Independent Representation for the Abused and Neglected Child: The Guardian Ad Litem

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Grow old along with me
The best is yet to be.
Robert Browning, *Rabbi Ben Ezra*

On January 31, 1974, the President of the United States signed into law the Child Abuse Prevention and Treatment Act.[1] The Act allocated $85,000,000 of federal funds for the identification, prevention and treatment of child abuse and neglect.[2] Of the sums allocated by this Act, not less than five per cent and not more than twenty per cent of the total were specifically earmarked for state use.[3] Before any state is eligible to receive federal funds, however, there are ten conditions that must be met.[4] One such condition is a provision for the mandatory appointment of a guardian ad litem to represent an abused or neglected child's interests in any case of child abuse that results in a judicial proceeding.[5] Neither the Act nor the rules and regulations drafted by Health, Education and Welfare personnel to implement it differentiate between a criminal court proceeding and a juvenile court proceeding.[6]

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1. 42 U.S.C. §§ 5101-06 (1974).

2. *Id.* § 5104. This sum was allocated over a period of four years. $15,000,000 for the fiscal year ending June 30, 1974, $20,000,000 for the 1975 year, and $25,000,000 for the 1976 and 1977 fiscal years.

3. *Id.* § 5103(b)(1) (1974). The allocation to each state is calculated on the basis of $20,000 to each state plus an additional sum based upon the number of children under 18 years of age within the state to the total number of children under 18 in the country. *See also* HEW Reg. § 1340.3-7, 39 Fed. Reg. 43941 (1974).

4. 42 U.S.C. § 5103(b)(2) (1974); HEW Reg. § 1340.3-3, 39 Fed. Reg. 43939 (1974).

5. 42 U.S.C. § 5103(b)(2)(G) (1974); HEW Reg. § 1340.3-3, 39 Fed. Reg. 43940 (1974).

6. HEW Reg. § 1340.3-(3)(d)(7), 39 Fed. Reg. 43940 (1974):

> The state must 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.

Id. (emphasis added).

The concept of a guardian ad litem to represent a child's independent interests is not a recent innovation. The *mandatory* utilization of a guardian ad litem to represent a child's interests in cases of child abuse or neglect, however, is a recent innovation.[7]

This Article will discuss several aspects of the problem of child abuse today while focusing on the need for independent representation for the abused or neglected child. The historical development of this problem will be briefly presented in order to support this author's contention that independent representation is the only real solution to adequately protecting the abused or neglected child's interests. The main thrust of this Article is that a guardian ad litem is the most effective form of independent representation. The basic concept of a guardian ad litem, his role and duties in representing an abused or neglected child are the key to understanding and providing truly *effective* independent representation in child abuse cases.

I. CHILD ABUSE IN THE UNITED STATES

A. Social Awareness, Reporting and Treatment

Child abuse is not a phenomenon of the twentieth century.[8] Children have been physically traumatized, neglected, deprived, sexually molested, and murdered by adults from the dawn of man's earliest recorded history.[9] What *is* new is that the phenomenon has been formally identified and its more complex forms of pathology explored. Records of the incidence of child abuse are now kept and tabulated and, to a certain extent, child abuse has been sensationalized.

American society has functioned for the past two hundred years under the belief that any person who is biologically capable of becoming a parent can become a good parent,[10] that parents want and will act in their child's best interests,[11] and that the child's

7. *See* COLO. REV. STAT. ANN. § 22-10-8 (1963). Colorado was the first state to require the appointment of a guardian ad litem in child abuse cases. The original statute has now been revised in COLO. REV. STAT. ANN. § 19-10-133 (Cum. Supp. 1975).

8. There has been a considerable amount of material written on the child abuse problem. *See, e.g.*, CHILD ABUSE AND NEGLECT: THE COMMUNITY AND THE FAMILY (C. KEMPE & R. HELFER eds. 1976); THE BATTERED CHILD (C. KEMPE & R. HELFER eds. 1974); HELPING THE BATTERED CHILD AND HIS FAMILY (C. KEMPE & R. HELTER eds. 1972).

9. *See* Radbill, *A History of Child Abuse and Infanticide*, in THE BATTERED CHILD 3-4 (C. KEMPE & R. HELFER eds. 1974).

10. *See* J. GOLDSTEIN, A. FREUD, & A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD 16-17 (1973).

11. Perhaps the real issue is not whether parents will act in their child's best interest, but rather the standard of care to which a child is entitled. One school of thought argues that the child is entitled to that standard of care that

interests and those of his parents are the same.[12] History has taught us otherwise. It is estimated that 665,000 to 1,675,000 children are physically abused, sexually molested or seriously neglected by their parents each year.[13] Nationally, it is estimated that 2,000 to 5,000 children die each year as a direct result of child abuse.[14] In 1972 alone, over 140,000 cases of neglect were filed in various courts.[15]

It was not until 1962 that child abuse was formally identified as an observable, clinical condition and recognized as a serious wide-spread threat to children's lives.[16] Originally coined "the "the battered child syndrome," child abuse was defined to be a "serious, non-accidental physical injury to a child."[17] Employing this definition, individual states began in 1964 to enact mandatory child abuse reporting statutes.[18] The avowed purpose of these initial statutes was simplistically misleading. It was argued that by requiring certain groups of persons to report suspected cases of child abuse, children who were in danger could be quickly identified, investigation of the incident could be quickly completed, appro-

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a reasonably prudent parent would provide. *See generally* Gil, *The Legal Nature of Neglect*, 6 NAT. PAROLE & PROBATION ASS'N J. 1 (1960). Others have argued, probably more realistically, that a child is only entitled to that standard of care that is accepted as a minimum by the community. *See* Paulsen, *The Delinquency, Neglect and Dependency Jurisdiction of the Juvenile Court*, in JUSTICE FOR THE CHILD 15-16 (M. ROSENHEIM ed. 1962).

For a more complete discussion of the problems of standards see Fraser, *The Parent and the Child: A Delicate Balance of Power?*, in CHILD ABUSE AND NEGLECT: THE COMMUNITY AND THE FAMILY (C. KEMPE & R. HELFER eds. 1976).

12. One does not have to work long in the juvenile court to learn in countless circumstances the juvenile's rights and interests are often in sharp variance with his parents'. *In re* Clark, 21 Ohio Op. 2d 86, 87, 185 N.E.2d 128, 130 (Ct. Common Pleas 1962). *See also* Worsfold, *A Philosophical Justification for Children's Rights*, 44 HARV. EDUC. REV. 142, 143 (1974).

13. Light, *Abused and Neglected Children in America: A Study of Alternative Policies*, 43 HARV. EDUC. REV. 556, 567 (1975).

14. Kempe, *Approaches to Preventing Child Abuse*, 130 AM. J. DIS. CHILD 941, 945 (1976).

15. *See* note 25 *infra*, at 887.

16. Skeletal trauma, inflicted upon children, was noted by Dr. Frederic N. Silverman and Dr. John Caffey in the 1950's. *See* Silverman, *The Roentgen Manifestations of Unrecognized Skeletal Trauma in Infants*, 69 AM. J. ROENTGENOLOGY 413 (1953); Caffey, *Some Traumatic Lesions in Growing Bones Other Than Fractures and Dislocations: Clinical and Radiological Features*, 30 BRIT. J. RADIOLOGY 225 (1957). It was Dr. C. Henry Kempe, however, who coined the phrase "the battered child syndrome" and brought it national recognition. *See* Kempe, Silverman, Steele, Droegemueller & Silver, *The Battered-Child Syndrome*, 181 J.A.M.A. 17 (1962).

17. *See* Sussman, *Reporting Child Abuse: A Review of the Literature*, 8 FAMILY L.Q. 245, 252-53 (1974).

18. The first non-mandatory reporting statute was enacted in the California Penal Code, Section 11161.5, in 1963. Mandatory reporting statutes were first proposed and published by the Children's Bureau of the office of Health, Education and Welfare. U.S. DEPT. OF HEALTH EDUCATION & WELFARE, CHILDREN'S BUREAU, THE ABUSED CHILD—PRINCIPLES & SUGGESTED LANGUAGE FOR LEGISLATION ON REPORTING OF THE PHYSICALLY ABUSED CHILD (1963).

priate treatment could be offered, and, if necessary, the courts could be asked to intervene.

Unfortunately, the success of this procedure rested upon three assumptions: (1) Persons who were mandated to report knew and acknowledged that child abuse exists, and could identify its symptoms; (2) persons who did identify suspected cases of child abuse would be willing to report them; and (3) once a case was reported and identified as child abuse, treatment would be available. In varying degrees all three assumptions proved to be erroneous.[19] Nevertheless, by 1974 all fifty states, the District of Columbia, Puerto Rico and the Virgin Islands had adopted some form of mandatory reporting statute.[20]

In the decade that passed between the identification of the battered child syndrome and the universal adoption of mandatory reporting, society's knowledge of the complex problem grew.[21] As public awareness grew, the definition of child abuse expanded also. What was originally defined as a serious, non-accidental physical injury became enlarged in scope until, in some jurisdictions, child abuse became synonymous with any harm to a child that resulted from a parent's nonfeasance, misfeasance, or malfeasance.[22] Today, although every state defines child abuse differently,[23] all definitions include at least one or more of these four elements:

(1) Non-accidental physical injury;[24]
(2) neglect;[25]

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19. In short, persons who were mandated to report often did not know that they were so obligated and furthermore, were not aware of child abuse. Many of the persons who were able to identify the symptoms and knew of their obligation to report, refused to do so even though a number of states included a criminal provision for a failure to report. Finally, effective treatment was not available in most communities.

20. *See* Fraser, *A Pragmatic Alternative to Current Legislative Approaches to Child Abuse*, 12 AM. CRIM. L. REV. 103, 104 n.4 (1974).

21. For an interesting look at how the concept grew and what form it took see A. SUSSMAN & S. COHEN, REPORTING CHILD ABUSE AND NEGLECT (1974); Sussman, *Child Abuse Reporting: A Review of the Literature*, 8 FAMILY L.Q. 245 (1974).

22. In some states a child will be found "neglected" even in the absence of demonstrable harm. Colorado has defined a neglected child to be one "whose environment is injurious to his welfare." COLO. REV. STAT. ANN. § 19-1-103(2)(c) (Supp. 1974). A similar Oregon statute was held to be not void for vagueness in *State v. McMaster*, 259 Ore. 291, 486 P.2d 567 (Ore. 1971).

See also Wald, *State Intervention on Behalf of Neglected Children*, 27 STAN. L. REV. 985, 1000-01 (1975).

23. *See generally* Fraser, *Towards A More Practical Central Registry*, 51 DENVER L.J. 509-10 (1974).

24. *See* Schmitt & Kempe, *Pediatrician's Role in Child Abuse and Neglect*, 5 CURRENT PROBLEMS IN PEDIATRICS 1, 3 (Mar. 1975).

25. *See generally* Areen, *Intervention Between Parent and Child: A Reap-*

(3) sexual molestation;[26] and
(4) mental injury.[27]

The expanded definition and increased social awareness of child abuse have resulted in proportionately more reports.[28] These factors have also led to a more complex and sophisticated social superstructure to deal with the problem.[29] These changes have not, however, brought about a greater protection of the abused or neglected child's independent interests.

Child abuse is not a black problem, a brown problem or a white problem. Child abusers are found in the ranks of the unemployed, the blue-collar worker, the white-collar worker and the professional. They are Protestant, Catholic, Jewish, Baptist and atheist.[30] If there is any one indigenous element that seems to be characteristic of all abusing parents, it is that they themselves were abused, neglected or deprived as children.[31] To a certain extent, abusive behavior is learned or conditioned behavior;[32] an abused child learns to be abusive, grows into adulthood, becomes a parent and abuses his own children. These children, and succeeding generations in turn, follow this self-perpetuating behavior pattern. In a very real sense, all persons who are touched by child abuse—whether they be child or parent—are its victims.

Criminal prosecution of the abusing adult may satiate society's need for retribution, but it neither cures the growing problem nor even addresses the issue of providing for the child's independent interests. What is desperately needed is treatment—treatment for the parents, for the child and for the family. The simple act of identification via the mandatory reporting statute, alone, is use-

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praisal of the State's Role in Child Neglect and Abuse Cases, 63 GEO. L.J. 887, 920-30 (1975); Wald, *supra* note 22.

26. *See* Sgroi, *Sexual Molestation of Children: The Last Frontier in Child Abuse,* 4 CHILDREN TODAY 18 (May-June 1975); Schultz, *The Child Sex Victim: Social, Psychological and Legal Perspectives,* 52 CHILD WELFARE 147 (1973); *see generally* V. DE FRANCIS, PROTECTING THE CHILD VICTIM OF SEX CRIMES COMMITTED BY ADULTS (1969).

27. *See Emotional Neglect in Connecticut,* 5 CONN. L. REV. 100 (1969).

28. For example, from 1971 to 1973, when the state of Florida broadened its definition of child abuse, instituted a statewide advertising campaign, and initiated a statewide child abuse hotline, the number of reported cases rose from 250 to 28,000. Fraser, *The Tragedy of Child Abuse: "Momma Used to Whip Her . . . ,"* 8-9 COMPACT 10 (1974).

29. *See, e.g.,* N.Y. SOC. SER. LAW §§ 422-23 (McKinney 1976).

30. *See* Gil, *Incidence of Child Abuse and Demographic Characteristics of Persons Involved,* in THE BATTERED CHILD 19-39 (C. KEMPE & R. HELFER eds. 1968); Steele & Pollock, *A Psychiatric Study of Parents Who Abuse Infants and Small Children,* in THE BATTERED CHILD 89, 92-94 (C. KEMPE & R. HELFER eds. 1974).

31. *See* Steele & Pollock, *supra* note 30, at 97-98.

32. Fraser, *supra* note 20, at 120; *see also* Grumet, *The Plaintive Plaintiffs: Victims of the Battered Child Syndrome,* 4 FAMILY L.Q. 296, 307 (1970).

less in this regard. Unless identification is coupled with intervention and treatment, the process itself becomes an exercise in futility.[33]

Historically, child abuse proceedings and treatment have been directed to the child's parents. The assumption has been that by offering treatment to the parents, benefits would filter down to the abused child. This assumption is erroneous. Children have their own interests and their own needs that exist quite independently of the needs and interests of their parents.[34] One of the legal vehicles available to insure that a child's needs and interests are addressed is the concept of independent representation for the abused and neglected child: The guardian ad litem.[35]

In 1967, in its now famous decision of *In re Gault*,[36] the United States Supreme Court ruled that a child is entitled to certain constitutionally-guaranteed safeguards when its liberty is endangered. One of the rights enumerated is the right to independent representation by counsel.[37] Perhaps it is now incumbent upon Americans to question the rationale that provides a child with independdent representation in cases in which his liberty is endangered but does not provide such representation when his health and life are endangered.

Fortunately, the federal government has provided impetus to a nationwide, mandatory adoption of the guardian ad litem for abused children. Under the Child Abuse Prevention and Treatment Act, if a state is to receive federal funds, it must provide a vehicle for reporting suspected cases of child abuse.[38] The state must define child abuse to encompass non-accidental physical injury, neglect, sexual molestation and mental injury.[39] Further-

33. *See generally* CHILD ABUSE AND NEGLECT: THE COMMUNITY AND THE FAMILY (C. KEMPE & R. HELFER eds. 1976).

34. H. MARTIN, CHILD ABUSE: A DEVELOPMENTAL APPROACH (1976); *see* Martin, Beezley, Conway, & Kempe, *The Development of Abused Children*, 21 ADVANCES IN PEDIATRICS 25-34, 43, 66 (1974).

35. The literal translation of guardian ad litem is a guardian appointed by the court. BLACK'S LAW DICTIONARY 834 (4th ed. 1951).

36. *In re* Gault, 387 U.S. 1 (1967).

37. *Id.* at 41.

38. It is deemed sufficient if a state has a law or administrative procedures which require the reporting of child abuse. 42 U.S.C. § 5103(2) (1976).

39. 42 U.S.C. § 5102 (1976).

> For purposes of this chapter the term "child abuse and neglect" means the physical or mental injury, sexual abuse, negligent treatment, or maltreatment of a child under the age of eighteen by a person who is responsible for the child's welfare under circumstances which would indicate that the child's health or welfare is harmed or threatened thereby, ...

For the purposes of brevity, when the term "child abuse" is used in this article, it means a non-accidental physical injury, neglect, sexual molestation, or mental injury, or a combination thereof.

more, the physically abused child, the neglected child, the sexually-molested child, and the mentally injured child must be provided with its own spokesman if the case results in a judicial proceeding.[40]

B. *Analysis of a Child Abuse Case*[41]

A typical child abuse case can be seen as consisting of three chronological steps. The first is identification of a suspected case of child abuse. Once a case of suspected abuse has been identified, state law requires that it be investigated.[42] If the investigation has been conducted thoroughly, it should be possible to develop a diagnosis,[43] a prognosis,[44] and, if the facts warrant initiation of the third step, a treatment plan which might include judicial intervention.

1. Identification.—The primary vehicle for identification is the mandatory reporting statute.[45] Although every state's reporting statute differs with respect to what abuse is, who must report, and what must happen once a report is received, all statutes have one common purpose: To identify the child in peril as quickly as possible.[46] Some states, in an effort to identify those children in peril at the earliest possible time, require reporting not only of suspected cases of actual child abuse, but also of circumstances and conditions which might reasonably result in abuse.[47]

No state requires an observer to do more than report; the only requirement is that the person notify the authorities when he has reasonable cause to believe or suspect that a child has been abused. The actual diagnosis and investigation of child abuse is a function of the state agency designed to receive and investigate reports of suspected child abuse.

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40. *See* note 5 *supra.*

41. For a complete discussion of the identification, investigation and intervention of a child abuse case in a particular state see Fraser, *Colorado: Child Abuse and the Child Protection Act* (1976) (unpublished material at the National Center for the Prevention and Treatment of Child Abuse and Neglect, Department of Pediatrics, University of Colorado, Denver).

42. *See* Brown, Fox & Hubbard, *Medical and Legal Aspects of the Battered Child Syndrome*, 50 CHI.-KENT L. REV. 45, 59-60 (1973).

43. For the purposes of this article "diagnosis" means an evaluation of the facts to determine whether or not the child's injuries or the parent's behavior can be classified as child abuse under state law. *See also id.* at 45-49.

44. For the purpose of this article "prognosis" means an evaluation of the facts to determine the possibility of effective treatment for the child abuser.

45. *See* Fraser note 20 *supra* at 105.

46. *Id.* at n.4.

47. COLO. REV. STAT. ANN. § 19-10-104 (1974), *as amended*, (Cum. Supp. 1975); CONN. GEN. STAT. ANN. § 17-38a(b) (1975); IDAHO CODE § 16-1641 (Cum. Supp. 1975).

2. *Investigation.*—Every state has designated at least one statewide agency to receive and investigate reports of child abuse.[48] In the majority of states, that agency is the department of social services. For a state to be eligible for federal funds, the agency designated to receive reports must also provide a prompt investigation.[49] The usual procedure, once a report has been received, is to complete the intake process[50] and, if appropriate, assign the case to an agency worker for investigation. State requirements for the investigation of child abuse range from the minimal[51] to the very extensive.[52] In most jurisdictions, regardless of the statutory requirements, investigations are done poorly.[53]

If the child abuse investigation has been conducted properly, however, investigatory data can be completely analyzed to determine the proper diagnosis and prognosis and the possible need for intervention. Child abuse is not a problem that "belongs to" any one agency or any one discipline. It cannot be classified solely as a medical problem, a psychological problem, a legal problem or a social problem. A child abuse case may involve many diverse disciplines. Thus, it is simplistic to suggest that a single social worker has sufficient expertise to draw all the proper conclusions.[54] A number of jurisdictions around the country have tacitly acknowledged that child abuse is complex and should be resolved by using all available expertise within a community. These jurisdictions have created multi-disciplinary child protection teams.[55] There is little doubt that the social worker, physician, psychiatrist, and lawyer—working together—can make a greater contribution to investigation and treatment of a child abuse case.

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48. Unfortunately a number of states have designated more than one agency to receive reports and investigate. The result is a confusion of roles and a loss of effectiveness. *See* D. BESHAROV, JUVENILE JUSTICE ADVOCACY: PRACTICE IN A UNIQUE COURT 131 (Practicing Law Institute 1974).

49. While the federal code does require a prompt investigation, "prompt" is not defined. 42 U.S.C. § 5103(2)(C) (1976).

50. The intake process is a screening procedure at which the receiving agency determines if there is enough data to proceed with the case, if that agency is the appropriate agency (if not it will be transferred to the appropriate agency), and which cases need immediate action and which can be deferred. *See generally* V. DEFRANCIS, THE FUNDAMENTALS OF CHILD PROTECTION: A STATEMENT OF THE BASIC CONCEPTS AND PRINCIPLES 15 (1955).

51. IDAHO CODE § 16-1628 (Cum. Supp. 1975).

52. N.Y. SOC. SER. LAW § 422 (McKinney 1976).

53. Child abuse investigations are done poorly because the caseworkers have no training in child abuse and the case loads are so large time does not permit a complete investigation. M. MIDONICK, CHILDREN, PARENTS AND THE COURTS: JUVENILE DELINQUENCY, UNGOVERNABILITY AND NEGLECT 66-67 (Practicing Law Institute 1972).

54. *See* Fraser, note 41 *supra*; Paulson, *Juvenile Courts, Family Courts, and the Poor Man*, 54 CALIF. L. REV. 694, 711 (1966).

55. VA. CODE § 63.1-248.6(E) (Cum. Supp. 1976); *see* COLO. REV. STAT. ANN. § 19-10-109(6) (Cum. Supp. 1975).

The actual format and implementation of child protection teams vary from state to state. In some states they operate in individual hospitals and are used primarily to determine whether child abuse is present. In other states they operate as an integral part of the department of social services. In still other states these teams are given statutory authority to review and act independently upon all reports of suspected child abuse. Regardless of their statutory authorization and placement within the social superstructure, the team's collective expertise can provide valuable guidance to the investigator, the caseworker, the judge and the guardian ad litem.

3. Intervention.—A proper evaluation of the investigatory data should resolve three questions:

> (1) Do the injuries to this child, or the parents' behavior fall within the statutory definition of child abuse?[56]
>
> (2) What are the parents' needs, the child's needs, and what can be offered within the community to meet those needs?
>
> (3) What are the possibilities of effective treatment in this case?[57]

Answers to the second and third questions often lead to the conclusion that state intervention is warranted.

Intervention in the child abuse case can take three forms. Services and treatment can be offered to the parents and child on a voluntary basis, the case can be filed in the criminal court,[58] or the case can be filed in the juvenile court or the district court with juvenile jurisdiction.[59]

The abused child needs and is entitled to some form of independent advocacy at each of the three stages of identification, investigation and intervention.[60] This Article focuses upon only one form of advocacy—the guardian ad litem. The concept of employing a guardian ad litem to represent a child's interests at

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56. Actually, the proper evaluation should determine whether or not the child is in danger. It is conceivable that the child does exhibit some demonstrable harm, but for a number of reasons the injury or the danger does *not* fall within the purview of the legal definition of child abuse. Intervention should be predicated on need, not upon whether something falls within a legal definition.

57. U.S. DEPT. OF HEALTH, EDUCATION AND WELFARE, THE DIAGNOSTIC PROCESS AND TREATMENT OF CHILD ABUSE AND NEGLECT (OCD Publication No. 75-69, 1975).

58. A number of states have enacted statutes which make ill treatment, cruelty, or abuse a crime. *See* Fraser, *supra* note 20, at n.4. Regardless of whether or not there is a specific statute which makes child abuse a crime, any physical injury inflicted upon a child could be classified as an assault under state law.

59. *See, e.g.*, COLO. REV. STAT. ANN. § 19-10-113 (Cum. Supp. 1975); ILL. ANN. STAT. ch. 23, § 2055 (Cum. Supp. 1975).

60. *See generally Fraser, Advocacy for the Child*, in THE ABUSED CHILD: A MULTIDISCIPLINARY APPROACH TO DEVELOPMENTAL ISSUES AND TREATMENT (H. MARTIN ed. 1976).

the point of state intervention is the most widely accepted and most structured form of advocacy in use in cases of child abuse.[61] Unfortunately, it is also the most widely misconstrued.

II. THE CONCEPT OF A GUARDIAN AD LITEM FOR THE ABUSED CHILD

A. Historical Role of the Guardian Ad Litem

It has been almost universally accepted that young children lacking in experience, education and knowledge should not be required to make decisions which might adversely affect their lives or the lives of others.[62] In simple terms, the status of infancy[63] (at common law, anyone under the age of 21)[64] is a status free of the liabilities and responsibilities of adulthood. This lack of responsibility and liability, it is argued, encourages the freedom necessary to develop the knowledge that will eventually enable the child to function adequately in society as an adult.

At common law, the parents' control over their child was virtually limitless. Generically, parents' rights were viewed as the rights of care, custody and control.[65] The parent could physically discipline his child; he could instill religious and political beliefs;

61. *See* Wald, *supra* note 22.

62. J. BENTHAM, THE THEORY OF LEGISLATION 248 (1840).

> The feebleness of infancy demands continual protection. Everything must be done for an imperfect being, which as yet does nothing for itself. The complete development of its physical powers takes many years, that of its intellectual faculties is even slower. At a certain age, it already has the strength and the passion without experience enough to regulate them. Too sensitive to prevent impulses, too negligent of the future, such a being must be kept under an authority more immediate than that of the law.

63. Infancy, as it may be used in legal relationships, does not necessarily imply any definite age limit, and may be synonymous with "minor" especially with reference to contracts by infants. State v. Flath, 59 N.D. 121, 124, 228 N.W. 847, 848 (1930). In a statutory sense, a person is an infant until he arrives at maturity as fixed by law. Audsley v. Hale, 303 Mo. 451, 470, 261 S.W. 117, 123 (1924).

64. James, *The Age of Majority*, 4 AM. J. LEGAL HIST. 22 (1966); *but see* Katz, Schroder & Sidman, *Emancipating Our Children*, 7 FAMILY L.Q. 211, 232-40 (1973).

> Technical terms such as "child, minor, infant" apply to all persons under the age of 21 years. The specific age of 21 would seem to be purely arbitrary and a carry over from feudal times. The choice of 21 years probably evolved as the feudal system of judicial combat and knight service evolved. The age of knighthood increased from 15 years to the completion of 20 years as warfare became more complex, as combat skills became more sophisticated and as armor grew heavier.

Id.

65. American courts have gone so far as to characterize parental rights as rights which transcend property rights, (Denton v. James, 107 Kansas 729, 735, 193 P. 307, 310 (1920)); as sacred rights, (*In re* Hudson, 13 Wash. 2d 673, 677, 126 P.2d 765, 768 (1942)); as natural rights, (Anguis v. Superior Court, 6 Ariz. App. 68, 71, 429 P.2d 702, 705 (Ct. App. 1967)); and as a right which is given constitutional status, (Stanley v. Illinois, 405 U.S. 645 (1972)).

he could educate him as he saw fit; he was entitled to the child's earnings; and he could grant or withhold medical care.

The last fifty years have seen the slow erosion of this doctrine of parental absolutism.[66] Though it is still commonly agreed that the parent may exercise the rights of care, custody and control, these rights are no longer regarded as absolute.[67] Each state, under its police powers and the doctrine of parens patriae,[68] may restrain and regulate parental prerogatives when the parent grossly abuses these rights of care, custody and control.[69] Any regulation adopted by a state to govern parental conduct must serve a legitimate state interest and must not unduly restrict a fundamental right.[70]

What was formerly referred to as a doctrine of parental absolutism is now more realistically characterized as a presumptive parental right.[71] Accordingly, it might be said that every child is entitled to certain negative legal rights which arise after the presumption of parental rights has been rebutted.[72] In short, a child has the right of not being physically chastised to the point that it becomes abuse;[73] of not being denied the necessities of life to the point that it endangers life;[74] of not being denied the medical care necessary to preserve life;[75] and of not being totally denied some form of education to the point that it deters mental or intellectual growth.[76]

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66. *See* Fraser, *supra* note 11.

67. *See* Poe v. Gerstein, 417 U.S. 281 (1974); Wisconsin v. Yoder, 406 U.S. 205 (1972); Prince v. Massachusetts, 321 U.S. 158 (1944); Pierce v. Society of Sisters, 268 U.S. 510 (1924).

68. The doctrine of parens patriae originated in England. Noted by the American courts specifically in 1839 in the case of *Ex Parte Crouse*, 4 Whart. 9 (Pa. 1839), it was specifically delineated in the case of *Finley v. Finley*, 240 N.Y. 429, 148 N.E. 624 (1925), and became firmly entrenched in the case of *Prince v. Massachusetts*, 321 U.S. 158 (1944). Although this doctrine was roundly criticized in the case of *In re Gault*, 387 U.S. 1 (1967), it was revived a year later by the Supreme Court in *Ginsberg v. New York*, 390 U.S. 629 (1968).

69. *See* Ginsberg v. New York, 390 U.S. 629 (1968); Prince v. Massachusetts, 321 U.S. 158 (1944); State v. Bailey, 157 Ind. 324, 61 N.E. 730 (1901).

70. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943). *See generally* Shapiro v. Thompson, 394 U.S. 618, 634 (1969).

71. *See* Fraser, *supra* note 11. *See also* Kleinfield, *The Balance of Power Between Infants, Parents and the State*, 4 FAMILY L.Q. 319, 409 (1970); 5 FAMILY L.Q. 64, 66-68 (1971).

72. The actual rebuttal of parental rights in the parent-child relationship takes place in the juvenile court, family court, or district court with juvenile jurisdiction when a petition alleging neglect, dependency or abuse is filed. *See* State v. Hunt, 2 Ariz. App. 6, 406 P.2d 208 (1965).

73. *See* Note, 26 BAYLOR L. REV. 678 (1974).

74. *See* Wald, *supra* note 22, at 1000, 1013-14; Areen, *supra* note 25, at 892.

75. *See* Fraser, *A Pediatric Bill of Rights*, 16 SOUTH TEX. L. REV. 245, 264 (1975).

76. *See* State v. Bailey, 157 Ind. 324, 61 N.E. 730, 732 (1901).

As is true in most cases, when certain duties are altered or certain responsibilities abrogated, related rights may be lost. One of the rights lost to a child as a result of his infancy is the right to seek out and retain an attorney and to pursue his own grievances in a court of law.[77] The usual rationale for abrogating the child's right to retain counsel is:

> (1) The lawyer-client relationship is a contractual one, and the child, because of his status of infancy, does not have the legal capacity to enter into a contract;
>
> (2) the child, because of his age, lacks the necessary expertise and judgment to determine what his grievances are, who wronged him, and who ought to represent him; and
>
> (3) if a child were entitled to retain his own attorney, he might sue his own parents, and this, in turn, would result in destruction of the family nucleus.

As a general rule, a child cannot seek out his own advocate, personally bring an action in his own behalf, or personally defend a suit which is brought against him. That a child cannot personally pursue his own grievances should not be construed to mean, however, that a child is not entitled to independent representation. He is.[78] The questions which govern enforcement of the right are twofold: Who determines when a child is entitled to and needs independent representation? Who will appoint the independent representative?

Historically, a guardian ad litem was appointed by the court to represent a child named as a defendant. Conversely, the court appointed a "next friend"[79] to represent the child as a plaintiff. Today, though the semantic classifications may remain, the only real difference between a guardian ad litem and a next friend is technical in nature.[80] The initiation of a suit by the guardian ad litem and the defense of a suit by the next friend is only regarded as an irregularity and will not render a judgment void.[81]

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77. The limits of legal capacity of infants to assert legal rights in their own behalf were not established to defeat the enforcement of their rights. *See* Dellamano v. Francis, 308 Mass. 502, 503, 33 N.E.2d 327, 328 (1941). *Contra* Inker & Perretta, *A Child's Right to Counsel in Custody Cases*, 5 FAMILY L.Q. 108 (1971); Kay & Segal, *The Role of the Attorney in Juvenile Court Proceedings*, 61 GEO. L.J. 1401 (1973).

78. *See* Ferster, Courtless & Snethen, *The Juvenile Justice System: In Search of the Role of Counsel*, 39 FORD. L. REV. 375, 391 (1971) *citing* THE UNIFORM JUVENILE COURT ACT § 26.

79. Historically, a child was granted independent representation in matters concerning property. *See generally* F. POLLOCK, HISTORY OF ENGLISH LAW (1972).

80. Till v. Hartford Accident & Indem. Co., 124 F.2d 405 (10th Cir. 1941); City Nat'l Bank and Trust v. Sewell, 300 Ill. App. 582, 583, 21 N.E.2d 810, 812 (1939); Ellison v. Ward, 294 Ill. App. 197, 13 N.E.2d 649, 651 (1938).

81. *See* Wygal v. Myer, 76 Tex. 598, 601, 13 S.W. 567, 569 (1890).

It is important to note that the guardian ad litem historically assumed an adversarial role, defending against the allegations made by another party. That is not the guardian's role today in a case of child abuse. The child is neither the plaintiff nor the respondent. In most states the local department of social services is the plaintiff on behalf of the child, and the adult who inflicted the injury is the defendant. In cases of child abuse, the guardian ad litem represents the child's independent interests. Technically, his role is therefore not adversarial.[82]

Each state, through its police powers or the doctrine of parens patriae, is authorized to enact legislation which will protect children from neglect, ill treatment, cruelty and abuse.[83] If properly drafted it will not unduly restrict any fundamental right. Individual states have and should assert the unilateral legal authority to make provision for the independent representation of children's interests.

B. The Role of the Guardian Ad Litem in a Child Abuse Case

Once a report of suspected child abuse is received and an investigation completed, a petition may be filed in the juvenile court. A child who is the subject of a petition becomes, at least in respect to all issues before it, a ward of the court.[84] Expressed in slightly different terms, if the child is properly before the court, the court becomes the child's guardian.[85] As the child's guardian, it is incumbent upon the court to insure that the child's safety and interests are fully protected.[86] At any point after the filing of a petition, the court has the option of appointing a third party to help protect the child's interests. That third party may be a guardian ad litem.

Although the court may appoint a third party to promote and protect the child's interests, the court remains ultimately responsible for the protection of the child. The court may temporarily transfer some of its functions, but it cannot abrogate its responsibility. In simple terms, the court will remain the child's guardian,

82. An adversary is one who contends with, resists, or opposes an opponent. Technically, the guardian ad litem in the case of child abuse is an *advocate*, or one who pleads the cause of another.
83. *See* State *ex rel.* Slatton v. Bols, 147 W. Va. 674, 130 S.E.2d 192 (1963).
84. *See* Kingsbury v. Buckner, 134 U.S. 650 (1890).
85. State v. Ferris, 369 S.W.2d 244, 249 (Mo. 1963).
86. *See* Sangster v. Toledo Mfg. Co., 193 Ga. 685, 19 S.E.2d 723 (1942). *See also* text accompanying notes 90-91 and 182 *infra.*

at least during the proceedings, and the appointed third party thus becomes an officer of the court.[87]

The appointment of a guardian ad litem by the court creates a special symbiotic relationship. The guardian ad litem is a "special guardian" temporarily appointed to protect the child's interests.[88] As a special guardian, the guardian ad litem is legally obligated to do everything within his power to insure a judgment that is in the child's best interests.[89] Conversely, it is the court's obligation to insure that the guardian ad litem actively protects and promotes the child's best interests.[90] If for some reason the guardian ad litem does not pursue and protect the child's interests, it becomes the duty of the court to intervene and to reassume those responsibilities.[91] Furthermore, if the child's interests are compromised as a result of the guardian ad litem's neglect, the guardian may be punished[92] and held responsible for any damages sustained by the child.[93] The court remains the child's *ultimate* legal guardian and must continuously monitor the third party's performance.[94]

As a special guardian, the guardian ad litem's duties are both temporary and limited in scope. He has no powers or duties prior to his appointment or after the case has terminated.[95] Conversely, the child does not have either the legal capacity to waive the appointment or the unilateral right to dismiss his guardian.[96] The guardian ad litem has no right to interfere with the child's person or property, nor the power to bind the infant or his estate.[97] He

87. Lovett v. Stone, 239 N.C. 206, 211, 79 S.E.2d 479, 483 (1954); Van Herwerzyn v. State, 206 Misc. 896, 897, 134 N.Y.S.2d 922, 923 (Ct. Cl. 1954); Garner v. I.E. Schilling Co., 128 Fla. 353, 360, 174 So. 837, 840 (1937).

88. *In re* Quinn, 23 App. Div. 2d 548, 256 N.Y.S.2d 309 (1965); Cumbie v. Cumbie, 245 S.C. 107, 139 S.E.2d 477 (1964); *In re* Schriers Will, 157 Misc. 310, 283 N.Y.S. 233 (Sur. Ct. 1935); Crawford v. Amusement Syndicate Corp., 37 S.W.2d 581, 584 (Mo. 1931).

89. Kingsbury v. Buckner, 134 U.S. 650 (1890); Teele v. Kerr, 261 N.C. 148, 134 S.E.2d 126 (1964). *See also In re* Will of Jaeger, 218 Wisc. 1, 259 N.W. 842 (1935).

90. *In re* Will of Jaeger, 218 Wisc. 1, 10, 259 N.W. 842, 846 (1935).

91. Lee v. Gucker, 16 Misc. 2d 346, 347, 186 N.Y.S.2d 700, 702 (Sup. Ct. 1959); State v. Davis, 226 Ind. 526, 530, 82 N.E.2d 82, 85 (1948); Johnson v. Turner, 319 Ill. App. 265, 286, 49 N.E.2d 297, 306 (1943); Bertinelli v. Galoni, 331 Pa. 73, 200 A. 58 (1938); Peters v. Allen, 296 S.W. 929, 932 (Tex. Civ. App. 1927); Howell v. Randle, 171 Ala. 451, 54 So. 563 (1911).

92. *See* McIver v. Thompson, 117 S.C. 175, 108 S.E. 411 (1920); Andrews v. Hall, 15 Ala. 85, 90 (1848).

93. *See In re* Will of Jaeger, 218 Wisc. 1, 11, 259 N.W. 842, 846 (1935).

94. Alternatively, it may be said that the juvenile court is affirmatively obligated to appoint a guardian ad litem who can effectively promote and pursue the child's interests. *See* text and accompanying notes 90-91 *supra* and 182 *infra*.

95. Blackwell v. Vance Trucking Co., 139 F. Supp. 103 (E.D. S.C. 1956).

96. *In re* Dobson, 125 Vt. 165, 168, 212 A.2d 620, 623 (1965).

97. *See* Morris v. Standard Oil Co., 192 Cal. 343, 219 P. 998 (1923).

is not the child's *legal guardian*,[98] nor is he the child's *trustee*.[99]

There are no specific guidelines concerning when a guardian ad litem should be appointed.[100] It is generally agreed, however, that the appointment should be made when the child is first served notice of legal proceedings or at the point when a child's interests are first threatened.[101] Similarly, there are no specific standards which mark the end of the guardian ad litem's obligations to the child. Minimally, the guardian's responsibilities continue until the neglect-abuse proceedings terminate. However, if the final decision is adverse to the child's intersts,[102] the guardian ad litem has the option of taking an appeal.[103] Some courts have even suggested there is an *affirmative* obligation to appeal an adverse decision.[104]

There is no requirement that the person appointed by the court to act as the guardian ad litem be an attorney.[105] The argument is well made, however, that the appointee *should* be an attorney. As juvenile courts become more cognizant of children's rights,[106] and as courts in general become more structured and sensitive to due process safeguards, the lay person is at an increasing disadvantage. If the purpose of an appointment is to protect the child's interests, then it would seem axiomatic that such an appointment be made to one who understands the "system" and how it can be used most effectively for the child's interests.[107]

98. A *legal guardian* is a person who is lawfully invested with the power and charged with the duty of caring for that person's well being and managing his property. *See* Fleming v. Leibe, 95 N.J. Eq. 129, 122 A. 616 (1923).

99. A *trustee* is a person who is appointed to administer and care for the property, for the benefit of another person. *See* Cartlett v. Hawthorne, 157 Va. 372, 161 S.E. 47 (1931).

100. In cases of child abuse, however, the guardian ad litem must be appointed before and be present at any hearing for temporary custody, adjudication, or disposition.

101. Trippe v. Trippe, 35 App. Div. 2d 944, 316 N.Y.S.2d 579 (1970); Blaton v. Davis, 107 Ark. 1, 154 S.W. 947 (1913).

102. A decision which is adverse to a child's interests is a highly subjective issue. This is especially true at the dispositional hearing at which custody is awarded.

103. *See* Flynn v. Flynn, 283 Ill. 206, 119 N.E. 304 (1918); Givens v. Clem, 107 Va. 435, 59 S.E. 413 (1907).

104. *See, e.g.*, Tyson v. Tyson, 94 Wis. 225, 68 N.W. 1015 (1889).

105. Maloney v. Dewey, 127 Ill. 395, 403, 19 N.E. 848, 849 (1889).

106. "Given the complexities of modern courtroom procedure, it is clear that the presence of an attorney is the only means of assuring adequate representation of individual interests in the courtroom." Kaplan, *Appointment of Counsel for the Abused Child*, 58 CORNELL L. REV. 177, 179 n.12 (1972). A number of states that make provision for the appointment of a guardian ad litem in cases of child abuse require that such appointment be made to an attorney, see note 183 *infra*.

107. If the court appoints a guardian ad litem who is not an attorney, the guardian ad litem may appoint his own attorney. Any attorney appointed by a guardian ad litem is limited to the powers that are inherent in the role of the guardian ad litem. Paskewie v. East St. Louis Suburban Ry., 281 Ill. 385, 117 N.E. 1035 (1917).

III. THE NEED FOR INDEPENDENT REPRESENTATION[108]

A. The Child's Special Interests

No one would argue that a child's safety and interests are not jeopardized in a case of child abuse,[109] but some question the need for independent representation. It is the hypothesis of this Article, in every case of child abuse which results in a juvenile court proceeding, that the child is entitled to and needs independent representation. For instance, it is true that the juvenile court is itself ultimately responsible for the child's interests once a petition alleging abuse is properly before it. But it is equally true that the allegations are nothing more than that until the case has been formally adjudicated. The juvenile court must hear both sides and render an equitable and judicious decision based upon the merits of the case. The juvenile court which actively promotes the child's interests thereby diminishes its ability to render an impartial decision. The court should, therefore, appoint a guardian ad litem and transfer its immediate functions to this third party.[110] However, this temporary transfer of functions is not synonymous with the transfer and abrogation of responsibilities.[111]

Similarly, in the majority of cases the abused child has been abused by his own parents.[112] Thus, an attorney retained by the parents to represent their interests as respondents or defendants obviously cannot simultaneously protect the child's interests. In fact, in these cases of child abuse the child's interests are often in direct conflict with his parents' interests.[113]

In most states, the petitioner in a case of child abuse is the local department of social services. The person who actually presents the petition and case to the court is the city or county attorney.[114]

108. *See generally* Kaplan, *Appointment of Counsel for the Abused Child*, 58 CORNELL L. REV. 177 (1972); Hohmann & Dwyer, *Guardians Ad Litem in Wisconsin*, 48 MARQ. L. REV. 445 (1965).

109. It has been suggested that 50% of the children seen in the hospital under one year of age, suffering from severe neglect or battering, will die after being returned to their parents. V.J. FONTANA, SOMEWHERE A CHILD IS CRYING 109 (1973).

110. *See* notes 174 and 176 *infra* for a list of states which require the appointment of a guardian ad litem in cases of child abuse.

111. *See* notes 84-93 *supra* and accompanying text.

112. "Thus, in 86.8 percent the perpetrator was a parent or a parent substitute with whom the child had been living." D. GIL, VIOLENCE AGAINST CHILDREN: PHYSICAL CHILD ABUSE IN THE UNITED STATES 116 (1970); *see In re* Edwards, 70 Misc. 2d 858, 859, 335 N.Y.S.2d 575, 578 (1972).

113. *But see* Issacs, *The Role of the Lawyer in Child Abuse Cases*, in HELPING THE BATTERED CHILD AND HIS FAMILY (C. KEMPE & R. HELFER eds. 1972).

114. This, of course, varies from jurisdiction to jurisdiction. In some counties it is the county attorney and in others it is the city attorney, the corporation counsel, or the district attorney.

Arguably, because the local department has filed the petition and because the city attorney represents the child's interests, those interests are therefore adequately represented. Realistically, however, they are not. In an increasing number of jurisdictions, the city attorney is simply a conduit into the juvenile court. It is the local department which receives the report, completes the intake, makes the investigation, analyzes the investigatory data, decides whether or not to proceed into the juvenile court, prepares the petition, and subpoenas the witnesses. Social workers, unfortunately, simply do not have all these essential capabilities.[115]

In recent years, the number of reported cases of child abuse has risen dramatically. During this same period, the number of agency personnel who are mandated to conduct these cases has *not* grown accordingly. The result has been an increase in caseloads and a decrease in time allocated to each case.[116] Even if a caseworker were qualified to deal with all the necessary functions, he no longer has the time to perform them adequately. Consequently, because the city attorney relies on the local department's information, he, too, is at a disadvantage.

Realistically, the interests of the county and the local department may not be the same as those of the child.[117] Agency decisions are often based upon the availability of scarce resources and the cost of treatment instead of upon the needs of the child.[118] For example, while it may be in the child's best interests to be placed temporarily in foster care and receive special treatment, that is a cost that must be borne by the county, usually out of the local department's budget. Viewing the alternatives and visualizing the shrinking of limited financial resources, agency personnel often decide to place the child with his parents, defer the needed treatment, and employ the resources elsewhere.

115. *See* Levine, *Caveat Parens: A Demystification of the Child Protective System*, 35 U. PITT. L. REV. 1, 13-18 (1973); Paulson, note 54 *supra*.

116. The eventual result of ever-increased caseloads is a high turnover of agency personnel. Campbell, *The Neglected Child: His and His Family's Treatment Under Massachusetts Law and Practice and Their Rights Under the Due Process Clause*, 4 SUFFOLK L. REV. 631, 643 (1973).

117. In research sponsored by the New York City Task Force on Child Abuse and Neglect, it was found that less than 20% of the child protective service workers polled felt that it was their role to protect the child's interests. FINAL REPORT: NEW YORK CITY TASK FORCE ON CHILD ABUSE AND NEGLECT 98 (N.Y.C. 1971). *See also In re* Custody of a Minor, 250 F.2d 419, 420-21 (D.C. Cir. 1957).

118. The family dynamics involved in a child abuse case are extremely complex. Successful treatment for the child and his parents is a long-term process. There is an understandable desire on the part of caseworkers, as caseloads increase, to "close" an old case to make way for a new case. This would seem to be the consensus of opinion by the authors of the essays collected in CHILD ABUSE AND NEGLECT: THE COMMUNITY AND THE FAMILY (C. KEMPE & R. HELFER eds. 1976).

Finally, once the city attorney presents the petition to the juvenile court, he assumes a quasi-prosecutorial role. His function becomes one of establishing, with the requisite burden of proof, the allegations contained within the petition.[119] Unfortunately, the mere establishment of culpability of the respondents may have absolutely no bearing on the child's own interests.

B. The Role of the Guardian Ad Litem

Most abusive incidents take place within the privacy of the family home without non-family eyewitnesses.[120] The majority of children who are abused by their parents are young[121]—too young to articulate their hurts, their needs, or to express their desires. They are persons who, because of their age, are legally estopped from retaining their own counsel and pursuing their own grievances. They are persons who, when embroiled in legal proceedings in which they have a real interest, have no spokesman who can specifically and individually address their needs and their interests.[122]

The guardian ad litem's role is to protect those needs and those interests. He represents neither the petitioner nor the respondent, but assumes the role of an advocate for the child. In fulfilling this role, the guardian ad litem assumes four functions. He is: (1) An *investigator*[123] whose task it is to ferret out all of the relevant facts; (2) an *advocate*[124] whose task it is to insure that all the relevant facts are before the court at all hearings; (3) a *counsel*[125] whose task it is to insure that the court has before it at the dispositional hearing all the available options; and (4)

119. "The necessity of establishing culpability is too great to ensure the single-minded attention that is necesssary to safeguard a child's long-range interests." *See* note 113 *supra* at 229.

120. "Over ninety percent of the abuse incidents of the sample cohort occurred in the child's home. . . ." D. GIL, *supra* note 112, at 118.

121. "Estimates of the usual age for physical abuse are that one-third occur under six months of age; one-third from six months to three years and one-third over the age of three." Kempe & Schmitt, *The Battered Child Syndrome*, CURRENT PEDIATRIC DIAGNOSIS AND TREATMENT 781 (C. KEMPE, H. SILVER & D. O'BRIEN eds. 1974); *see* T. ELMER, CHILDREN IN JEOPARDY 2 (1967).

122. Stated somewhat more eloquently: "Parents have a right to their children but their children have a right to live." Paulsen, *The Legal Protections Against Child Abuse*, 13 CHILDREN 43, 45 (1966).

123. "Hard facts obtained by a thorough prodding, investigation, not esoteric or abstract constitutional or legal arguments decide most juvenile court cases . . . The only way counsel can be assured of the facts is to make his own investigation." *See* note 48 *supra* at 221.

124. "[e]xamine and cross-examine witnesses in both the adjudicatory and dispositional hearing and may introduce and examine his own witnesses . . ." COLO. REV. STAT. ANN. § 19-10-113(3) (Cum. Supp. 1975).

125. "[R]eviewing psychiatric, psychologic and physical examinations of the child." ME. REV. STAT. ANN. tit. 22, § 3858 (1975).

a *guardian*[126] in the simplest sense of the word, whose task it is to insure that the child's interests are fully protected.

Although all four functions are equally important, the ability to act adequately as an an advocate, a counsel, and a guardian greatly depends upon the guardian ad litem's ability as an investigator. Until a thorough investigation has been completed, there is simply not enough data available to develop a prognosis, to develop a treatment plan, and to present the possible options to the court. It is important to note that the report of suspected child abuse is made, the intake process and agency investigation completed,[127] and a preliminary diagnosis of the child abuse conducted,[128] all *before* the guardian ad litem is appointed. If an investigation has been thoroughly and correctly conducted, there is no need for the guardian ad litem to repeat the process.[129] What *is* important is that the guardian ad litem must collect all reports, evaluations, and records and be able to assess the thoroughness of the investigation in regard to the child's interests. The guardian ad litem must then integrate all the data and determine the child's needs.

The problem here is that most child abuse investigations are not properly conducted.[130] Agency personnel, for the most part, have a tendency to focus upon the injury which is reported. The result of this one-dimensional investigation is to create a "still-life portrait" of the child at the time the reported incident took place. Child abuse does not consist of a single attack or act of deprivation.[131] Most often, child abuse is abusive behavior directed to the

126. "[A] guardian ad litem shall have the duty to protect the interests of the child for whom he has been appointed. . . ." NEBRASKA LAW BULL. No. 19, § 1(2) (1975).

127. In some instances it is conceivable that the agency investigation has not been completed. Court proceedings may begin before the report of suspected child abuse is investigated or during the course of the agency investigation if the child has been taken into temporary custody. *See* text accompanying notes 168-69 *infra.*

128. The guardian ad litem is appointed by the court *after* a petition alleging abuse has been filed. The petition alleging abuse can only be filed after a report of suspected child abuse has been received, after an investigation has been completed, and after an evaluation of the investigatory data has been made by the agency. The agency has, in fact, made its own preliminary diagnosis of child abuse.

129. Provisions enumerating the guardian ad litem's duties do not require that he conduct his investigations in a vacuum. Most provisions require that he "make further investigations as he deems necessary to ascertain the facts . . . ." ME. REV. STAT. ANN. tit. 22, § 3858 (Supp. 1975); *see also* COLO. REV. STAT. ANN. § 19-10-113(3) (Cum. Supp. 1975).

130. *See* notes 115-16 *supra.*

131. In one study it was noted that 30 to 40 per cent of the parents who were reported as having abused a child had previously been involved in another abusive incident in the past. Furthermore, "at least half of the children (abused) of the sample cohort had been victims of physical abuse prior to the incident

child over a period of time.[132] The longer the abusive behavior continues, the more serious are the resultant injuries. The properly conducted investigation, therefore, does not focus solely on the reported injury. Rather, the investigation should create a "moving picture" of the child's life, a kaleidoscope that illustrates a pattern of parental misfeasance, nonfeasance, or malfeasance which jeopardizes the child's safety, health, or life.[133]

IV. Representing the Abused Child

A. Investigation

1. Agency Reports.—Persons who conduct child abuse investigations should be aware that those who report cases of suspected child abuse have little knowledge of the law or their obligations.[134] Persons who report child abuse usually do so to agencies with which they have previously dealt—usually ones they view as being both non-punitive and able to respond quickly. Although a particular statute may require that all reports be made to the local department of social services, in reality they are most often made to schools, public or mental health agencies, the juvenile court, the district attorney, or to the police.[135] In most cases, the receiving agency will screen these reports and forward them to the mandated agency.[136] Although the initial report is referred to

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reported in 1967." D. Gil, Violence Against Children: Physical Child Abuse in the United States 108-09 (1970). *See also* Caffey, *Significance of the History in the Diagnosis of Traumatic Injury to Children*, 67 Journal of Pediatrics 1008, 1014 (1965).

132. Both the criminal courts, People v. Hensen, 33 N.Y.2d 63, 304 N.E.2d 358, 349 N.Y.S.2d 657 (1973); State v. Loss, 295 Minn. 271, 204 N.E.2d 404 (1973), and the juvenile courts or district courts with juvenile jurisdiction, *In re* J., 74 Misc. 2d 606, 344 N.Y.S.2d 422 (Fam. Ct. N.Y. Cnty. 1973); *In re* K.D.E., 210 N.W.2d 907 (S.D. 1973); *In re* State ex rel. Thaxton, 220 So. 2d 184 (La. App. 1969), have acknowledged the fact that child abuse is not a single isolated attack. *See also* N.Y. Family Ct. Act, § 1046(a)(i) (McKinney 1975).

133. It is only when all of these injuries are taken together that they constitute by virtue of the cumulative effect an overall pattern which compels a finding . . . that the child was and is a "neglected child . . . ."

In the Matter of Young, 50 Misc. 2d 271, 274, 270 N.Y.S.2d 250, 253 (Fam. Ct. Westchester Cnty. 1966).

134. A number of states have recognized this deficiency and now require in their statutes that some state agency, usually the department of social services, provide training and public awareness. *See* Iowa Code § 235(A)(9) (Cum. Supp. 1975); Va. Code Ann. § 63.1-248.6(E) (Cum. Supp. 1975).

135. Since a non-accidental physical injury to a child is likely to be a crime in any state, it is quite likely that the local law enforcement agency or the district attorney's office will make their own independent investigation.

136. While this is what ought to happen, in many cases it does not. In some instances, the receiving agency is not aware that it is required to forward the report to the mandated agency. In other instances, especially in those states in which there are more than one mandated agency, the report may simply get lost. Additionally, each agency may think another agency is pursuing the matter.

the mandated agency, the receiving agency may also conduct its own intake and investigation. In many cases, these are not forwarded to the mandated agency. To do a thorough job, the investigator should be able to obtain these reports and integrate them into his own data.[137]

The guardian ad litem's first task, therefore, is to determine the existence of and request copies of:

(1) The initial report of suspected child abuse;
(2) the intake report;
(3) the mandated agency's investigatory report;
(4) any followup reports required of the mandated agency;
(5) any police reports;
(6) any medical, psychological, or psychiatric reports;
(7) any relevant records in the central registry; and
(8) any photographs or x-rays that have been made of the subject child.

The majority of states require only an oral report from those persons specifically mandated to report.[138] A few states, however, require, or provide the option of requesting, a written report.[139] In any event, a written report will be completed by the reporter himself or by agency personnel as a part of the intake process. States vary in the amount of information that is recorded in the initial report. At a minimum all states require the child's name, age, sex, and address; the parents' names and address(es); the type and extent of the injury; the name of the suspected perpetrator, if known; and any other information that the reporter believes may be beneficial.[140]

In addition to this initial report (a copy of which is usually forwarded to the state's central registry) a number of states now re-

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See generally Helfer, *The Child's Need for Early Recognition, Immediate Care and Protection,* in HELPING THE BATTERED CHILD AND HIS FAMILY (C. KEMPE & R. HELFER eds. 1972).

137. From the initial report of suspected child abuse, the guardian ad litem can determine the identity of the reporter. If the reporter is a member of the law enforcement agency, the public or mental health department, etc., the guardian ad litem should be able to isolate any independent reports or evaluations made by that agency.

138. "An immediate oral report shall be made by telephone or otherwise." DELAWARE CODE ANN. § 1003 (Supp. 1975); *see also* KANSAS H.B. No. 2543, ch. 231, § 38-717 (1975).

139. *See* COLO. REV. STAT. ANN. § 19-10-108(1) (Cum. Supp. 1975); CONN. GEN. STAT. ANN. § 17-38(c) (1975).

140. *See* FLA. STAT. ANN. § 848.041(5) (Supp. 1974); MISSOURI H.B. No. 578, § 4.1 (1975).

quire followup reports at regular intervals.[141] The followup reports are used to expunge unfounded reports from the central registry, to augment information in the records which are retained, and to evaluate a family's progress. The information contained within the initial and followup reports should provide the guardian ad litem with a sound base for his investigation.

2. *Medical Reports.*—In every case of suspected child abuse, the child should be examined by a qualified and licensed physician. The examination should be made immediately upon receipt of a report.[142] If a physical examination has not been completed by the time the guardian ad litem is appointed, he or she should request one.[143] Bruises, abrasions and burns all disappear with surprising speed. In young children, bones mend quickly.[144] More importantly, though external indications of trauma may disappear, the danger to the abused child does not.

It is a patent mistake to proceed under the assumption that all physicians are familiar with child abuse, can identify its symptoms, and will provide the investigator with information that is valuable for his own evaluations. Physicians must be requested to examine each injury *separately*. Each injury should, in turn, be broken down into four descriptive categories:

(1) Type—e.g., burn, fracture;

(2) extent—e.g., three centimeters by four centimeters, rectangular in shape;

(3) severity—e.g., third degree burn, compound fracture; and

(4) age—e.g., two days previous, two weeks old.[145]

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141. *See, e.g.*, N.Y. SOC. SERV. LAW § 425(3) (McKinney 1975).

142. An immediate medical investigation is especially important in cases of child abuse involving sexual molestation. *See* Sgroi, *supra* note 26. Some states require by law that a medical examination be made immediately of children suspected of being maltreated. *See, e.g.*, N.Y. FAMILY COURT ACT § 1027(g) (McKinney 1975).

143. Once the child is properly before the court, that child is, for all practical purposes, a ward of the court. The court, as the child's guardian for these proceedings, may order a complete physical examination. The guardian ad litem does *not* have this authority.

144. A trauma survey (x-rays) will determine the existence of recent and healing fractures. Healing fractures are indicated by calcium deposits surrounding the injured area. However, unlike adults, a child's bones are still growing. In a relatively short period of time (8-12 months), the growing bone will absorb the calcium deposits and no evidence will remain of a previous fracture. A word of caution is in order. A negative trauma survey for a child only indicates that there has been no recent bone trauma. It should not be construed to mean that there has *never* been any bone trauma.

145. For an excellent article discussing the physical manifestations of child abuse, the most common injuries and their causes, and a discussion of differential diagnosis, see Schmitt & Kempe, *The Pediatrician's Role in Child Abuse and Neglect*, 5 CURRENT PROBLEMS IN PEDIATRICS 1 (1975).

Upon completion of the examination, the physician should inform the investigator whether the actual injuries exhibited by the child are compatible with the parents' explanation for those injuries. If not, the investigator should learn why not. The two most incriminating facts indicative of non-accidental trauma are an explanation by the parents which is medically incompatible with the nature or type of injury exhibited, and numerous injuries exhibited by the child which were inflicted at different times.[146]

In addition, any physical examination of a child suspected of being abused should include a complete trauma survey.[147] A number of states have noted parents' hesitation to grant consent for a trauma survey, and have given the physician or hospital administrator the right to take x-rays without parental permission, or even against parental wishes.[148] Two states even *require* that such x-rays be made at public expense in any case of child abuse.[149]

In cases where superficial body trauma is found, color photographs should be taken by a qualified photographer.[150] Again, some states have acknowledged the parent's probable hesitation in granting consent and permit color photographs to be taken without parental permission or wishes.[151]

3. Personal Interviews.—It is incumbent upon the guardian ad litem that he or she interview many persons, including the one who made the initial report, the physician who examined the subject child, the child (if old enough to verbalize his thoughts),[152]

146. *See* People v. Jackson, 18 Cal. App. 3d 504, 95 Cal. Rptr. 919 (4th Dist. 1971); In the Matter of A.H., 64 Misc. 2d 965, 316 N.Y.S.2d 16 (Fam. Ct. King's Cnty. 1970); *In re* S., 46 Misc. 2d 161, 259 N.Y.S.2d 164 (Fam. Ct. King's Cnty. 1965); *In re* Phelps, 145 Mont. 557, 402 P.2d 593 (1965).

147. A *complete* trauma survey includes a radiological survey of the long bones, fingers, toes, skull, rib cage and pelvis.

For all practical purposes, a complete radiological survey is only completed when there is some external manifestation of internal trauma: A bruising or skin discoloration around the injured area; painful and limited maliability of the appendages; increased surface heat around the injured area or a swelling of the injured area. If there is any external indication of skeletal trauma, a complete radiological survey should be completed immediately and then repeated 10 to 14 days later. Certain injuries to the bone or the tissues that surround the bone may not be detected immediately (i.e., periostial elevation) but as the bone or the tissue surrounding the bone repairs itself (calcium deposits), that reparative change can be detected.

148. *See* COLO. REV. STAT. ANN. § 19-10-106 (Cum. Supp. 1975); PA. S.B. No. 25 § 7 (1975).

149. N.Y. SOC. SER. LAW § 416 (McKinney 1975); MISSOURI H.B. No. 578, § 3 (1975).

150. *See* Ford, Smestek & Glass, *Photography of Suspected Child Abuse and Maltreatment*, 3 BIOMEDICAL COMMUNICATIONS 12 (1975).

151. *See* COLO. REV. STAT. ANN. § 19-10-106 (Cum. Supp. 1975); MISSOURI H.B. No. 578, § 3 (1975).

152. Children can, of course, testify in court. The decision is usually left

the child's parents, the suspected perpetrator, neighbors, relatives, and business associates who know the family well. The purpose of these interviews is to gather enough information to develop a "moving picture" of the child's life. The guardian ad litem should be particularly interested in past injuries to the child,[153] who treated these injuries, injuries to siblings,[154] the method of discipline used by the parents, the parents' expectations of the child, the parents' own childhoods,[155] and all addresses at which this family resided from the birth of the subject child.

4. State Central Registries.— Forty-eight states now have central registries created by legislation or administrative fiat.[156] If the guardian ad litem has determined the family's residences since the subject child's birth, he or she can then consult each state's central registry to discover any previous reports of suspected child abuse. For a variety of reasons, however, some reports of suspected child abuse never find their way into a state's central registry.[157] The guardian ad litem must therefore crosscheck his own investigation by contacting local departments of social services in those counties in which the family has previously resided.

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to the individual judge who will consider such factors as the child's ability to articulate his thoughts and his ability to distinguish between what is the truth and what is not. *See generally* McCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 62 (2d ed. 1972). Children are, however, for a variety of reasons, usually unwilling to testify against their parents. *See* Comment, 13 CATHOLIC LAWYER 231, 234 (1967); V. FONTANA, SOMEWHERE A CHILD IS CRYING 27 (1973). For judicial notice of the same fact, see Gelhar v. State, 41 Misc. 2d 230, 163 N.W.2d 609 (1969); State v. Hunt, 2 Ariz. App. 6, 406 P.2d 208 (1965).

153. The phrase "past injuries" without the adjective "non-accidental" was purposely drafted in that manner. The fact that a particular child suffered four "injuries" in an 18-month period may be just as indicative of child abuse as one non-accidental injury. *See* Newberger, Hagenbuck, Ebling, Calligan, Sheenan & McVeigh, *Reducing the Literal and Human Cost of Child Abuse: Impact of a New Hospital Management System*, 51 PEDIATRICS 840, 846 (1973). There are, however, "accident-prone" families. *See* U.S. DEP'T OF HEALTH, EDUCATION AND WELFARE, FEDERAL PROGRAMS FOR YOUNG CHILDREN: REVIEW AND RECOMMENDATIONS 423 (No. 74-101 1973).

154. A number of courts have noted the fact that previous injuries to siblings are valid data to be considered in cases determining the existence of child abuse. *See In re* G., 74 Misc. 2d 606, 344 N.Y.S.2d 422 (Fam. Ct. N.Y. Cnty. 1973); *In re* J.F., 190 N.W.2d 27, 35 (N.D. 1971); In the Matter of Young, 50 Misc. 2d 271, 274, 270 N.Y.S.2d 250, 253 (Fam. Ct. Westchester Cnty. 1966).

155. Because child abuse is often referred to as a learned or conditioned behavior passed from generation to generation, information concerning the parents' own childhood is often valuable for the purposes of investigation and for court. *See* State v. Best, 232 N.W.2d 447, 459 (S.D. 1975); State v. Loss, 295 Minn. 271, 204 N.W.2d 404 (1973).

156. Currently, 48 states do have functional central registries to house reports of suspected child abuse. For an alphabetical listing of those states, citations to the enabling statutes, a list of persons who are given access, and the address of each central registry see Fraser, *Appendix E, Central Registries in Colorado: Child Abuse and the Child Protection Act* (1976) (unpublished material at the National Center for the Prevention and Treatment of Child Abuse and Neglect, Department of Pediatrics, University of Colorado, Denver).

157. *See* A. SUSSMAN & S. COHEN, REPORTING CHILD ABUSE AND NEGLECT 149-65 (1974).

B. *Initial Action*

When all of the investigatory data is compiled, the guardian ad litem must resolve three questions:

(1) Is there a present danger to the child?

(2) If there is a present danger to the child, can the child's injuries or the parents' behavior be classified as child abuse under state law?

(3) If there is a present danger to the child, what are the child's physical, psychological and developmental needs?[158]

1. What are the Child's Needs?—If the guardian ad litem believes that the child's injuries or the parents' behavior cannot be classified as as child abuse under state law, he must inform the court that in his opinion the court lacks jurisdiction. However, it is the issue of *present danger* to a child that is more germane to the guardian ad litem's role. His ability to characterize present injuries or parental behavior as abuse under state law only provides the agency with one other opinion on intervention. This does not address the issue of *present need*—the issue with which the guardian ad litem should be most concerned. In short, it is the guardian ad litem's primary obligation to identify a child's needs—whether physical, psychological, or developmental—and to insure that those needs are addressed.

2. Formal Proceedings.—In most states, the guardian ad litem has the option of examining and cross-examining both the petitioner's and the respondent's witnesses.[159] The guardian ad litem should also have the option of examining his own witnesses, and introducing his own reports and evaluations.[160] At the close of each proceeding, the guardian ad litem should be given the opportunity to make recommendations to the court.[161] The court, however, is under no obligation to adopt the guardian ad litem's recommendations as its own. In this respect, the guardian ad litem's role is closely akin to that of *amicus curiae*.[162]

158. For a list of specific physical, psychological, and developmental needs that must be addressed, see H. MARTIN, CHILD ABUSE A DEVELOPMENTAL APPROACH, Appendix A (1976).

159. *E.g.*, ARK. STAT. ANN. § 42-817 (Supp. 1975); COLO. REV. STAT. ANN. § 19-10-113(3) (Cum. Supp. 1975); ME. REV. STAT. ANN. tit. 22, § 3858 (Supp. 1975); PA. STAT. ANN. tit. 11, § 2223 (Supp. 1975).

160. Colorado seems to be the only state which specifically allows the guardian ad litem to introduce his own evidence and witnesses. *See*, COLO. REV. STAT. ANN. § 19-10-113(c) (Cum. Supp. 1975). The other pertinent statutes, however, do not specifically preclude such evidence.

161. ARK. STAT. ANN. § 42-817 (Cum. Supp. 1975); COLO. REV. STAT. ANN. § 19-10-113(3) (Cum. Supp. 1975); ME. REV. STAT. ANN. tit. 22, § 3858 (Supp. 1975); PA. STAT. ANN. tit. 11, § 2223 (Supp. 1975).

162. *Amicus curiae*, a friend of the court, is one "who interposes and volun-

Child abuse proceedings can involve as many as five separate hearings.[163] The first is the *advisement.* At the advisement hearing the respondents are formally notified of the allegations, and their rights are reiterated. The second is the *setting,* at which a mutually convenient date and time are set to resolve the allegations. The third is the *adjudication.* At the adjudicatory hearing there is only one issue to resolve: Do the child's injuries or the parents' behavior fall within the state's statutory definition of child abuse?[164] If the court decides that this is not a case of child abuse, all legal proceedings are terminated. If the court decides that the child has been abused, it will order the fourth hearing, the *disposition.*[165] At the dispositional hearing there is again only one issue to resolve: To whom should custody be awarded?[166] Finally, there is opportunity for a fifth hearing which may be held at any time from receipt of the report of suspected abuse to the final disposition of the case.

It may be initially evident, or it may become evident as the investigation goes forward, that the child is in immediate danger in his home environment. If this is the case, the petitioner or guardian ad litem may request that the court assume temporary custody,[167] or protective custody, until the investigation has been completed and a final disposition has been made. A number of states now authorize certain persons to assume unilateral temporary custody without a court order[168] if it is believed that the child's life or health is in imminent danger.[169] Attached to these

teers information upon some matters of law in regard to which the judge is doubtful or mistaken." Fort Worth & Denver City Ry. Co. v. Greathouse, 41 S.W.2d 418, 422 (Tex. 1931). Although he is not a party to the action, he volunteers information and opinions "of which the court may take judicial cognizance." *In re* Perry, 83 Ind. App. 456, 458, 148 N.E. 163, 165 (1925). The extent to which the court does accept the guardian ad litem's recommendations will no doubt depend on his knowledge of the facts, his understanding of the factors involved in child abuse situations, and his ability to elicit the child's needs and thereby formulate workable solutions.

163. For a comprehensive discussion of these proceedings see Fine, Fraser and MacDonald, *The Battered Child,* 3 COLO. LAWYER 33 (1974).

164. *See* Note, *Expert Medical Testimony Concerning Child Abuse,* 42 FORD. L. REV. 935 (1974); Comment, *Evidentiary Problems of Proof in Child Abuse Cases,* 13 J. FAMILY L. 819, 825-36 (1974).

165. COLO. REV. STAT. ANN. § 19-3-106(6)(b) (1973). Several states provide for concurrent adjudicatory and dispositional hearings. The issues involved in each hearing are distinct, and it is, therefore, more prudent to separate them.

166. At the dispositional hearing, the juvenile court may: (1) Terminate the parents' rights; (2) return the child to the parents under court supervision; or (3) place the child in foster care. If the child is returned to the parents, the court will periodically review the parents' progress, and once the home stabilizes, the court will withdraw.

167. *E.g.,* ARK. STAT. ANN. § 42-817 (Supp. 1975).

168. *E.g.,* MO. ANN. STAT. § 210.125 (Vernon Supp. 1975). In Missouri, a physician, a police officer, or other law enforcement official may assume temporary protective custody without parental permission or a court order.

169. *E.g.,* 1975 Ala. Acts 1124, § 6; protective custody may be assumed, if the circumstances or conditions of the child are such that continuing

provisions is usually the requirement that there be a formal hearing within some fixed period of time.[170] Although guardians ad litem are routinely appointed in some states to represent the child's interests at the adjudicatory and dispositional hearings, they are not routinely appointed or even present at hearings for temporary custody. They should be.

If the guardian ad litem's role is to protect the child's interests, then it would seem necessary that he be involved in all formal hearings, including any hearing for temporary custody. The issue of temporary custody involves the balancing of two very real interests for the child. The court must decide whether the potential for future harm in the child's own home outweighs the known harm to a child that results from a forced separation.[171] At any point where the child's interests may be adversely affected, it is imperative that the guardian ad litem be involved. Arguments that a guardian ad litem can not be appointed that quickly, that he will not be prepared or that it is not part of his function, all seem to have a listless apathy to them. If the parents can find and hire their own attorney in the relatively short time before a hearing on temporary custody, there is no reason the court, too, cannot have appointed its own representative.[172]

C. *Expanding the Guardian Ad Litem's Use, Knowledge and Expertise*

Today, nineteen states specifically require the appointment of a guardian ad litem to represent an abused child's interests in a proceeding for child abuse.[173] Three states permit the court to

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in his place of residence, or in the care and custody of the parent . . . presents an imminent danger to that child's life or health.

170. COLO. REV. STAT. ANN. § 19-10-107 (1973) (seventy-two hours); N.D. CENT. CODE § 50-25.1-07 (Supp. 1975) (ninety-two hours); N.Y. SOC. SERV. LAW § 417(2) (McKinney 1976) (next regular work day session).

171. *See* J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEYOND THE BEST INTEREST OF THE CHILD 20, 39 (1973); U.S. DEP'T OF HEALTH, EDUCATION & WELFARE, IS EARLY INTERVENTION EFFECTIVE (No. 74-25 1974).

172. Although the hearing regarding temporary custody soon follows the state's assumption of custody, the time span is the same for the petitioner, the respondent and the guardian ad litem. Thus, there is no reason why the guardian ad litem should not be as well prepared as the other parties in the action.

173. 1975 Ala. Acts 1124, § 6; ARK. STAT. ANN. § 42-817 (Supp. 1975); COLO. REV. STAT. ANN. § 19-10-113 (Cum. Supp. 1975); CONN. GEN. STAT. ANN. § 13-38a(f) (1975); KAN. STAT. ANN. § 38-821 (Supp. 1975); ME. STAT. REV. ANN. tit. 22 § 3858 (Supp. 1975); MICH. COMP. LAWS ANN. § 722.630 (Supp. 1975); MISS. CODE ANN. § 43-21-17 (Supp. 1975); NEB. REV. STAT. § 38-118 (1975); N.J. STAT. ANN. § 9:6-8.19 (Supp. 1975); N.Y. FAMILY CT. ACT § 249 (1975); N.D. CENT. CODE § 50-25.1-08 (Supp. 1975); OHIO REV. CODE ANN. § 2151.28.1 (Anderson Supp. 1975); PA. STAT. ANN. tit. 11 § 2223 (Supp. 1975); S.D. COMPILED LAWS ANN. § 26-10-12.1 (Supp. 1976); UTAH CODE ANN. § 55-16-7 (Supp. 1975); VA. CODE ANN. § 63.1-248.12 (Supp. 1976); WASH.

appoint a guardian ad litem for children in cases of child abuse that result in judicial proceedings.[174] Elsewhere, there are two broad classifications found in various statutory provisions which enable a court to appoint and provide the child with independent representation in cases of child abuse.[175]

By and large, the enabling statutes which require or permit the appointment of a guardian ad litem offer little guidance for those who are chosen. Most states simply provide for the appointment of a guardian ad litem and note that his responsibilities include protection of the child's interests.[176] A few states go further and provide that the guardian ad litem has an affirmative obligation to insure a proper investigation, to examine and cross-examine the petitioner's and respondent's witnesses, to introduce his own evidence and own witnesses, and to make recommendations at the close of each hearing.[177]

Colorado goes further than other states to insure that the guardian ad litem will be fully informed: He is specifically given access to all records which are relevant to the case.[178] In addition, in Colorado it is the local department of social services or the local child protection team which files the petition in

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REV. CODE ANN. § 26.44.053 (Supp. 1975). New York and Michigan provide for the appointment of a law guardian and a counsel respectively.

174. FLA. STAT. ANN. § 827.07(12) (1976); LA. REV. STAT. ANN. § 14.403 (6)(7) (West 1974); MONT. REV. CODES ANN. § 10-1310(12) (Supp. 1975).

175. Five states require that the child be appointed independent representation when certain conditions are met. While these provisions are not codified in the mandatory reporting statutes, the structure of the statutes ultimately provides the child with independent representation. *See* GA. CODE ANN. § 24A-3301 (Supp. 1974) (when child's interests conflict); IOWA CODE ANN. § 232.28 (1969) (whenever necessary); MINN. STAT. ANN. § 260.155(4) (1971) (parent indifferent or hostile to child's interests); TENN. CODE ANN. § 37-248 (Supp. 1975) (conflict of interest); VT. STAT. ANN. tit. 33, § 653(a) (Supp. 1975) (conflict of interest). Thirteen states *permit* the appointment of independent representation when certain conditions are met or in the court's discretion. Although these provisions are not found in the mandatory reporting statutes they could be used to provide the child with independent representation in cases of child abuse. ALASKA STAT. § 47.10.050 (Supp. 1974); ARIZ. REV. STAT. ANN. § 8-535 (1974); HAWAII REV. STAT. § 571.24 (1968); IDAHO CODE § 16-2007 (Supp. 1975); ILL. REV. STAT. ch. 37, § 704-5 (Supp. 1975); MO. REV. STAT. § 211.471 (Vernon 1962); N.H. REV. STAT. ANN. § 462.1 (1968); N.M. STAT. ANN. § 13-14-25(6) (1976); OKLA. STAT. ANN. tit. 10, § 1109(b) (Supp. 1975); ORE. REV. STAT. § 419.498(2) (1975); TEX. FAM. CODE § 11.10(a) (Cum. Supp. 1976); WIS. STAT. ANN. § 48.25(5) (1957); WYO. STAT. ANN. § 14-115.17 (Supp. 1975).

176. *E.g.*, N.D. CENT. CODE § 50-25.1-08 (Supp. 1975) ("the court in every case involving an abused or a neglected child which results in a judicial proceeding shall appoint a guardian ad litem for the child in these proceedings.")

177. *See* notes 119-21 *supra*.

178. A list of the reports and evaluations which are specifically made available to the guardian ad litem is found in COLO. REV. STAT. ANN. § 19-3-101(4) (1973). In Colorado, as in other states, the guardian is given specific authorization to utilize records in the state-wide central registry for child abuse. COLO. REV. STAT. ANN. § 19-10-115(d) (Cum. Supp. 1975).

juvenile court on behalf of the abused child.[179] The local department or child protection team[180] must also notify the guardian ad litem, in writing, of the reason for initiating the petition, of suggestions for an optimum disposition, and of treatment and social services available within the community which are recommended for the abused child and his family.[181]

This information, if transferred quickly and completely, will aid the guardian ad litem in his investigation and help him integrate the facts and identify the various needs of the child. The guardian also becomes better informed of treatment resources within the community which could be directed to the child's needs. In general, the required information helps the guardian ad litem present a well-documented and completely integrated case to the court on behalf of the child.

A few states have addressed their concerns over the requisite qualifications of a guardian ad litem and the court's concomitant responsibility to appoint capable persons to fill this position. Thus, five states specifically require that the guardian ad litem be an attorney.[182] Two states expressly note the court's responsibility to monitor the guardian ad litem's progress.[183] Two states specifically require that the guardian ad litem be trained in the pertinent areas of investigation and counseling.[184]

V. CONCLUSION

Historically, the guardian ad litem represented only a defendant child in a court of law. As guardian for the accused child, the guardian ad litem assumed an adversarial role. This is not true in a case of child abuse. The child is neither the plaintiff nor the defendant. The guardian ad litem, appointed solely to represent the abused child's interest, is an advocate for the child and is ultimately responsible to the appointing court. For lawyers trained in the adversary process, the combined role of guardian and advocate may be a difficult role to conceptualize.

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179. COLO. REV. STAT. ANN. § 19-10-109(4)(b) (1973).

180. For a legal definition of the child protection team in Colorado see COLO. REV. STAT. ANN. § 19-10-103(2) (1973). Under Colorado law, this team must review every reported case of suspected child abuse (non-accidental trauma, neglect, sexual molestation) within seven days.

181. *See*, COLO. REV. STAT. ANN. § 19-10-109 (1973).

182. Alabama, Connecticut, Kansas, New Jersey and Virginia.

183. Ohio and North Carolina.

184. "[T]he child shall be represented by counsel appointed by the court to speak in behalf of the best interests of the child; which counsel shall be knowledgeable about the needs and protection of the child." CONN. GEN. STAT. ANN. § 17-38a(f)(2) (1975). *See also* VA. CODE ANN. § 63.1-248.12 (Supp. 1976).

To fulfill his obligations to the child, the guardian ad litem must actually assume four separate roles. He is first an investigator, then an advocate, a counsel, and a guardian. His ability to function as an advocate, a counsel, and a guardian depends to a great degree on his ability to investigate. To perform adequately as an investigator, it is necessary to have at least a working knowledge of the incidence of child abuse and neglect. This does not necessarily mean that the guardian ad litem must have substantive expertise in child development, medical pathology, psychiatry, social work and juvenile law. It *does* mean that the guardian ad litem must recognize his deficiencies in particular areas and turn to others who can supply that expertise. Moreover, in order to protect the abused child's interests adequately, the guardian ad litem must receive prompt appointment to enable him to be present at all proceedings.

Present enabling statutes provide little in the way of legislative guidelines for the guardian ad litem.[185] It would be wiser perhaps to simply regard the legislation as a framework—a framework which defines the upper and lower limits of acceptable performance. What happens between those limits is largely a function of the person chosen to represent the child. Ultimately, the success of a guardian ad litem will rest upon his willingness to explore the complexities of the problem, to work hard and develop his own expertise, to incorporate the expertise of others, and finally—perhaps most importantly—to be innovative and creative.

In very few cases is a lawyer asked to assume more responsibility than a child abuse case. A lack of diligence, a lack of interest, or a passive pursuit of the child's interests may have little effect on the lawyer. That is not true of the child. Children grow older, but for many children the best is not yet to be.

185. *See* Isaacs, *The Role of the Lawyer in Representing Minors in the New Family Court*, 12 BUFF. L. REV. 501, 505-06 (1963).