

Overview and Background

This chapter provides an introduction to the concept of guardians *ad litem*, a brief overview of their use in Minnesota courts, and a review how guardian services are provided in other states. We asked:

- What is a guardian *ad litem* and what role do guardians play in the judicial system?
- What is the guardian *ad litem* system like in Minnesota?
- How are guardian *ad litem* services provided in other states? What program models do other states use?

Our analysis is based on a review of the current literature, statutes from Minnesota and selected other states, and interviews with judges and guardian program administrators.

THE ROLE OF GUARDIANS *AD LITEM* IN THE JUDICIAL SYSTEM

Guardians are supposed to advocate the best interests of the child.

Historically, the court appointed a guardian *ad litem* to protect the rights of infants or incompetent defendants in court proceedings. The guardian assumed an advocacy role to aid the child in proving or defending a case. Today guardians *ad litem* are appointed by the court to represent the best interests of a child who is a party to or involved in judicial proceedings including neglect, dependency, termination of parental rights, custody court proceedings, or in any other proceeding where the child's interests are at stake and not otherwise protected.

Previous studies have indicated that the appropriate roles for a guardian include investigation, advocacy for the best interests of the child, and counsel to the court.¹ The guardian's specific duties vary with the type of case and wishes of the court. A guardian *ad litem* may be a lawyer, but the role of guardian is separate and distinct from that of the child's legal counsel. The latter must represent the child's wishes, while the guardian advocates for the child's best interest. In general, a guardian independently assesses the child's situation and presents information for the court to consider in planning for the immediate and long-term

¹ U.S. Department of Health and Human Services, National Center on Child Abuse and Neglect, *Final Report on the Validation and Effectiveness Study of Legal Representation Through Guardian Ad Litem* (Washington, D.C.: National Clearinghouse, 1994), 2-5 - 2-11.

needs of the child. Guardians are appointed by the judge and serve as an officer of the court, giving the guardian a quasi-judicial status. As with other officers of the court, guardians are usually considered immune for actions made in the course of their assigned duties or if they are acting in good faith.² Guardians have no authority beyond the specific court proceeding to which they are temporarily appointed.

A BRIEF HISTORY OF GUARDIANS *AD LITEM* IN THE UNITED STATES

Guardians *ad litem* became widely used in the United States after Congress passed the Child Abuse Prevention and Treatment Act (CAPTA) of 1974, the first comprehensive legislation dealing with prevention and treatment of child abuse.³ To qualify for federal child abuse prevention and treatment funding, CAPTA required states to pass legislation providing for the appointment of a guardian *ad litem* in every judicial proceeding involving an abused or neglected child. The guardian was to represent and protect the best interests of the child.

At the federal level, CAPTA brought with it no language about guardian qualifications, training, or duties. Federal rules did not clarify this situation, stating only that the guardian's responsibility includes representing and protecting the rights, interest, welfare, and well-being of the child. The federal government left implementation of guardian *ad litem* requirements to the states. Following passage of CAPTA, most states enacted legislation requiring that guardians *ad litem* be appointed to represent abused and neglected children involved in legal proceedings. Most states delegated the responsibility for guardian *ad litem* representation to individual counties, resulting in a wide variety of guardian models and program structures both across and within states.

GUARDIAN *AD LITEM* SERVICES IN MINNESOTA

In Minnesota, current law provides for the appointment of guardians *ad litem* in juvenile and family courts to protect or represent the interests of the child. Both mandatory and discretionary appointments may be made in either court. In juvenile court, a guardian must be appointed in cases of suspected child abuse or neglect, or when the parent is absent, or incompetent, indifferent or hostile to the child's interests.⁴ In family court, a guardian *ad litem* may be appointed in

² Immunity is discussed in more detail in Chapter 4.

³ 42 U.S.C. 5101 et seq.

⁴ *Minn. Stat.* § 260.155, subd. 4.

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divorce or separation proceedings where visitation or custody is an issue.⁵ Guardians *ad litem* are required in all such proceedings if the court has reason to believe that the child is a victim of abuse or neglect.⁶

When CAPTA became law in 1974 there was no obvious state agency in Minnesota to administer guardian appointments. Guardians were already used on a limited basis in various counties, but there was no centralized state program. The burden of overseeing the mandatory appointment of guardians and program development, if any, was delegated to district courts and counties. Consequently, Minnesota has a patchwork of guardian *ad litem* programs across the state, with programs operating independently in each county. There is no central authority for providing guardian services and little consistency across jurisdictions. Each Minnesota county, in large part driven by the philosophy of the court or an administrator, determined which type of guardian best suited its needs.

Most Minnesota counties use guardians who are paid attorneys, paid non-attorneys, or volunteers. Programs may have full- or part-time coordinators; services may be provided by contract with for-profit and non-profit agencies. Programs vary in the ways that guardians are selected, trained, supervised, and evaluated. Some programs may coordinate training efforts; some guardians may work for more than one county. The Minnesota Association of Guardians *Ad Litem* (MAGAL), a member of the National Court-Appointed Special Advocates Association (NCASAA), is an independent, statewide guardian organization. MAGAL's annual conference is the only known organized statewide training opportunity currently available for guardians.

In 1986, the Minnesota Judges Association adopted *Guidelines for Guardians Ad Litem* partly in response to legislation requiring additional use of guardians in family court. To "assure quality guardian *ad litem* practice throughout Minnesota," the *Guidelines* provided substantial information for judges, program coordinators, and guardians about types of appointment, roles, duties, screening, training, and supervision. However, the *Guidelines* are not mandatory and do not carry the authority of rule.⁷ They are "a compilation of practices and policies already in use, as well as concepts suggested by those providing or utilizing guardian *ad litem* services." The *Guidelines* acknowledge that for many of the issues addressed "there is no ideal method or practice."⁸ The Supreme Court is currently revising the *Guidelines*. Chapters 2 through 5 provide more detail on guardian *ad litem* services in Minnesota.

⁵ Minn. Stat. § 518.165, subd. 1.

⁶ Minn. Stat. § 518.165, subd. 2. Chapter 2 discusses Minnesota law related to guardians *ad litem* in more detail, and Appendix A contains a listing of guardian *ad litem* statutory references.

⁷ The guidelines have been cited in Minnesota case law, most notably regarding the definition of guardian immunity, and to that extent they have authority, but this is not well understood in many counties.

⁸ Minnesota Judges Association, *Guidelines for Guardians Ad Litem* (St. Paul: June 1986), unnumbered introductory pages. Hereafter referred to as the *Guidelines*.

GUARDIAN *AD LITEM* PROGRAMS IN OTHER STATES

We contacted national associations, such as the National Court-Appointed Special Advocates (CASA) Association, and we reviewed statutes from selected states to learn how guardian services are provided in other jurisdictions. When Congress re-authorized CAPTA in 1988, it requested the first national study on the effectiveness of guardian *ad litem* programs.⁹ We also used the findings from this national study, which describes the status of guardian programs in states and counties across the nation, to compare guardian programs in Minnesota with those in other states.

Since passage of the CAPTA, each state has adopted legislation providing for the appointment of guardians *ad litem* and developed its own methods of providing guardian services. With few exceptions, state statutes have not clearly defined the qualifications, roles and responsibilities, or training required for guardians. States—and jurisdictions within states—vary considerably in the ways they provide guardian *ad litem* representation. According to one national study, “Coherence and consistency of guardian *ad litem* representation clearly is the exception in most states.”¹⁰

Minnesota, along with 42 other states, mandates the appointment of a guardian in all abuse or neglect proceedings. Minnesota also provides for the discretionary appointment of guardians in family court divorce or separation proceedings involving custody and visitation issues. In the remaining eight states, however, the appointment of guardians is either totally discretionary or required for only certain cases, such as the termination of parental rights.

There is little agreement on what type of person should serve as a guardian.

Types of Guardian Models

Many different models exist for providing guardian *ad litem* services. There is considerable debate about what components define the “best” model, and little consistency across or within states on what type of person should serve as a guardian *ad litem*.¹¹ Based on our review of how other states provide guardians *ad litem*, we conclude that:

- **There is no dominant national pattern for providing guardian services.**

⁹ U.S. Department of Health and Human Services, National Center on Child Abuse and Neglect, *Final Report on the Validation and Effectiveness Study of Legal Representation Through Guardian Ad Litem* (Washington, D.C.: National Clearinghouse, 1994). U.S. Department of Health and Human Services, National Center on Child Abuse and Neglect, *Appendix A: National Study of Guardian Ad Litem Representation* (Washington, D.C.: National Clearinghouse, October 1990).

¹⁰ Health and Human Services, *National Study*, 7.

¹¹ Health and Human Services, *National Study*, 39.

Originally, attorneys served as guardians *ad litem*. In the late 1970s, the judges in Seattle, Washington, began using trained volunteers or court-appointed special advocates (CASAs) to service as guardians *ad litem*. In the early 1980s, the number of volunteer guardian *ad litem* programs increased when the Administration for Children, Youth and Families included volunteer programs as a criterion for receipt of grants. Other models for providing guardian services also developed. Today, most juvenile and family courts in the United States provide guardian *ad litem* services using one of the following models:

1. **Paid attorney model.** Attorneys are hired to serve as guardians *ad litem*. This model can take two forms: private or staff attorney. In the private attorney model, the court appoints an attorney in private practice from a panel or court appointment list to serve as a guardian. The court pays for the private attorney's guardian services, usually at an hourly rate. In the staff attorney model, counties employ staff attorneys who specialize as guardians. Staff attorneys may be employed directly or through contracts with law firms or legal aid societies. In some jurisdictions, public defenders serve as guardians. Typically, staff attorneys are salaried employees.
2. **Volunteer model.** Volunteers are selected and trained by the court or an independent CASA organization. The nature of volunteer models can vary depending on the role given to volunteer guardians in different states. In some states, volunteers serve as guardians but are assisted by private attorneys who serve as legal counsel.¹²
3. **Paid non-attorney model.** Non-attorneys are selected by the court to serve as guardians. Some jurisdictions may use social workers or similarly trained professionals as guardians; others may use non-attorneys without any special training. Paid non-attorney guardians may or may not receive guardian training, depending on their education and experience, and the jurisdiction. This model is not as widely used as the first two models. The court pays non-attorney guardians, usually at an hourly rate.

Most states use attorneys as guardians.

The type of guardian model used varies from state to state; however, most states use attorneys as guardians, followed by states, including Minnesota, that use a combination of these models. Even in states with a statutory requirement for one type of system, other models may be used to supplement the primary model. Table 1.1 shows that 22 states require guardians *ad litem* to be attorneys.¹³ In some of these states, a volunteer CASA may also be appointed in addition to the attorney. State statutes usually designate whether the attorney or the volunteer CASA serve as the guardian. For instance, the courts in Kentucky, Maryland and Oklahoma may appoint volunteer CASAs in addition to attorneys, but the CASA does not serve as the guardian *ad litem*.¹⁴

¹² Only two states--Arizona and North Carolina--require a combined volunteer and attorney appointment. The court appoints both a volunteer to represent the child's best interest and an attorney to provide legal representation.

¹³ Of these, 18 states require the appointment of guardians, while four states (Colorado, Georgia, Louisiana, and Wisconsin) have discretionary appointment of guardians. Wisconsin requires the appointment of a guardian *ad litem* only in out-of-home placements, abuse restraining orders, or termination of parental rights.

¹⁴ Health and Human Services, *National Study*, 17 - 20.

Table 1.1: Guardian *Ad Litem* Models Used in the United States

	<u>Number of States</u>
Guardians must be attorneys ^a	22
Guardian may be either an attorney or a volunteer	21 ^b
OF THESE 21 STATES:	
Use attorneys	5
Use a combination of attorneys, paid non-attorneys, and volunteers	14 ^b
Use volunteers with attorneys as back-up	1
Appoint both a volunteer and attorney	1
Guardian must be a volunteer ^c	5
Require volunteer guardian and attorney as legal counsel	2

Source: U.S. Department of Health and Human Services, National Study of Guardian *Ad Litem* Representation, October 1990.

^aA volunteer court-appointed special advocate also may be appointed but does not serve as the guardian.

^bMinnesota is in these groups.

^cIn the absence of a trained volunteer, several states appoint attorneys to serve as guardians.

Twenty-one states, including Minnesota, allow either attorneys or volunteers to serve as guardians *ad litem*. Of these, 14 states, including Minnesota, appoint a combination of paid attorneys, paid non-attorneys, or volunteers to serve as guardians. Minnesota is one of eight states using paid non-attorneys, such as social workers or other paid non-attorneys to serve as guardians. In jurisdictions using more than one guardian model, judges play a significant role in deciding whether an attorney or volunteer guardian should be appointed. While this decision may depend on the availability of both types of guardians, Minnesota judges told us that they try to appoint attorney guardians to cases involving complex legal issues.

Only five states require the guardian *ad litem* to be a volunteer. In the absence of trained volunteers, several states appoint either private or staff attorneys to serve as the guardian. Some states use staff attorneys to provide legal counsel to the volunteer guardian. Finally, two states require the appointment of both a volunteer guardian and an attorney serving as legal counsel.

Program Administration

Seventeen states have developed statewide guardian *ad item* programs, while 33 states provide guardian services locally.¹⁵ Generally, statewide programs provide for some consistency in guardian qualifications, appointment, duties, and training

¹⁵ *The National Study* (1990) identified 14 statewide guardian programs—Alaska, Arizona, Delaware, Florida, Hawaii, Maine, Massachusetts, New Jersey, New York, North Carolina, Rhode Island, South Carolina, Utah, and Vermont. A review of statutes from selected states identified three states that have implemented statewide programs since 1990—Indiana, Kansas, and Virginia.

requirements. The nature of statewide programs varies from state to state with regard to administrative structure, guardian models used, and other program components. We found:

- **Even where statewide guardian programs exist, uniformity in guardian models and program components is unusual.¹⁶**

Examples of the lack of uniformity include:

- Alaska uses a combination of volunteers, and staff and private attorneys. The Alaska Office of Public Advocacy provides direct supervision, and administrative and legal support to only two of the state's nine court districts. The remaining court districts do not receive supervision or support.
- Both New Jersey and New York have statewide programs that use "law guardians," or attorneys who specifically represent children in abuse and neglect proceedings. New Jersey uses staff attorneys; with two exceptions, New York uses private attorneys.
- North Carolina requires the appointment of an attorney and a volunteer guardian in every abuse and neglect case. In practice there is some local variation in who is appointed depending on the availability of volunteers.
- Both Florida and South Carolina require the appointment of volunteer guardians. Of the other statewide programs, nine rely on the use of volunteer guardians in combination with some other model.

The administrative structure and operation of statewide guardian programs also varies from state to state. Program administration is provided by the state court system in ten states, and by the public defender's office, department of criminal justice, or other independent agencies in nine states. In most states, a state guardian *ad litem* program office has been established by statute and authorized to develop rules, provide support, such as staff legal counsel, and supervise local (county or court district) guardian programs.¹⁷ Generally, the duties of state and local program administrators focus on recruitment, supervision and evaluation of guardians, and record keeping for the guardian program.

In states without statewide guardian programs, either counties or district courts are responsible for providing guardian services. As noted earlier, Minnesota, with its guardian services organized on a county-by-county basis, is one of 33 states where guardian services are provided locally. Chapter 2 discusses in more detail how Minnesota provides guardian services.

Seventeen states have statewide guardian programs, but few have uniform components.

¹⁶ Health and Human Services, *National Study*, 7 and 13.

¹⁷ Health and Human Services, *National Study*, 34 to 37.

Roles and Responsibilities of Guardians *Ad Litem*

Many states fail to specify the roles and responsibilities of guardians *ad litem*, thus diminishing the guardian's ability to effectively represent the child's interests. After reviewing both literature and selected statutes from other states, we concluded:

- **It is rare for states to provide a detailed definition of guardian duties in state statutes; usually states define guardian roles and responsibilities broadly.**

If state statutes address guardian duties, most simply direct the guardians to represent, protect, and/or advocate for the interests of the child. About 20 states have statutes, court rules, or administrative procedures or policies that specifically address the roles and responsibilities of guardians although the level of detail varies from state to state. Generally, states define guardian responsibilities broadly: conduct an independent investigation, meet with the child and family, and monitor the case. The following are examples of statutory language related to guardian roles.

North Carolina has outlined in statute the duties of its trained volunteer guardians in juvenile court:

The duties of the guardian *ad litem* shall be to *make an investigation* to determine the facts, the needs of the juvenile, and the available resources within the family and community to meet those needs; to *facilitate*, when appropriate, the settlement of disputed issues; to *offer evidence and examine* witnesses at adjudication; to *explore options* with the judge at the dispositional hearing; and to *protect and promote the best interest of the juvenile* until formally relieved of the responsibility by the judge.¹⁸ (Emphasis added.)

Oregon statutes also set forth broad responsibilities of the guardian *ad litem*:

Subject to the direction of the court, the duties of the court appointed special advocate shall be to: *investigate* all relevant information about the case; *advocate* for the child, assuring that all relevant facts are brought before the court; *facilitate and negotiate* to insure that the court, the Children's Services Division, if applicable, and the child's attorney, if any, fulfill their obligations to the child in a timely fashion; and *monitor* all court orders to insure compliance and to bring to the court's attention any change in circumstances that may require a modification of the court's order.¹⁹ (Emphasis added.)

¹⁸ North Carolina General Assembly § 7a-586 (a).

¹⁹ Oregon Statutes § 417.610.

Finally, Idaho statutes articulate guardian responsibilities along with the timing and method of reporting back to the court and status of the guardian in court:

Subject to the direction of the court, the guardian *ad litem* shall have the following duties ...

- (a) To conduct an independent factual investigation of the circumstances of the child ...
- (b) To file with the court a written report stating the results of the investigation, the guardian *ad litem*'s recommendations and such other information as the court may require. The guardian *ad litem*'s written report shall be delivered to the court, with copies to all parties to the case, at least five (5) days before the date set for the adjudicatory hearing ...
- (c) To act as an advocate for the child ... and is charged with the general representation of the child. To that end, the guardian *ad litem* shall participate fully in the proceedings ...
- (d) To facilitate and negotiate to insure that [all parties] fulfill their obligations to the child in a timely fashion.
- (e) To monitor the circumstances of a child, ...
- (f) To maintain all information regarding the case confidential and to not disclose [information] except to the court or to other parties to the case.²⁰

Like most states, Minnesota does not define guardian roles in detail in statute.

Minnesota is among the group of states whose statutes simply charge guardians to “represent” or “protect the interests of the child.” Nowhere in Minnesota statute or rule are guardian roles and responsibilities defined in the kind of detail noted above.²¹ Instead, guardian roles and responsibilities are defined in the 1986 *Guidelines*. Chapter 3 discusses guardian roles and responsibilities.

Recruitment, Qualifications, and Evaluation of Guardians *Ad Litem*

According to our research, recruitment issues encountered in most states include the limited availability of guardians in rural areas, the inability to recruit minorities to serve as guardians, and lack of funding for recruitment activities. Based on our research it appears that:

- **Volunteer guardian programs and states with statewide programs are more likely than other states or programs to have standards for guardian recruitment.**

The National CASA Association's recommended management practices for recruitment include the use of a standardized information packet explaining the purpose of the program, and the role and responsibilities of the volunteer guardian. NCASAA recommends that recruitment efforts should try to attract male and female volunteers from diverse cultural and ethnic backgrounds and from a variety of age groups and economic levels. NCASAA also recommends

²⁰ *Idaho Code* § 16-1630 (a).

²¹ Detail is provided as to what constitutes the “best interests of the child” for the purpose of custody investigation, but this is not necessarily a guardian function.

that volunteer guardian programs screen volunteers using a written application, two reference checks, and a personal interview with the applicant. Finally, NCASAA directs volunteer guardian programs to conduct security checks by screening criminal records through local and state law enforcement agencies, and the central Child Abuse Registry. Minnesota's *Guidelines* suggest that counties use both formal (newspaper articles or want ads) and informal (personal contacts) methods to recruit guardians. To adequately screen potential guardians, the *Guidelines* also recommend the use of personal interviews, reference checks, and criminal history checks.

Aside from those states that require the guardian to be either an attorney or a volunteer, we found that:

- **Most states do not specify in statute any further qualifications for who can or cannot serve as a guardian *ad litem*.**

The most common requirements are that the potential guardian should be at least 21 years of age, be screened for any criminal record or record of investigation for child abuse or neglect, have no conflict of interests with the duties of guardian, and meet minimum training requirements. Additional general characteristics, frequently contained in rules or administrative procedures, include: the ability to communicate effectively; interest in children; mature judgment; and ability to relate to persons of different cultures. Minnesota's *Guidelines* contain a similar list of guardian qualifications.

Few states specify guardian qualifications or training requirements in detail.

The nature of guardian evaluation varies depending on the model used to provide guardian services. Nationally, virtually all of the jurisdictions using volunteer guardians reported annual or more frequent monitoring and regular caseload review conducted by the program coordinator. In contrast, only 35 percent of the counties reported regular monitoring of attorney guardians. The majority of attorneys were monitored informally by judges, or were provided no oversight or review.²² Chapter 4 discusses the recruitment, qualifications and evaluation of guardians in Minnesota.

Training Requirements for Guardians *Ad Litem*

Most of the states with statewide guardian programs have training requirements for volunteer guardians, but only five of these states require training for attorney guardians. In reviewing the existing literature, we found:

- **The vast majority of the states without statewide programs do not have statewide training requirements for either volunteer, paid attorney, or paid non-attorney guardians.**

If the state does not require training, many local (county or court district) guardian programs adopt guardian training requirements. The length of training and topics covered in local programs vary from jurisdiction to jurisdiction, and there is little consistency within a state. All states and local jurisdictions using volunteer guardians have training requirements set either by the jurisdiction or by

22 Health and Human Services, *National Study*, 36.

the CASA organization although the nature of these programs also differs across jurisdictions.²³ A few of these states also require specialized guardian training for attorneys who serve as paid guardians. Minnesota does not have a statewide training requirement for guardians *ad litem*. Instead, training requirements are set locally, and vary across jurisdictions. Training requirements for guardians in Minnesota are discussed in Chapter 5.

Immunity from Liability for Guardians *Ad Litem*

Immunity from liability is usually defined through state statute or case law. After reviewing literature, case law, and selected statutes from other states, we found:

- **At least 15 states provide some type of guardian immunity through statute, nine other states define immunity in case law, and most of the remaining states have not clearly addressed the issue of guardian immunity.**

Several states reported that attorney guardians were covered through individual policies for malpractice insurance. In Minnesota, case law has granted guardians absolute immunity similar to that granted other court officials. The national study of guardians found that even when guardian immunity is defined “at both the county and state level often [guardians] were unsure of the extent to which [they] could be held personally responsible for actions performed while representing a child.”²⁴ Immunity for Minnesota’s guardians is discussed in Chapter 4.

SUMMARY

In this chapter, we discussed the role of guardians *ad litem* in the judicial system and described how guardian services are provided in other states. Guardians are appointed by the court in civil proceedings where the interests of the child would not otherwise be adequately represented. A guardian serves as an officer of the court and is required to represent the best interests of the child.

Guardians *ad litem* became widely used after Congress required states to pass legislation providing for the appointment of guardians in every judicial proceeding involving an abused or neglected child. However, the federal government left implementation of guardian *ad litem* requirements to the states. Most states, including Minnesota, delegated the responsibility for guardian representation to individual counties resulting in a wide variety of guardian models and program structures both across and within states.

Our review of guardian representation in other states reveals that there is no dominant national pattern for providing guardian services. State and local jurisdictions across the country use a variety of guardian models, involving various combinations of paid attorneys, paid non-attorneys, and volunteers. Some states (17) have statewide guardian programs providing more consistency in program administration within a state. However, the nature of these programs

²³ Health and Human Services, *National Study*, 29 to 32.

²⁴ Health and Human Services, *National Study*, 36.

About half of the states give guardians explicit immunity from liability.

varies from state to state with regard to administrative structure and other program components.

Guardians have become an integral part of the juvenile and family court system in Minnesota. With guardian services organized on a county-by-county basis, Minnesota is one of 33 states where guardian services are provided locally. As we will show in later chapters, Minnesota has no central authority for providing guardian services. Counties use a combination of paid non-attorney, paid attorney, and volunteer guardians. Guardian programs vary in the ways that guardians are selected, trained, supervised, and evaluated.