraction of each county's caseload which was sampled varied. In all of the following tabulations and statistical analyses cases are weighted to reflect each county's accurate contribution to the state's abuse/neglect caseload. Thus the sample remains representative of the state as a whole. The final unweighted number of 210 cases was approximately 8.2% of the statewide 1977 abuse/neglect caseload.

[60] Sociodemographic background data (age, sex, race, law school attended) were collected for 103 attorneys of the 108 attorneys who had served as guardian ad litem in our case sample. Ninety-one of the 108 attorneys responded to a phone survey conducted by Samuel Streit, Esq., of the Bush Institute for Child Development of the University of North Carolina at Chapel Hill. Thus completed questionnaires were available for 84% of the attorneys who served our cases and background data were available for 95% of the attorneys. Because of the weighting scheme used for the case data and because several attorneys handled more than one case, usable attorney

and attorney information we also collected comprehensive socio-economic, demographic, social service, and judicial-administrative data about each of the twenty counties. Case level, attorney level, and county data are integrated in the analysis that follows.

C. *The Analysis*[61]

The primary purpose of this analysis was to determine if the presence of a guardian ad litem influenced the following variables: (1) Whether or not the child was removed from its parent(s) or guardian by court action. (2) Whether or not, once removed, the child was returned to the parent(s) or guardian. (3) Whether or not, once removed, the length of time away from home was short in duration or indefinite.

At the same time we also wished to address the more general question: Which factors such as race, sex, and age influence the manner in which abuse/neglect cases are handled by the courts? The factors that were analyzed here may be grouped into the following categories:

(1) Characteristics of the petition which brought the case to court.
(2) Characteristics of the child or children named in the petition.
(3) Characteristics of the court's treatment of the case.
(4) Characteristics of the parents or guardian.
(5) Characteristics of the attorney who served as the guardian ad litem.
(6) Characteristics of the county in which the case was heard.

The variables in each of these categories and the dependent disposition variable are presented in Table 1.

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data could be matched with 130 of the 156 abuse/neglect cases in which attorneys served, constituting approximately 83% of such cases.

[61] Additional information about the analysis can be obtained by writing the authors.

TABLE 1
List of Variables, Their Direction of Variation, Means or Distributions(a)

		Low Score	High Score
Custodial-Disposition Dependent Variables			
V1.	Immediate Custody Order	0 = No 42%	1 = Yes 58%
V2.	No Change in Custody Indicated Either by Immediate Custody Order or Other Court Order	0 = Some Change 87%	1 = No Change 13%
V3.	Custody Returned to Original Guardian	0 = No 68%	1 = Yes 32%
V4.	Speed With Which Custody is Returned to Parents or Original Guardian (b)	Custody Returned in Short Period of Time	Long Term Separation
Characteristics of the Petition Which Brought the Case to Court			
V5.	Poverty-Status Petition Problem	0 = No 48%	1 = Yes 52%
V6.	Violence Petition Problem	0 = No 53%	1 = Yes 47%
V7.	Abandonment/Neglect Petition Problem	0 = No 33%	1 = Yes 66%
V8.	Number of Types of Problems Mentioned in Petitions	Few Mean = 1.9	Many
V9.	Removal Risk: Number of Reasons Cited in Petition	Few Mean = 1.8	Many
V10.	Department of Social Services is Petitioner	0 = No 32%	1 = Yes 68%
Characteristics of the Child (Children) Named in the Petition			
V11.	Black	0 = Not Black 62%	1 = Black 38%
V12.	American Indian	0 = Not Indian 93%	1 = Indian 7%
V13.	Sex of Youngest Child Named in the Petition	0 = Male 46%	1 = Female 54%

Characteristics of the Child (Children) Named in the Petition (CONTINUED)

		Low Score	High Score
V14.	Number of Children Named in the Petition	Few Mean = 1.78	Many
V15.	Average Age of Children Named in Petition	Young Mean = 7.2	Old
V16.	Youngest Child's Age Squared (in months) (c)	Young	Old
V17.	Total Number of Female Children Named in the Petition	None or Few Mean = .89	Many

Characteristics of the Courts' Treatment of the Case

V18.	Appointment of Guardian ad litem	0 = No 26%	1 = Yes 74%
V19.	Total Number of Court Appearances	Few Mean = 1.73	Many
V20.	Total Number of Days in Court Systems(d)	Few Mean = 4.58 (weighted days)	Many

Characteristics of Parents or Original Guardian

V21.	Custodian is Other Than One or Both Parents	0 = No 94%	1 = Yes 6%
V22.	Father is Named as the Source of Problem	0 = No 88%	1 = Yes 12%
V23.	Petition Indicates That Family Has Long History of Problems	0 = No 59%	1 = Yes 41%
V24.	Parents or Guardian Has Counsel	0 = No 76%	1 = Yes 24%

Characteristics of Attorney Who Served as Guardian Ad Litem

V25.	Attorney's Age	Young Mean = 33.2	Old
V26.	Number of Abuse/Neglect Cases Handled by Attorney	Little Mean = 7.7	Much
V27.	Children Matched With Attorneys By Race	0 = No 62%	1 = Yes 38%

Characteristics of Attorney Who Served as Guardian Ad Litem (CONTINUED)

		Low Score	High Score
V28.	Attorney's Time Spent Negotiating (percent)	Little Mean = 8.5	Much
V29.	Attorney's Average Number of Hours Spent on Abuse/Neglect Cases	Few Mean = 10.5	Many

Characteristics of the County In Which the Petition Was Filed

V30.	Number of Neglect Hearings in County Per Capita (1978)	Few Mean = .08	Many
V31.	Degree of Recent Urban Growth (e)	Small Mean = .48	Large
V32.	Degree of Rural Poverty (e)	Small Mean = .51	Large
V33.	Number of New Jobs Created in County Per Capita (1975-1977)	Few Mean = .37	Many

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(a) N = 210

(b) Each of the variables used to create this interaction term (speed of return) has been standardized and augmented by units of 10 in order to produce an equally weighted and unbiased measure. Because the unit in which this term is measured is not in itself interpretable, the mean is not reported here. (See footnote 61).

(c) This term was selected because analysis showed certain curvilinear relationships with the dispositional variables. The average age of the youngest child named in the petition was 77 months or 6.4 years.

(d) This variable is calculated as the number of days from petition date to last date noted on court record and is weighted by the number of potential days the case could have spent in the court system as of the petition date for the period of time under study. Without taking potential days into account, children spent an average of 91.1 days under court supervision.

(e) Factor scores (see footnote 72).

Before turning to additional explanations of these variables, a brief description of the mode of analysis itself is needed. We used a multifactor or multivariate (regression) statistical approach in order to analyze relationships among variables in our data. This technique makes it possible to estimate and evaluate the strength and significance of the independent contributions of a number of factors to the explanation or prediction of a dependent variable. Thus, for example, the unique effect of the presence of an attorney on return of custody can be measured while taking into account or controlling for the effect of other factors such as the type of problem noted in the petition or the age of the child named in the petition.[62] A multivariate analysis allows the researcher to examine all or most of the variables which influence a given dependent variable, thereby making it possible to reduce the likelihood that the impact of one independent variable is spuriously attributed to another independent variable because either is excluded from analysis. In the analysis reported here it is possible to be relatively confident that when we attribute an impact to the presence of a guardian ad litem in the custodial disposition of the cases, this impact is not an artifact produced by some excluded variable.

The need to include certain variables in our analysis is unambiguous. Most explanatory models of any social process will include measures of race, sex, age, and similar dimensions of members of the population being studied. However, the inclusion of other measures and the techniques by which they were developed warrant additional comment. We wanted to differentiate among the cases as precisely as possible with respect to the nature of the problems which appeared on the petition. These problems were grouped into the following five catagories:

1. Substance Abuse: drug or alcohol abuse by parents, boyfriends, or guardians.
2. Violence/Physical Abuse/Sexual Abuse: father beating wife or child; threat of violence with firearms; father-

[62] Three of the four dependent variables that are analyzed in this report are binary in nature, that is they can take on only two values, 0 and 1. Log linear or logit approaches to multivariate analysis would be preferable to ordinary least squares regression because the dependent variables are binary. However, because our sample size is small, and because the complexity of court survey data quite literally requires multivariate analysis we have used ordinary least squares to estimate our models. *See* D. KLEINBAUM & L. KUPPER, APPLIED REGRESSION ANALYSIS AND OTHER MULTIVARIABLE METHODS (1978).

daughter sexual relation; child is bruised, burned, has broken bones.

3. Poverty/Status:[63] parents unemployed or unable to support child; home lacks utilities, is unclean or overcrowded; mother takes children to school late and doesn't pick them up on time; mother sells moonshine; mother lives with boyfriend.
4. Abandonment/Neglect[64] (not clearly related to poverty): mother in jail; parents' whereabouts unknown; child left with unfit custodian; mother does not want child; children get no care.
5. Removal Risk: a combination category which includes all cases of physical harm to the child (boyfriend raped child, child burned) and cases in which the child was lacking a caretaker (mother abandoned child, custodian too sick to care for child).[65]

Including variables of this type is important because substantial social science literature, in addition to common sense, indicates that the nature and severity of the problem or charge which brings a case to court should influence the manner in which the case is disposed.[66]

We included in our models three variables which describe the manner in which the courts, as organizations, handled cases of abuse and neglect. The most important of these was whether or not a guardian was appointed. Also, we sought an indicant by which to gauge the

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[63] Virtually all our cases involved poor families, but this category is for those cases in which poverty was an overt problem. "Status" problems were combined with "poverty" problems because initial analysis indicated that the two categories were indistinguishable in their predictive impact on dispositions.

[64] There was a certain amount of overlap in the North Carolina statutory definitions of "neglected" children and "dependent" children. Since some judges interpreted the category of neglect more broadly than others, children who were classified as "neglected" in one county might be classified as "dependent" in another. We accepted these classifications as we found them. Since the guardian ad litem statute applied only to "neglected" children, "dependent" children were not included in our sample.

[65] The measures of substance abuse, violence, poverty/status and abandonment/neglect indicate whether or not the specified problem was ever mentioned in the petition. The removal risk variable counts the number of reasons mentioned in the petition which might justify removal.

[66] *See* Clarke & Koch, *Juvenile Court: Therapy or Crime Control, and Do Lawyers Make a Difference*, 14 LAW & SOC'Y REV. 263 (1980); Scheurer & Bailey, *Guidelines for Placing a Child in Foster Care*, in THE BATTERED CHILD (Kempe & Helfer eds. 3d ed. 1980).

degree of court activity in each case. The best proxy available for such an indicant was the total number of times that each case made an appearance in court. The number of days a case spent in the court system was also considered.

Inherent in the very notion of child abuse and neglect is the fact that children do not come before the courts as individuals but rather as members of troubled families. Thus, one category of variables includes measures of who the child's custodian was at the time that the petition was filed, whether or not the petition indicated that the family had a long history of problems and which custodian or parent was specifically named as the source of the problem.[67] Also included in this category is a variable which measures whether or not the parents themselves had legal counsel.[68]

Another set of variables measures various characteristics of the lawyers who served as guardians ad litem.[69] Included in this grouping are background measures on the attorney such as age, as well as measures of the attorney's experience and performance as a guardian ad litem. These measures are used to ascertain not only if "any" attorney has an influence upon custodial disposition, but also the sorts of attorneys as persons and practioners who influenced the disposition of abuse and neglect cases. It is hoped that information of this sort will be useful in the process of selecting and training guardians ad litem in the future.

The last category of variables contains indicants that may be referred to as structural or contextual variables in that they measure

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[67] Unfortunately we were unable to find consistent and reliable information on the age of mothers or fathers.

[68] The importance of attorneys for parents is discussed in Comment, *Representation in Child-Neglect Cases: Are Parents Neglected?*, 4 COLUM. J.L. & SOC. PROB. 230 (1968). At the time of our study indigent parents were not entitled to counsel. Parents therefore had to either employ counsel or be in a locality served by a legal aid office.

[69] Because attorneys were not appointed in 26% of the cases, there are missing scores for these cases on attorney-level variables. In order to minimize the loss of cases in our regression analysis we assigned the mean ($\bar{x}$) value from appointed attorney cases on these variables to the nonappointment cases. This procedure should minimize serious bias in our models. An additional difficulty with respect to the attorney variables is that the attorneys were asked about their general experiences as guardians and not about specific cases. Thus, while in our analysis we tie attorneys' responses to the specific cases in which they served, the attorneys themselves were not prompted to respond in terms of specific cases.

variations in the counties and court systems where the cases were heard. A number of researchers have recently argued that legal evaluation studies must be sensitive to such environmental influences.[70] Similarly, child maltreatment research has indicated that measures of community resources as well as socioeconomic and demographic conditions are important predictors of abuse and neglect.[71] In the analysis we scrutinized a large number of county-level measures and their relationship to the custodial disposition of our cases.[72] Among the significant measures in this grouping were the county's abuse/neglect caseload and measures of urbanization and economic conditions.

In the next four sections we describe which variables contributed

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[70] K. DOLBEARE, POLITICAL CHANGE IN THE UNITED STATES: A FRAMEWORK FOR ANALYSIS (1974); Brown & Crowley, *The Societal Impact of Law: An Assessment of Research*, 1 LAW & POL'Y Q. 253 (1979).

[71] D. GIL, VIOLENCE AGAINST CHILDREN (1970); Gargarino & Crouter, *Defining the Community Context for Parent-Child Relations: The Correlates of Child Maltreatment*, 49 CHILD DEV. 604 (1978); Zigler, *Controlling Child Abuse in America: An Effort Doomed to Failure*, in CRITICAL PERSPECTIVES ON CHILD ABUSE 171, 191-95 (Bourne & Newberger eds. 1979).

[72] We originally coded over 140 pieces of information concerning each county. Each of the variables was then collated with the specific county in which each of the 210 cases in the sample had been heard. We used the most reliable county level data available contemporaneous with the study time period. Because county-level socioeconomic, social service, and sociodemographic factors tend to be highly interrelated and therefore often redundant, and because we had so many county-level measures relative to our sample size, we employed factor analysis as a data reduction technique in order to produce a small number of county level dimensions to be used in the analysis of custodial disposition. County-level variables used in the factor analysis were: percent of total county land classified as farm land; percent of total county land classified as urban; percent of population nonwhite in 1976; 1976 unemployment rate; percent of population receiving AFDC in 1977; 1976 population; percent of population Indian in 1976; percent population change, 1970-1977; 1975 county unemployment rank; 1970 children per capita; 1975 per capita income; 1978 juvenile court appearances per capita; 1978 assigned counsel expenditure per capita; 1974 infant mortality per capita; 1974 Headstart enrollment per capita; 1974 preschool programs enrollment per capita; 1976 percent change in district court indigency expenditure. These variables were chosen for inclusion because they encompass several broad dimensions that we wish to represent in our analysis, namely demographic variables, economic variables, court system variables, child and child social service variables, welfare-poverty variables, and health variables. We found that the factor analysis yielded four interpretable dimensions. The first dimension gauges the extent to which counties have large minority populations and extensive social problems such as delinquency and AFDC. The second dimension measures the county's economic climate. The third factor measures the counties' degree of urban population growth and the fourth factor measures rural poverty. Each of these factors was transformed into a variable and entered in the various regression models presented in the body of this report. A full description of the factor analysis discussed here is available from the authors upon request.

significantly to the explanation of: (1) whether or not the court issued an immediate custody order; (2) whether or not custody was *ever* removed (either by immediate custody order or other means); (3) whether or not, once removed, custody was returned; (4) whether, once removed, custody was quickly returned to the parents or removal was continued for an extended period of time.[73] In each regression model an attempt was made to include those variables which explained in the best and the most parsimonious fashion the particular custodial disposition under consideration.[74] Because of our interest in the impact of guardians ad litem, the variable which measures whether or not an attorney was appointed is included in each model regardless of its statistical significance. Also included in each model is the petition problem variable which measures the degree of removal risk which appeared in each petition.[75]

One methodological and substantive issue which is central to the analysis of custodial dispositions is some comprehension of the factors which determined whether or not attorneys were appointed to serve as guardians ad litem for the cases in our sample. It will be recalled that appointment was not strictly required, and in fact, for the sixteen month period which was studied attorneys were not appointed in 26% of all cases.

Since our goal was to assess the unique and independent impact of the guardian ad litem on disposition, we wanted to reduce the likelihood of attributing influence to an attorney's presence when that influence was the result of a correlation between some extraneous factor and the fact of the appointment of an attorney. A regression analysis was performed in order to ascertain which county-level and case variables were associated with the appointment of attorneys. By far the most powerful predictor of appointment was the date of the petition. Since further analysis revealed there was no significant relationship between the petition date and any other independent variable used

[73] In addition to the variables listed in Table 1 numerous other indicants were studied in order to assess potential contributions to the prediction of dependent dispositional variables. However, only those variables which exercised some influence on disposition variables are included in the present Article.

[74] To be included in a regression model variables had to meet the following criteria: (1) a statistical significance level of .05 or .10 in cases in which the variable was of particular substantive interest; and (2) a causal priority over the dependent dispositional variables.

[75] Each type of petition problem, as well as their first and second order interaction, was examined for possible inclusion in each regression model.

in our analysis, it is reasonable to believe that the variable which measures whether or not an attorney is appointed can be interpreted in a quasi-experimental way. Thus, we feel justified in asserting for our subsequent analysis that any influences attributed to the presence of an attorney ought to be considered as approximate experimental treatment effects.[76]

Returning briefly to the issue of the appointment of guardians ad litem the question might be posed, why were the odds of non-appointment so much greater during the first months in which the program operated? From a sociological perspective judicial systems are, above all else, bureaucracies and bureaucracies typically respond slowly to innovation and its implementation. This tenet apparently obtained in the case of the North Carolina guardian ad litem statute as it has been shown to obtain in other legal settings.[77] After the first three months in which the program operated the odds of appointment went from one in two to four in five.

1. Factors Affecting the Use of Immediate Custody Orders

The decision to issue an immediate custody order was the earliest point in a neglect proceeding at which a custodial decision could be rendered by the court. Although guardians ad litem generally were not appointed prior to the issuance of immediate custody orders, it was useful to examine the factors underlying the immediate custody order decision as a background to our analysis of the influence of guardians ad litem on subsequent custodial dispositions. In a surprisingly high number of cases (58%) in the sample children were removed by immediate custody order. We therefore considered the question: What factors were associated with the court's decision to remove custody

[76] Note that, as had been mentioned previously, multivariate analysis also has the effect of controlling for spurious effects.

[77] S.L. WASBY, SMALL TOWN POLICE AND THE SUPREME COURT (1977). In a report now in preparation we present a detailed discussion of other factors which are associated with the appointment of guardians ad litem. Several studies on the implementation of the Supreme Court's procedural requirements in *In re* Gault have documented the resistance of both rural and urban courts to change. *See, e.g.*, Cannon & Kilson, *Rural Compliance with Gault: Kentucky, a Case Study*, 10 J. FAM. L. 300 (1971), and Lefstein, Stapleton & Teitelbaum, *In Search of Juvenile Justice: Gault and Its Implementation*, 3 L. & SOC'Y REV. 491 (1969). Of the several other factors which influenced the likelihood of appointment, it is sufficient to note at this point that each such factor was entered and tested for significance in each of the dispositional regression models.

in the most expeditious method provided for by the law? Table 2 reports the results of a regression analysis which examined this question.

TABLE 2
Regression Model of Factors Influencing the Issuance of Immediate Custody Orders

Independant Variables	Standardized B Coefficients (Unstandardized b)	Level of Statistical Significance
Poverty/Status (V5)	-.158 (-.156)	.02
Removal Risk (V6)	-.028 (-.019)	.67
DSS Petitioner (V10)	.276 (.290)	.0001
Black (V11)	.118 (.120)	.06
American Indian (V12)	.231 (.438)	.002
Number of Children (V14)	-.118 (-.049)	.08
Average Age (V15)	-.140 (-.013)	.04
Nonparental Custodian (V21)	-.162 (-.323)	.01
Father Source of Problem (V22)	-.119 (-.178)	.09
Rural Poverty (V32)	-.226 (-.048)	.001

Variance Explained (R^2) = .246

N = 210

Looking just at the impact of petition problems, we found that the only type of problem which had a significant impact was the poverty /status category. This impact was negative, indicating that those cases

in which a poverty or status problem was noted at least once in the petition were less likely to result in immediate removal. It appears that family problems related in some manner to these issues were less likely to be perceived by the court as requiring drastic action or as able to benefit by such action. Two other points should be made. First, two other types of petition problems, violence and substance abuse, which had been expected to have a strong positive influence on the immediate custody order decision, were found to have no influence either alone or in interactions with other petition problems. Second, a high removal risk had no impact on the decision to remove custody immediately. Cases with high removal risk were as likely not to be removed as cases with little risk.[78]

When the neglect petition was instigated solely by a county department of social services the likelihood that custody would be removed immediately was much greater. In positing an explanation of this result, it should be recalled that any significant differences in sociodemographic characteristic among cases in the various petition categories have been controlled. It appears that the courts were more responsive to requests for immediate custody changes when the request came from the social service system than from relatives or friends of the children or other parties. Perhaps the courts viewed social services as a more dispassionate, objective, and professional source of evaluation for a given child's condition. This finding is similar to that reported by Clarke and Koch in their study of the juvenile justice system in two North Carolina counties. In particular, they found that when probation officers were the complainants in juvenile cases there was a greater likelihood of the child being adjudicated delinquent.[79]

Three characteristics of the children themselves influenced the probability that an immediate custody order would be issued. In cases in which the average age of the children was high it was less likely that the courts would issue immediate custody orders. Presumably, the court's action reflects a belief that older children are not as vulnerable as younger children and therefore less in need of speedy intervention. Older children require less care, they are better able to communicate their needs and to protect themselves. Both Black and Native American children were more likely than white children to be removed by im-

[78] We had expected that cases with high removal risk would be more likely to be removed. *See* Scheurer & Bailey, *supra* note 66, at 303.

[79] Clarke & Koch, *supra* note 66, at 287.

mediate custody order and Native American children were more likely than Black children to be removed in this fashion. It is not uncommon in the study of social processes to find an enduring and potent effect which derives from racial factors, and the legal system appears to be no exception. Black and Native American families may be more vulnerable to interventions of this type because the courts view such families as typically disrupted and therefore in need of therapeutic treatment.[80] Treatment-oriented ideologies of this sort may be used, especially in juvenile and family courts, to justify what is, in effect, an interventionist approach to the treatment of Blacks and Indians.[81] While Blacks constituted 38% of our sample their share of North Carolina's population in 1980 was 22.4%. American Indians constituted seven percent of our sample and slightly over one percent of the state's 1980 population. The number of children included in the neglect petition was also found to substantially affect the decision processes leading to an immediate custody order. Cases involving more than one child (the average number of children per case in the sample is 1.8) were less likely to result in a removal by immediate custody order. A number of factors may account for this finding. The courts may take the view that there is strength in numbers; that where there are many children it is more likely there will be older children and the children will be able to look out for each other.[82] The courts may also be constrained by a limited supply of multi-child placements and the distasteful possibility of separating siblings if there is a decision to remove.

Two characteristics of the child's parents or guardian influence the probability that an immediate custody order will be issued. When the child's father was identified as the major source of the problem which resulted in the neglect petition the chances that an immediate custody order would be issued were somewhat reduced. This relationship may be explained by the fact that the courts probably view mothers rather than fathers as the primary caretakers of the children, so that a father's misdeeds were not considered to be as serious as a mother's.

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[80] *Id.* at 291.

[81] Clarke and Koch present a similar discussion of race in their study of juvenile courts although they found no significant racial effects. *Id.* It should be noted, however, that Clarke and Koch studied two of the most urbanized counties in North Carolina, while our study is representative of the state as a whole.

[82] In fact is is not uncommon for just one child in a family to be singled out for abuse ("scapegoating") while other siblings are not mistreated and do not, and probably could not, prevent the abuse. *See* R. KEMPE & C. KEMPE, CHILD ABUSE 13 (1978).

Also, if the parents were not living together, the mother usually had custody so that removal of custody from the mother would appear to serve no useful end. It was also found that in cases where the child's custodian was neither parent it was less likely that an immediate custody order would be issued. It should be noted that in such cases custody, by whatever means, already had been removed from the biological parents. We suggest that these children were seen by the court to be in the therapeutic care of relatives or friends and that these custodians were seldom the source of the petition problem.

The last factor which evidenced some influence on the immediate custody decision was the structural county-level measure referred to as rural poverty. In sparsely populated counties that experienced growth in per capita indigency case loads and expenditures (1975-77) in their court system, the likelihood of issuing immediate custody orders was reduced. It may be argued that in such counties the court system and probably the social service system are pressed for resources with which to handle immediate custody order cases. That is, in these counties there may be both an increase in the demand for court and social services and an implicit scarcity of these services due to the rural nature of the county. Under such conditions it is reasonable to assume that both the courts and departments of social service will be less likely to call upon the additional custodial services required when an immediate custody order is issued. Similarly, it may be argued that removal in a rural setting is more difficult for the courts and social service agencies to manage because of the distances and isolated conditions involved. Removal is also a more punitive measure for the parent and child in a rural setting because distances may prevent family therapy and visitation. All of these rationales may account in some measure for the relationship between rural indigency and issuance of a custody order. The section which follows describes the analysis of the processes by which custody is removed either by an immediate custody order or at a later stage in a dispositional hearing. The relationship between rural indigency and removal by immediate custody order remains rigorous even under the expanded definition of removal.

2. *Factors Influencing the Decision Not to Remove Custody from Parents or Custodian*

In only 13% of the cases was there no change in custody either at the immediate custody stage or later in the proceedings. Since this category includes some dismissals, it is clear that non-removal after

a finding of neglect was rare indeed. We were very interested in whether the presence of a guardian ad litem had the effect of reducing the court's highly interventionist tendency, since preventing unnecessary removals was one of our criteria for beneficial representation. As Table 3 indicates, we found that the presence of an attorney in no way influenced the probability that custody would remain unchanged. In the conclusion of this Article we suggest an explanation for this discouraging result.

Although the mere presence of the attorney overall had no effect, certain characteristics of the attorneys did; namely race, experience as guardians ad litem, and age. In cases where there was a racial match between the attorney and client, white attorneys with white children, Black attorneys with Black children, the odds that custody would be removed were substantially reduced. The explanation of this phenomenon may lie in the fact that race remains a substantial social and communicative barrier and consequently, where no barrier exists among attorney, client and parents, greater degrees of empathy and cooperation may help to avoid a drastic custodial disposition such as removal. A body of social scientific research on racial and ethnic matching between interviewers and interviewees suggests that mismatches often introduce systematic bias into communication.[83] Since so much of the attorney's trade and craft is premised on the ability to correctly read the intent of the client, it is understandable that racial matching should demonstrate some influence. It appears that the influence of matching is beneficial since it results in a reduced tendency to separate children from parents.

Another attorney characteristic that affected the custody decision was the amount of experience with abuse and neglect cases the attorney possessed. Attorneys who had worked on relatively few neglect cases were associated with cases in which there was no removal. Two explanations may account for this relationship. In cases where changes in custody did not appear likely there may have been a tendency to select less experienced attorneys since the consequences for the child would not be markedly disruptive. Abuse and neglect cases in which there was no removal of custody might in fact have served as an informal training ground for guardians ad litem. A second possible explanation focuses on the interaction between organization expectations and role playing. An attorney who has had relatively little experience as a guard-

[83] *See* Dohrenwend, Colombotos & Dohrenwend, *Social Distance and Interviewer Effects*, 32 PUB. OPINION Q. 410 (1968-69).

ian may have a smaller stake in conforming to the expectations of either the court or social services and hence may tend to be more independent and critical. On the other hand attorneys who do significant amounts of guardian ad litem work may more readily respond to external institutional expectations that custody should be removed. Additionally, in cases where a young attorney was appointed, even if the attorney had experience with neglect cases, the likelihood of removal was substantially reduced. It may be inferred that younger attorneys, more recently graduated from law schools, are more likely to be aggressive in the prevention of custody changes. As in the case of attorneys with less experience, young attorneys are probably less likely to have developed stakes in conforming to interventionist institutional expectations.

In addition to looking at the influence of the guardian ad litem, we also considered what other factors influenced the probability that custody would remain unchanged. As was the case with the issuance of immediate custody orders, we found that the identity of the petitioner was influential. If the county department of social services was the petitioner, the likelihood of removal increased markedly. All other things being equal, including the nature of the problem which brought a child to court, cases referred by social services as compared to those brought by any other petitioners resulted in more drastic custody determinations.

Only one of the petition problems examined had a significant impact on whether or not a child was removed from its parents. When abandonment/neglect was alleged the likelihood of removal was enhanced. As was indicated in the preceding section on immediate custody orders, we had expected that cases with physical violence or sexual abuse and cases in which there were many justifications for removal would be more likely to result in the child being removed from the home. But again, as in the case of immediate custody decisions, the expectation was frustrated. Table 3 shows that while both violence and removal risk have the anticipated negative sign, neither is statistically significant. Children with high or low removal risk were equally as likely to remain with their parents as to be removed from them.

Two other factors which are significant in predicting non-removal were also significant in predicting immediate custody orders. The identification of the father as the source of the problem increased the odds that no removal would occur just as this factor was significant in predict-

ing that there would be no immediate custody order. This relationship is fascinating as much for its ambiguity as its statistical significance. Is it that the courts are patently sexist and simply refuse to accept that fathers can seriously imperil the lives of their children? Or, as was suggested earlier, is it that, while the fathers are the source of the problem, the mother is present and nurtures the child, and thus to remove the child from the troublesome father's care would unjustly punish the mother and deprive the child of its mother's care? It is suspected that some combination of these two explanations accounts for the tendency of courts to be more lenient when fathers are the source of the problem.

Finally in sparcely populated poor rural counties there was a greater tendency to avoid removal. This type of county was also less likely to have immediate custody orders issued and our explanations for these results are the same as those set forth in the preceding section on immediate custody.

Table 3
Regression Model of Factors Influencing the Decision Not to Remove Custody from Parents

Independent Variables	Standardized B Coeffecients (Unstandardized b)	Level of Statistical Significance
Violence (V6)	-.095 (-.063)	.189
Abandonment-Neglect (V7)	-.133 (-.092)	.063
Removal Risk (V9)	-.055 (-.025)	.439
DSS Petitioner (V10)	-.250 (-.177)	.001
GAL Appointed (V18)	.009 (.007)	.898
Father Source of Problem (V22)	.184 (.186)	.006
Attorney's Age (V25)	-.226 (-.018)	.001

Independent Variables	Standardized B Coeffecients (Unstandardized b)	Level of Statistical Significance
Attorney's Experience (V26)	-.119 (-.005)	.076
Racial Match (V27)	.136 (.092)	.066
Rural Poverty (V32)	.154 (.022)	.018

Variance Explained (R^2) = .21

N = 210

3. *Factors Affecting the Return of a Child to Its Parents or Original Custodian*

The third major dispositional category was a removal of custody from the parent with a subsequent return.[84] In this analysis (see Table 4) the factors which did not influence the disposition were as interesting as those which did.

Disappointingly, the analysis, at least during the time period of this study, indicated that the presence of an attorney representing the child had no significant impact on the odds that once removed, custody would be returned.[85] Note that this conclusion is drawn from an analysis that controlled for other significant factors which might influence the separation and reunion of children and their families, in particular the nature of the problems which brought the case to the court's attention.[86] Note also that we have controlled for the number of days in which

[84] For the purpose of this analysis the 31 cases in which there was no custody change were removed from the sample.

[85] Since our study was not longitudinal, we do not know whether custody was ultimately returned in those cases in which no return was accomplished by the time we took our sample. Cases which were placed in a "no return" category had been out of the home for a minimum of three months, and usually substantially longer.

[86] In order to test this conclusion under more rigorous conditions we looked only at those cases in which poverty/status was a petition problem. Within this group, it might be argued that removal of custody was least justified and therefore presented a condition in which guardians ad litem could be most effective by facilitating the reunion of parent and child. Even under this set of conditions, we found the presence of an attorney in no way altered the odds that custody would be returned.

the case was under the court's supervision, thus reducing the potential bias involved in an analysis of cases that were in the system for both short and long periods of time. In an attempt to explore why attorneys made no difference, certain activities of the guardians ad litem were taken into consideration. Attorneys were asked to estimate proportionately the amount of time they spent negotiating in neglect cases, as compared to other activities such as investigative work, legal research, court appearances, and consultation with social service workers. On average, attorneys spent only 9% of their time negotiating, compared to 24% in court, 34% in investigation and 23% in consultation.[87] It was found that time allocations in all categories other than negotiation were inconsequential to custodial decisions. But, in cases where attorneys allocated greater periods of time to negotiation, they were less likely to produce a reunion of parents and child. It is possible to interpret this relationship by viewing the amount of time negotiating as a proxy for the degree to which attorneys took a non-adversarial role. As such, the attorney was least able to cause a reunion of parent and child and instead added a bureaucratic impediment to return.

Another unanticipated finding in the analysis was that, for the most part, the type of petition problems had little influence on the return of children. Only one of the petition problems significantly altered the odds that custody would be returned to the parents or original guardians and this effect, while significant, was rather weak. During the period of the study, when the petition cited abandonment/neglect types of problems the likelihood that custody would be returned was reduced. Abandonment/neglect cases often involved parents who needed extensive and long-term social services which may not have been readily available. This may be why such parents were less likely to be reunited with their children. We were surprised again, however, by the fact that violence cases were no less likely to be returned than, for example, poverty/status cases. Similarly, we found that our removal risk indicant was in no way related to the propensity of the court to return custody to the parents or guardian.

To summarize our findings about petition problems thus far, cases in which abandonment/neglect was alleged were the most likely to cause a child's removal from parental custody and the least likely to produce a return. With the one other exception that poverty/status cases

[87] The remaining 10% of their time was allocated to miscellaneous categories which are uninterpretable.

were less likely than other cases to cause a removal by immediate custody orders, no other petition problem (or their various interactions) was found to influence custody removals or reunions.

Petition problems then did not have a strong impact on return. But what did? One powerful influence was the number of hearings in a case. The more hearings that were held, regardless of how many days a case had been under court supervision, the more likely it was that custody would be returned. Court appearances may be taken as a measure of the intensity of court and social service interest and degree of supervision of a case. In cases where monitoring is close, the likelihood is greater that services for the child and family will be provided, improvements in conditions will be noted and families reunited. Court appearances may also be a measure of parents actively seeking to get the child back. This possibility is supported by the fact that parents who had legal counsel were more likely to have their children returned.[88] Possibly the parents who knew how to get their cases reviewed, either on their own or with counsel, were more successful in getting their children back.

Another procedural aspect of the case which predicted return is the issuance of an immediate custody order. Although we had anticipated that return would be less likely in immediate custody cases, in fact the opposite was true—a child was more likely to be returned home if the child had been removed by an immediate custody order. This result makes more evident the error in our original assumption—namely that the immediate custody cases would be those in which the home situation was the most dangerous and irremediable. Instead, immediate custody orders were used in all kinds of cases. But why should the child who was removed by an immediate custody order ultimately be more likely to be returned? A discouraging explanation would be that the immediate custody procedure is misused by social services to convince a family to be cooperative, reminiscent of the farmer who uses a two-by-four to attract his mule's attention before telling it to plow. A less Machiavellian but no more hopeful explanation would simply be that this is but one more bit of evidence that the system is irrational. A more charitable and rational explanation is that the factors which go into a decision to take immediate custody are dif-

[88] A study conducted in 1962 by the Columbia Journal of Law and Social Problems reports similar findings concerning parents who have legal representation in neglect cases. *See supra* note 68, at 242.

ferent from those which control a final disposition. In the former, the overriding concern is what to do with a child who temporarily is not receiving adequate care; in the latter, the prevailing problem is whether an identified caretaker is capable of providing an adequate environment for the child. That there is no more overlap of significant factors in these two decisions is surprising, however.[89]

A final variable related to procedure which had predictive value in a negative direction is a weighted measure of the number of days spent by each case in the court system from the time that the petition was filed until the last noted court appearance. The longer the case was in the judicial system the less likely it was that custody had been or would be returned.[90] Conversely, if custody was not returned early in the case, it was likely that it was going to take a long time to accomplish the return. We may view this relationship as akin to a "creaming" phenomenon, in which cases with the highest potential for return are creamed off and returned early in the bureaucratic remedial process. This phenomenon is quite different from the one noted earlier in this discussion that the total number of appearances of a case in court was positively associated with return of custody. The possibility exists that, all other things being equal, those cases which spend long periods of time in the system are the forgotten, foster home placements.

In addition to these procedural matters, other aspects of cases had an influence on return. Two characteristics of the children in the North Carolina sample influence the likelihood of reunion. The older the youngest child named in the petition the more probable it was that the children would be reunited with their parents. Probably underlying this relationship was the belief by the courts that older children have more defenses and opportunities to call upon aid should conditions in their home deteriorate once they are returned. It should be recalled that in a previous model, we found that the average age of the children named in petitions was negatively associated with the issuance of an immediate custody order. It can thus be concluded that age is one of the consistent elements in any type of court custody decision. We also found that families were more likely to be reunited when one or more

[89] *See* Drews, *Child Protective Services*, in THE ABUSED AND NEGLECTED CHILD MULTI-DISCIPLINARY COURT PRACTICE 87, 108-16 (D. Besharov Chairman 1978).

[90] It has been documented elsewhere that the longer a child stays in foster care the more likely it is that he will not return home. *See, e.g.*, Fanshel, *The Exit of Children from Foster Care: An Interim Research Report*, 50 CHILD WELFARE 65 (1971).

of the children in the petition was female. It appears that the courts implicitly took the stance either that girls would suffer greater deprivation when separated from parents or that they would be less likely to be harmed by a return.

We found that only one characteristic of the children's families significantly influenced the chances that custody would be returned. In cases where court records indicated that the family had a long history of problems, the likelihood of reunion was substantially reduced. The courts appear to use the familial past record as an indicant of how likely it is that a reunion of the family will be successful. Such risk assessments are commonplace in court behavior. For example, Clarke and Koch found that a prior record (in combination with an indicant of current offense seriousness) was a strong predictor of disposition of a case, especially affecting the decision of the court to commit a child to training school.[91]

A final and powerful determinant of the decision to return custody was the type of county in which the case was handled. In counties which were heavily populated and which were experiencing substantial population growth in the 1970's, the odds were substantially greater that custody would be returned. Several factors may explain this relationship. First, in such "urban growth" counties the demand for out-of-home placements may exceed supply. Thus, pressure would exist to reunite families as rapidly as possible in order to attenuate any supply/demand disequilibrium. Further, it could be that in urban growth counties whose social service and court systems have grown rapidly in recent years, the currently popular ideology of "speedy reunion" of families would be stronger than in less demographically dynamic counties. Certainly, one would expect that social service agencies in such counties, agencies upon whom a court often relies in evaluating the advantage of returning custody, would have a larger proportion of new and recently trained professionals than the agencies found in poorer, more rural, counties.

[91] Clarke & Koch, *supra* note 66, at 285.

Table 4
Regression Model of Factors Influencing the Decision to Return a Child's Custody to Parents or Custodian

Independent Variables	Standardized B Coefficient (Unstandardized b)	Level of Statistical Significance
Immediate Custody Order (V1)	.199 (.205)	.003
Abandonment-Neglect (V7)	-.131 (-.137)	.048
Removal Risk (V9)	.005 (.003)	.940
Age Squared (V16)	.240 (.001)	.000
Number of Female Children (V17)	.191 (.116)	.004
Guardian Appointed (V18)	-.025 (-.027)	.705
Total Appearances (V19)	.273 (.170)	.001
Days in System (V20)	-.222 (-.020)	.009
History of Family Problems (V23)	-.139 (-.152)	.034
Parent Represented by Attorney (V24)	.166 (.188)	.012
Guardian's Time Negotiating (V28)	-.210 (-.013)	.002
Urban Growth (V31)	.337 (.084)	.000

Variance Explained (R^2) = .34

N = 179

4. Factors Affecting the Speed of The Child's Return Home

The final aspect of disposition to be discussed is the speed with which a child's return home was accomplished (Table 5). Our measure, an interaction term, distinguishes between cases which were returned quickly to parents or guardians and those cases in which, even after an extended period of time, reunion had not been accomplished. Using this criterion, the presence of a guardian ad litem had a discouragingly negative effect. The presence of an attorney was associated with *longer* rather than *shorter* separations of parents and children. Returns took an average of 76 days when children did not have attorneys, compared to 102 days when they did. This represents an increase of almost one month or 35%. In this analysis we controlled for the influence of other significant factors which might affect the speed of return, including the problems listed in the petition. Although disappointing, this result is not surprising since the appointment of guardians ad litem does add another bureaucratic layer to the system. Additional delay could result, for example, from the process of appointing the attorney, from the attorney needing additional time prior to a hearing to prepare his case, and from conflicts in the attorney's schedule which might necessitate postponements.

Our analysis, however, did find one positive aspect of attorney representation. When variations among the guardians were examined, we found that attorneys who spent more total hours on their cases did speed up the return of the child. This is encouraging because it indicates that an attorney willing to commit more time to cases could not only overcome the tendency for bureaucratic delay, but also could effect a quicker return in spite of judicial interventionism. This finding also indirectly lends support to one of the standards of benefit that we established, speed of return. It is reassuring to see that the hardest working attorneys were able to accomplish an outcome which we had postulated as beneficial.

While the mere presence of a guardian ad litem appears to have retarded the process by which children were returned to their parents overall, when the parents themselves had an attorney, they were able to expedite reunion.

Although we had anticipated that there would be a relationship

between the kind of petition problem and the speed of return, none of the petition problems (or their various interactions) had a significant impact on speed of return. Cases involving violence or substance abuse were as likely as cases involving poverty or abandonment to result in a quick return or long-term foster care or a similar arrangement for the children involved. Likewise, our measure of removal risk had no impact on speed of return. However, a speedy return was less likely in cases when more petition problems of different types were mentioned in the petition (without regard to their seriousness). These multi-problem families or cases would be those in which parents would have to correct many different problems before they could prove they could now provide "proper care and supervision,"[92] so that their child will be returned. Apparently, in the court's judgment this was more difficult than correcting more serious, but fewer, problems. A speedy return was also less likely in cases which had a history of problems with the court or department of social services. In these cases, the parents may have had long term problems which had not yet been remedied in spite of official intervention. Both situations might well require varied and intensive services in order for the parents to meet the expectations of the court and department of social services.

Another factor which was significant in predicting a quicker return was the issuance of an immediate custody order. Just as it seemed incongruous to have immediate custody predict return, it also seemed strange to have the issuance of such an order predict a faster return. Apparently, in a number of cases in which immediate custody orders were issued, solutions were readily obtainable, notably to the satisfaction of the main source of immediate custody order requests, the department of social service.

Two characteristics of the children predicted a speedy return. First, older children were returned more quickly than younger children. As was suggested in the preceding section on return, it seems that the courts felt older children were less at risk and more able to defend themselves than younger children. Second, when the youngest child named in the petition was female, a speedy return was more likely. This factor also predicted return, and, as was suggested in subsection 3, above, the courts may have felt that girls were less likely to be harmed at home,

[92] N.C. GEN. STAT. § 7A-286 (1977) (replaced by N.C. GEN. STAT. § 7A-657 (1981)).

or perhaps that they would suffer more if separated from their parents. Here again we see a tendency on the part of the courts, rightly or wrongly, to use sex as a factor in deciding custody issues.

Three characteristics of the counties in which the cases were heard influence the speed of return. The more neglect hearings per capita (1978) handled by the court, the more likely it is that return will be swift. Apparently, heavy court caseloads produce an incentive for the courts to return custody swiftly. The underlying dynamic of this relationship may well be that counties with heavy caseloads put excessive demands on the available supply of alternative placements. One method which the courts or the departments of social services apparently used to ease this disequilibrium was to hasten the return of custody to the parents or original guardian, thus easing the relatively low supply of alternative placements. A similar phenomenon may help to explain a second finding; namely that children in cases which were heard in counties experiencing substantial recent population growth were more likely to be returned quickly to their parents. Again, such counties may represent instances in which "speedy reunions" ease an excess demand for alternative placements over the available supply. In the previous section we found that return of custody, regardless of any time factor, was more likely in densely populated growth counties.

The final county-level variable which was found to affect the speed of return was a per capita measure of new employment opportunities in the counties. While a strong positive relationship between economic growth and population growth might be expected, our analysis controlled for this interrelationship and thus identified independent economic and demographic effects. The independent effects emphasized the strong influence supply of and demand for out-of-home placements have on custody decisions. In counties with little or no economic growth, there is a tendency to return custody more rapidly. It is reasonable to argue that poor and economically stagnant counties will be counties where the courts are least willing to shoulder the costs of extended placements. Thus, economic consideration may well motivate the courts in poor counties to limit the costs which extended placements entail.

TABLE 5
Regression Model of Factors Influencing the Speed of Return of Child's Custody to Parents or Custodian

Independent Variables	Standardized B Coefficient (Unstandardized b)	Level of Statistical Significance
Immediate Custody Order (V1)	- .151 (-4.364)	.032
Number of Problems (V8)	.174 (2.768)	.012
Removal Risk (V9)	.04 (.729)	.555
Sex of Youngest Child (V13)	-.161 (-4.365)	.021
Age Squared (V16)	-.189 (-.001)	.007
GAL Appointed (V18)	.145 (4.466)	.033
History of Family Problems (V23)	.28 (8.574)	.0002
Parents Represented by Attorney (V24)	-.12 (-3.81)	.086
GAL Average Hours (V29)	-.122 (-.154)	.082
Neglect Cases Per Capita (V30)	-.198 (-33.257)	.011
Urban Growth (V31)	-.160 (-1.115)	.030
New Employment Per Capita (V33)	.160 (4.725)	.053

Variance Explained (R^2) = .29
N = 179

V. Conclusion: Guardian Ad Litem and Making a Difference

Our analysis found that the presence of guardians ad litem produced no overall effects that would be considered beneficial by the standards developed for the North Carolina sample. This finding is important not only because of what it reveals about the functioning of the North Carolina system in 1977 and 1978, but also because it is based on data from a judicial system in which guardians ad litem could reasonably have been expected to have a *measurable* and beneficial impact on the lives of children. Thus, both the failures and the limited successes of the North Carolina system should provide useful lessons and guidance for those seeking to improve the quality of legal representation of abused and neglected children.

That attorneys had little effect overall is understandable if circumstances surrounding the guardian's role are considered. First, there was much confusion about the role of the guardian ad litem (discussed in part III). This confusion not only prevented the guardian ad litem from having a clear goal, but it was also a source of confusion to the judge who may have resented, criticized, or ignored a guardian ad litem who was taking on responsibilities that the judge felt were inappropriate. For example, if the judge believed that a guardian was not supposed to take an adversarial stance, he would not expect a vigorous cross-examination of a witness. The attorney survey showed that 53% felt that judges expected them to assume an adversarial role in representing their client's position, while 41% felt that judges did not have this expectation, at best an ambivalent situation. Traditionally, it was the judge's exclusive prerogative to act in the best interest of the child. Thus, the very presence of a guardian could antagonize a judge, especially a judge before whom the attorney might regularly appear in private practice cases, cases in which the financial stakes would presumably be higher than child protection cases. Again, the traditional structure of the court and the ambiguous role of the guardian would produce pressures upon the guardians to limit themselves to procedural questions. The condition of ambivalence with respect to the expectations of the attorney was not aided by the fact that guardians typically had received no specialized training relevant to abuse and neglect cases, either during law school or thereafter.

Another, and perhaps more critical, factor in limiting attorney effectiveness was that both guardians and judges seemed to assume that the guardian should play only a minor role. Court records from our sample indicated that attorneys spent a median of only five hours per case.[93] Since this figure includes all court time, the time left for investigation, negotiation, or consultation is negligible. Not surprisingly, guardians indicated that they concurred with the department of social services recommendations in 88% of their cases. Additionally, attorneys usually did not follow their cases after the dispositional hearing to see if treatment plans were being carried out. Attorneys, it appears, were a presence rather than an influence in the court's handling of the cases.

The judges, who determined what compensation an attorney would receive, could easily discourage attorneys from spending much time on a case. Indeed, a number of judges felt that the guardian should be limited to a $50 fee per case.[94] Although no limit was imposed, in many jurisdictions there seemed to be an understanding that compensation would be minimal. Sixty-eight percent of the attorneys indicated that they did not feel they were adequately paid for the time they spent on the cases. It is not surprising that such an arrangement resulted in small per case time commitments, especially considering that normally the attorneys would have other, better paying clients demanding their limited time and efforts. Similarly, if an attorney was interested in doing guardian work, he or she would have to handle many cases at one time if the income from guardian work was to produce a substantial financial return. Again, however, this arrangement would provide no incentive to spend large amounts of time on individual cases. Perhaps the simple lessons to be drawn are that for attorneys to provide independent and extensive services they must be paid to do so, and the method of payment should in some way be tied to performance. Perhaps the least effective method to ensure the provision of legal services, the method currently used in many jurisdictions, is the

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[93] Lawyers in the attorney survey reported a median of 6.6 hours per case. The mean of 10.5 hours shown in Table 1 reflects the inflationary effect of a small number of extreme scores in the distribution. We think that lower figures of five hours used in the text is more accurate in that it was taken from actual requests to the court for payment. It is also likely that attorneys somewhat inflated their estimates of hours spent on each case in the phone interview.

[94] S. STREIT, REPORT ON GUARDIAN AD LITEM STUDY: FINANCIAL ASPECTS 3 (1981), available through the Bush Institute for Child Development, University of North Carolina at Chapel Hill.

system in which the same judge before whom the attorney must appear is also the judge who authorizes payments from a limited fund.

It seems fair to say that for the most part the attorneys were not expected to spend a lot of time on these cases, and in fact most did not. They accepted the prevailing, if implicit, definition of what constituted adequate representation—a definition which seems to have emphasized their presence as a matter of procedural rather than substantive importance.

The guardians then had reasons for failing to affect the system. Confusion by both judge and attorney as to what the guardian was to do, lack of training, and an expectation that the cases would take a minimal amount of the guardian's time are factors which impede effective representation.

That even under these conditions attorneys could have some effect is indicated by what might be termed the "squeaky wheel" cases. In cases where the parents had an attorney or in which there was a large number of court appearances, the child was more likely to be returned. Also, a speedy return was positively related to the number of hours the guardian spent on the case. Thus in spite of financial and professional incentives to the contrary, lawyers who did spend more hours on their cases were able to produce what we have defined as a beneficial effect, namely the expeditious return of children to their parents. We also found that the younger attorneys and attorneys who had relatively little experience as guardians were best able to avoid a child's removal from home. We infer that attorneys who were relatively independent from the court's normal interventionist handling of neglect cases were best able to take a critical and independent stance with respect to the phenomenon we earlier referred to as custodial roulette. These findings suggest that prerequisites for an effective guardian ad litem system would involve not only sufficient payment practices but also institutional structures which to some degree provide autonomy and independence for guardians who act on the behalf of children.

The representation system used in North Carolina had serious flaws. Although some judges and attorneys regarded the position of guardian ad litem as an important one, requiring time and effort, generally this was not the case. Representation seemed to be a token affair, a mere procedural requirement with attorneys serving as a rubber stamp for the recommendation of the department of social services. This kind

of system gives the illusion that abused and neglected children have their own advocate when in fact they do not.

But what solution might be proposed? As we have tried to show, children are at a substantial disadvantage in a market system in which the state resources allocated to them are simply insufficient to generate an adequate supply of quality legal services. They cannot hire counsel; rather their attorney's fee comes from a third party, a party typically unwilling to pay more than a limited and uncompetitive fee. In addition, the third party authorizing payment is the very judge hearing the case. Children also generally lack the knowledge necessary to assess the quality of representation received. A solution to these problems seems to reside in increasing the funds available to pay attorneys,[95] in making the funding independent of the judiciary, and in tying these funds to performance.

A representation system which could accomplish this might be an independent agency charged with providing and monitoring legal services for children. An agency could make the attorneys independent of many confounding influences and expectations which might limit their willingness to fully represent children.[96] Such an agency also could provide specialized training for attorneys representing children in protection proceedings and could be a career ladder for the attorneys.[97]

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[95] Volunteer attorneys have successfully been used in Philadelphia by the Support Center for Child Advocates. The attorneys are given special training and are expected to commit 15 to 30 hours per case. Redeker, *The Right of an Abused Child to Independent Counsel and the Role of the Child Advocate in Child Abuse Cases*, 23 VILL. L. REV. 521, 542-43, n.131 (1978). The volunteers handled a small percentage of the total caseload; however, whether enough volunteer attorneys could be found to handle all cases is questionable. Some states have used lay person volunteers as guardians rather than attorneys. The volunteer guardians are assisted by legal counsel when they feel that it is needed. For a report on such a system, see Ray-Bettineski, *Should the Guardian Ad Litem Be an Attorney? In All Cases or in What Type Cases?*, in FINAL REPORT: NATIONAL GUARDIAN AD LITEM POLICY CONFERENCE, ABA NATIONAL LEGAL RESOURCE CENTER FOR CHILD ADVOCACY AND PROTECTION (1980). Volunteer guardians are also being tried in North Carolina on an experimental basis.

Lack of compensation, then, may not always result in poor quality representation. What must be avoided is having a low level of compensation serve as a definition of an adequate time commitment.

[96] Independence is a fragile thing. Studies which demonstrate the assimilation or cooptation of public defenders into the court system indicate the need for administrative separation from the court structure. *See* E. LEMERT, SOCIAL ACTION AND LEGAL CHANGE: REVOLUTION WITHIN THE JUVENILE COURT (1970); Sudnow, *Normal Crimes: Sociological Features of the Penal Code in a Public Defender Office*, 12 SOC. PROBS. 255 (1965).

[97] The lack of a cumulative career pattern for lawyers representing disadvantaged

Representing children requires specialized training and knowledge, but there is no incentive in a system like North Carolina's for the attorney to acquire such knowledge. Acquiring special training in labor relations or patent law, for instance, can result in financial rewards and an increase in clients. A specialty in juvenile law provides neither.

In designing a structure for the provision of representation of children, attention should be paid to efforts already made in providing counsel to the mentally ill in commitment proceedings.[98] Like minors, the mentally ill usually lack the resources needed to hire an attorney or to effectively influence an attorney's behavior. Although their attorneys should have specialized knowledge about mental illness and treatment options, there are no incentives for attorneys to acquire this knowledge and most do not. Systems of representation for the mentally ill which have been unsuccessful are likely to fail for children also. Conversely, systems which have been proposed or which have had some success with the mentally ill client might also work with children. Indeed, because of the similarity in organizational problems, systems of representation of the mentally ill and of minors might be fruitfully combined into one agency.

Presently representation of children in protection proceedings is often viewed as a casual and occasional charitable contribution by an attorney. We are recommending that the representation of children be taken seriously by the legal profession and the state, and that the seriousness of this commitment be reflected in organizational structures which recognize its complexity and importance.

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clients provides a disincentive for entering or remaining in a public interest practice. Abel, *Socializing the Legal Profession: Can Redistributing Lawyers' Services Achieve Social Justice?*, 1 L. & POLICY Q. 5, 30 (1979).

[98] Appointment systems like that used by North Carolina for providing counsel for children have been used in many jurisdictions to provide counsel for the mentally ill; the failure of these and other systems has been documented in numerous studies. *See* T. SCHEFF, BEING MENTALLY ILL: A SOCIOLOGICAL THEORY (1966); Andalman & Chambers, *Effective Counsel for Person Facing Civil Commitment: A Survey, a Polemic, and a Proposal*, 45 MISS. L.J. 43 (1974); Cohen, *The Function of the Attorney and the Commitment of the Mentally Ill*, 44 TEX. L. REV. 424 (1966).

The literature on counsel for the mentally ill also contains proposals for new systems and describes systems which have achieved some success; *e.g.*, Andalman and Chambers propose the establishment of such an agency (at 87-90); Gupta discusses the New York Mental Health Information Service, Gupta, *New York's Mental Health Information Service: An Experiment in Due Process*, 25 RUTGERS L. REV. 405 (1971).