4 Administration of Guardian *Ad Litem* Programs

In this chapter we review how guardian programs are administered, including how guardians are recruited, screened, assigned, supervised, and coordinated. We also review the concept of guardian *ad litem* immunity from civil suit and its place in the Minnesota legal system.

We asked:

- **What are the qualifications and eligibility requirements for guardians? Are screening procedures uniform across the state? Are there enough minority guardians?**
- **How are guardians selected for appointment to cases?**
- **How are guardians supervised and evaluated?**
- **What accountability do guardians have to the court and to the other parties, including parents?**
- **What sort of immunity do guardians *ad litem* have and how does this compare with immunity for other court officials?**

We surveyed court administrators about selection criteria they use to screen guardians and we surveyed court administrators and judges about the methods they use to select guardians for appointment. During interviews with guardians, program coordinators, and judges, we asked about how they recruit guardians and what problems they encounter. We surveyed family practice lawyers, public defenders, judges, court administrators and guardians and asked them how guardians are supervised and how complaints are made. We also asked lawyers, public defenders, and judges to rate guardians on a variety of characteristics. We reviewed recent Minnesota case law and statutes, information from other states, and relevant literature. In addition, we solicited an opinion from Peter Wattson, Senate Counsel, on the issue of guardian immunity.

There is little consistency in how counties recruit, select, and supervise guardians.

As shown in this chapter, there is little consistency in how counties recruit, select, and supervise guardians. There is no system to process complaints about a guardian, unlike other professionals, and there are no uniform procedures to remove a guardian from a case or program. The Supreme Court needs to develop broad guidelines addressing recruitment, selection, supervision, and evaluation that counties can use to administer guardian programs. According to case law, guardians in Minnesota have absolute immunity, as do other officers of the court, and there is no compelling reason to modify this or to add an immunity provision to state law.

RECRUITMENT

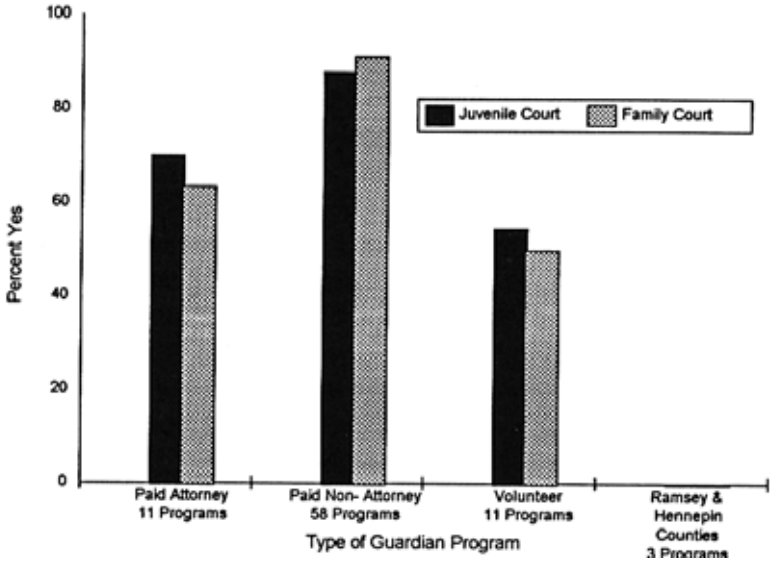
Volunteer programs usually must recruit more guardians than other types of programs.

Historically, judges recruited guardians as they were needed. Today, programs recruit guardians more systematically—placing ads in newspapers, soliciting volunteers from a variety of community organizations, and other methods. We asked program coordinators and judges how they recruited guardians and any problems they encountered. We found:

- **Volunteer programs must regularly seek new guardians, and many counties have difficulty recruiting minority guardians.**

About one-half of the volunteer program coordinators told us they did not have enough guardians, compared to about one-third of the paid attorney programs and ten percent of the paid non-attorney programs. Some coordinators criticized open solicitation of guardians as risky, and we agree that using newspaper ads does place a heavier burden on the screening process. As shown in Figure 4.1, court administrators from counties with volunteer programs were less likely to say to say that they had enough guardians. Because of small caseloads and the potential for "burnout", volunteer program coordinators usually must recruit more guardians than other types of programs. One county abandoned volunteer guardians in favor of paid non-attorney guardians, in part because of the difficulty finding volunteers. Another county told us that they were abandoning using paid non-attorney guardians in favor of paid attorneys, because of high guardian turnover. Another county recently contracted with a non-profit organization to provide, coordinate and supervise paid non-attorney guardians, taking the recruitment burden off the county.

Figure 4.1: Percent of Programs Reporting that They Have Enough Guardians



Note: Data from Hennepin and Ramsey counties were evaluated separately from other types of guardian programs. Court administrators were asked, "Are there enough guardians for your county's family and juvenile court needs?"

Most counties cannot find enough qualified minority guardians.

We interviewed guardian program coordinators and judges from programs in the Twin Cities' metropolitan area and other districts with relatively large numbers of minority children, including Washington, Ramsey, Hennepin, Carlton, Kandiyohi, and St. Louis counties. We were told that they cannot find enough minority and economically disadvantaged guardians, although the reason is not clear. Some advocate groups have alleged that guardian programs may not really be trying to identify appropriate minority members, or are recruiting inappropriately. Conversely, some people from minority populations may hesitate to become an active party to judicial proceedings In some jurisdictions, potential minority guardians are more likely to be poor, and it may not be economically possible for them to serve as guardians without compensation. In others, minority populations are very low.

We also found that most guardians are women (70 percent overall), except in programs using paid attorneys. We were told that the lack of male guardians can be a problem for some children. For example, some staff told us that teen-age boys tend to prefer working with male guardians. A commonly heard complaint about Hennepin and Ramsey county volunteer programs was that they used too many middle-class white women.

In our view, the pool from which guardians are selected and trained should be of high quality, although there is no simple way to achieve this. Programs must actively recruit guardians of diverse cultural and economic backgrounds to best meet childrens' needs. At a minimum, guardians must be trained to recognize the different cultural needs of children, including handicapped children, and program coordinators could work with district and state resources to more effectively identify potential guardians from minority communities. Volunteer programs might consider paying for guardians with specific skills or attributes, such as representing a specific minority.

SCREENING

The 1986 *Guidelines* specify no minimum educational requirement for guardians. However, they list nine guardian qualifications, specifically:

- at least 21 years of age,
- interest in children,
- availability of transportation,
- ability to maintain confidentiality,
- verbal and written skills,
- available time (averaging ten hours per month per case),
- no crimes against persons,
- good judgment and integrity, and
- stability.

The *Guidelines* emphasize the importance of life experience, particularly experience as a parent. We asked court administrators how they select guardians, including educational requirements and criminal background checks. We found:

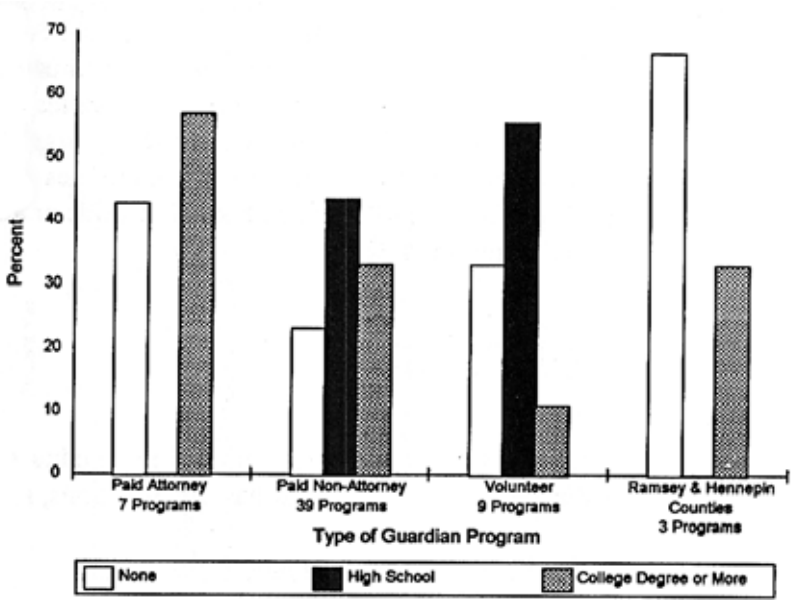
- **There is little consistency among guardian programs in the criteria used to select guardians.**

Few counties require that guardians have college degrees.

We asked court administrators what types of educational requirements they have for their guardians. Only two-thirds responded, and 29 percent of these said there were no requirements. We are not certain if the remaining counties have no requirements, or if the court administrators simply did not know. As shown in Figure 4.2, the most common minimum education requirement reported by county programs was a high school diploma. Relatively few programs, all of them using paid non-attorneys and paid attorneys, required college degrees. However, we were also told that many guardians in programs requiring high school degrees actually have higher levels of education.[1] Some critics of guardian *ad litem* programs told us that guardians should have a much higher level of education, or be educated in a specific area such as social work. However, judges told us that they can appoint guardians with specialized knowledge in those cases where this is required. Judges said that they usually value guardians because of their ability to take a very broad view, rather than because of their specialized skills.

We also asked court administrators what types of experience or personal characteristics they look for in guardians. Experience with children, communication skills, flexibility, and maturity were the characteristics most often

Figure 4.2: Guardian Education Requirements



Note: Data from Hennepin and Ramsey counties were evaluated separately from other types of guardian programs. Court administrators were asked to report the minimum education requirements under a section asking, "What criteria are used to screen candidates for guardian positions?"

1 It was also suggested that all guardians should be attorneys, which would require a law degree.

mentioned. While the language from some programs was virtually verbatim from the *Guidelines*, it appears that many programs are not using the *Guidelines* since fewer than 60 percent of court administrators provided information about qualifications. Several program coordinators told us that an extended interview process is used to screen candidates to make sure they are not carrying any "emotional baggage," and that potential guardians are also observed during training. The *Guidelines* suggest a probation period as an additional screening technique, but only a few counties reported using this method.

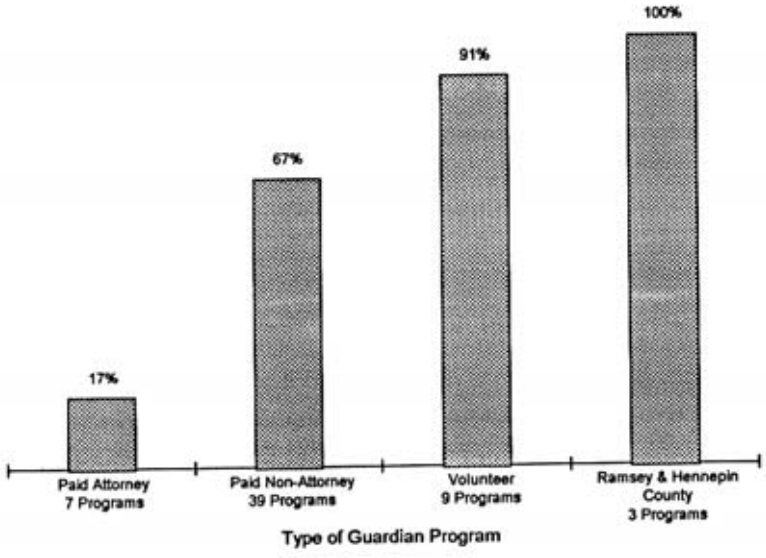
Some counties do not require criminal history checks.

About three-fourths of counties responded to our survey question about requiring criminal history checks for applicants. Two-thirds of those responding said that they perform criminal history checks. If we assume that most counties that did not respond do not perform such checks, then only about half of all guardian programs in Minnesota require criminal background checks. These programs include more than two-thirds of court cases with guardians in Minnesota. As shown in Figure 4.3, programs using volunteers were most likely and those using paid attorney guardians were least likely to report checking whether a guardian has a criminal history.

We think that guardian programs should have clear guidelines for guardian selection, and we suggest a written application, structured interview, personal references, criminal background check, observation during the training, and a probation period as recommended in the *Guidelines*. We recommend:

- **Within the guidelines set by the Supreme Court, each program should set standards for guardian selection, including education, experience and personal characteristics.**

Figure 4.3: Percent of Programs Reporting that They Perform Criminal History Checks



Note: Data from Hennepin and Ramsey counties were evaluated separately from other types of guardian programs. Court administrators were asked to answer yes or no to the question, "Are criminal history checks performed?"

We found no compelling reason for the state or individual programs to require either a college degree or other advanced academic training.[2] However, judges and guardian programs should retain the flexibility to appoint guardians with special skills, such as nursing, social work, or law, when they believe it is appropriate.

ASSIGNMENT

All guardian appointments are made by a judge, who writes an order specifying details for the guardian's assignment to a case.[3] The method used to assign a guardian to a specific case could affect the independence of their judgment. For example, some people with whom we spoke questioned whether guardians feel they have obligations to those who select them or whether judges feel obligated to support a guardian they personally selected if there are complaints about that guardian.

We asked judges and court administrators to tell us how guardians are assigned to cases. Administrators reported that in about 40 percent of the programs, judges made an appointment without referring to a pool or list of guardians, most often in paid attorney and paid non-attorney programs. In about 14 percent of all programs the coordinator guided the appointment. In another 40 percent of programs, there was a list of available guardians from which the judge selected. Judges reported making a specific recommendation about one-third of the time, usually in paid attorney programs.

We suggest that

- **Where possible, guardians should be assigned to cases by guardian program coordinators rather than judges.**

In our view, the perception of parents and others of the independence of judge and guardian is important, and judges should try to limit their involvement in the selection of a specific guardian for a case. Programs without coordinators might select guardians in rotation from a pool of available guardians, although the skills of individual guardians and the requirements of a specific case should be considered.

The timing of guardian selection and appointment is another issue, since national literature reported that over two-thirds of volunteer guardians were appointed more than one month after the filing of a petition in CHIPS cases.[4] Late assignments could lead to over-dependence on other professionals and reduced opportunity to conduct independent investigations. Hennepin County public defenders and others we surveyed told us about the unwillingness of guardians in Hennepin County juvenile court to oppose the opinions of social workers and other professionals. It has been suggested that guardians may be appointed late to

2 As stated in Chapter 2, we found no reason to require that all guardians be attorneys.

3 See Chapter 3 for more detail on judges orders.

4 U.S. Department of Health and Human Services, National Center on Child Abuse and Neglect, *Final Report on the Validation and Effectiveness of Legal Representation through Guardian ad Litem*, (Washington: October 1990), 4-10.

these cases and must often rely on investigative work done by other professionals. While we did not specifically study the timing of guardian appointments, late assignment should be avoided. For some programs, this may be an issue of resources and guardian availability.

SUPERVISION

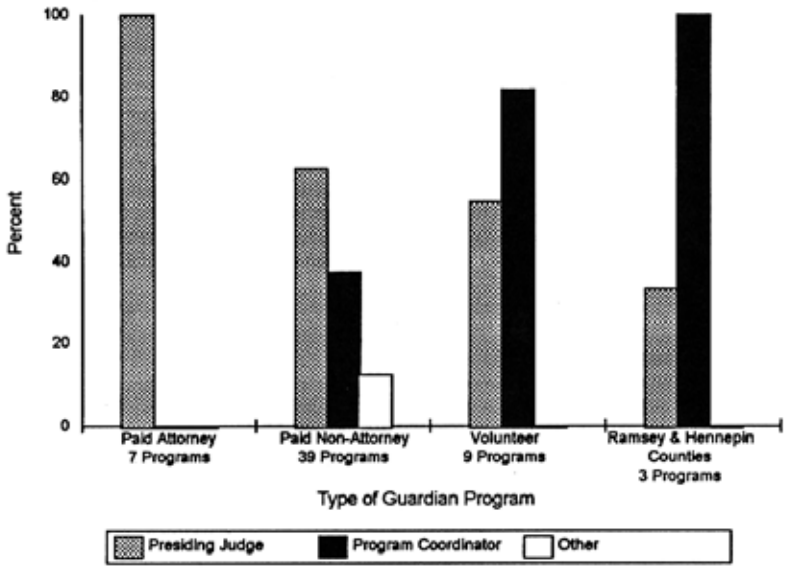
We asked court administrators to describe who supervised guardians and the method used. We found that:

- **Judges are often actively involved in guardian program supervision, but for paid attorney programs and some paid non-attorney programs, judges provided the only supervision.**

Judges provide the only supervision for some guardian programs.

As shown in Figure 4.4, court administrators reported that judges provided supervision and evaluation for paid attorney programs. Supervision for paid non-attorney guardians included program coordinators, peers, consultants, non-profit agencies and for-profit companies. Judges also helped supervise paid non-attorney programs, and for about 50 percent of the programs they provided the only supervision. All but one volunteer program had coordinators who provided supervision, although about half reported that the judge also helped supervise. Volunteer programs reported that guardians were evaluated by program coordinators, but judges evaluated most paid attorney and some paid non-attorney guardians. About 20 percent of paid attorney and paid non-attorney

Figure 4.4: Percent of Programs Reporting Different Types of Supervision



Note: Data from Hennepin and Ramsey counties were evaluated separately from other types of guardian programs. The category, "Other," excludes any supervision by a judge or program coordinator.

programs reported using periodic case review for guardian evaluation, compared to over 60 percent of the volunteer programs.

We asked judges, family practice lawyers, and public defenders how well they believed guardians are supervised. We found:

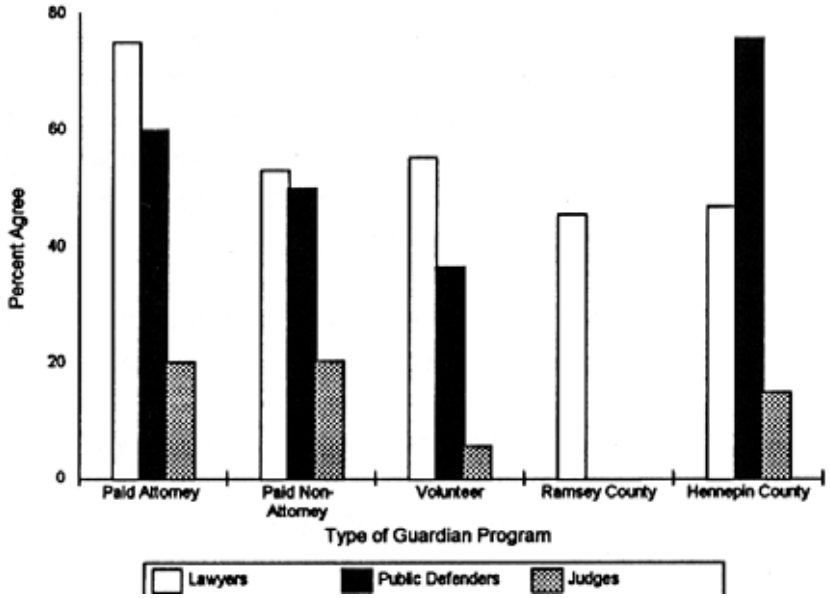
- **Judges believe most programs, especially volunteer guardian programs, are well supervised, but lawyers and public defenders generally disagree.**

As shown in Figure 4.5, judges were unlikely to say that guardians in any type of program were unsupervised, and they rated most volunteer programs, especially Ramsey county, as well supervised. Public defenders were most positive about supervision in volunteer programs, and about half of those responding agreed that guardians in paid attorney and non-attorney programs were seldom adequately supervised.[5] Lawyers' responses showed less variation, although they perceived paid attorney programs as least supervised. These results are generally consistent with the responses to the court administrator survey.

Parents and lawyers commented that judges often work too closely with guardians, that guardians may be recruited by a judge, and that judges may feel obligated to "protect" a guardian they selected and appointed. A lack of independent supervision contributes to this perception. Moreover, the degree of

Unlike judges, many lawyers and public defenders think guardians are not adequately supervised.

Figure 4.5: Percent of Lawyers, Public Defenders, and Judges Agreeing that Guardians Are Seldom Adequately Supervised



Note: Data from Hennepin and Ramsey counties were evaluated separately from other types of guardian programs. Respondents were asked to indicate how strongly they agreed with the statement, "Guardians are seldom adequately supervised."

5 Public defenders showed the same negative opinion toward Hennepin County as was discussed above in Chapter 2.

supervision that judges are able to provide is questionable, given high caseloads and busy schedules. While judges read guardian written reports, if any, it is less likely that they review guardian case files or critique written reports outside the courtroom. In fact, such evaluation might be considered inappropriate because of the degree of independence necessary between judges and guardians.

Most volunteer and several paid non-attorney programs specifically provide for guardian supervision. Such programs have full- or part-time coordinators and well defined policies and procedures. They may develop mentorships between new and experienced guardians or periodically review case files. The role of the judge in most of these programs is restricted to formal guardian appointment (and writing the specific order), occasional involvement in training, and working with the program coordinator.

GUARDIAN BEHAVIOR , THE COMPLAINT PROCESS, AND REMOVAL OF GUARDIANS FROM SPECIFIC CASES AND GUARDIAN PROGRAMS

We asked judges, lawyers, and public defenders about guardians' professional conduct, responsiveness to parents, and exhibition of bias. We found:

- **Most respondents said that guardians conduct themselves professionally, but there is some disagreement about which type of guardian is most likely to act inappropriately.**

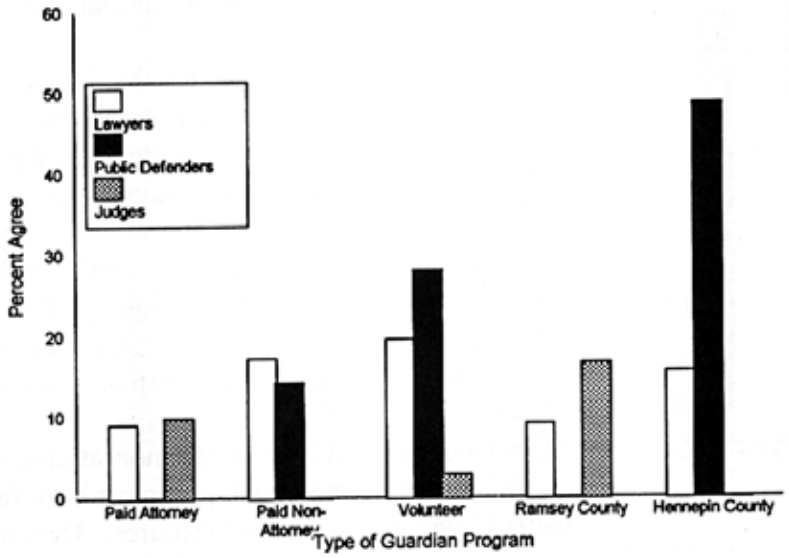
Overall, less than less than one-fourth of family practice lawyers, public defenders, and judges agreed that guardians did not conduct themselves professionally. Lawyers and public defenders were somewhatmore likely to identify volunteer programs and paid non-attorney programs as problematic, as shown in Figure 4.6.[6]

Not all counties have a formal process for filing complaints about a guardian.

More than 80 percent of judges responded that guardians do not exhibit bias, as shown in Figure 4.7. Over half of all lawyers and public defenders disagreed with this statement, although they seemed more positive toward paid non-attorney and volunteer programs. Lawyers, public defenders, parents, and others sent us considerable anecdotal information about specific allegations of guardian bias against women, men, minorities, and the poor. Generally, allegations stated that bias resulted in slanted reports with no substance for the guardian's recommendations. As discussed earlier, bias was a concern of program coordinators in the recruitment and selection process. It may be especially difficult to identify and recruit guardians with minority and economically disadvantaged backgrounds, making the role of training even more important. Reviewing guardian reports, even on an intermittent basis, is one supervisory technique that can help identify and alleviate some of these problems.

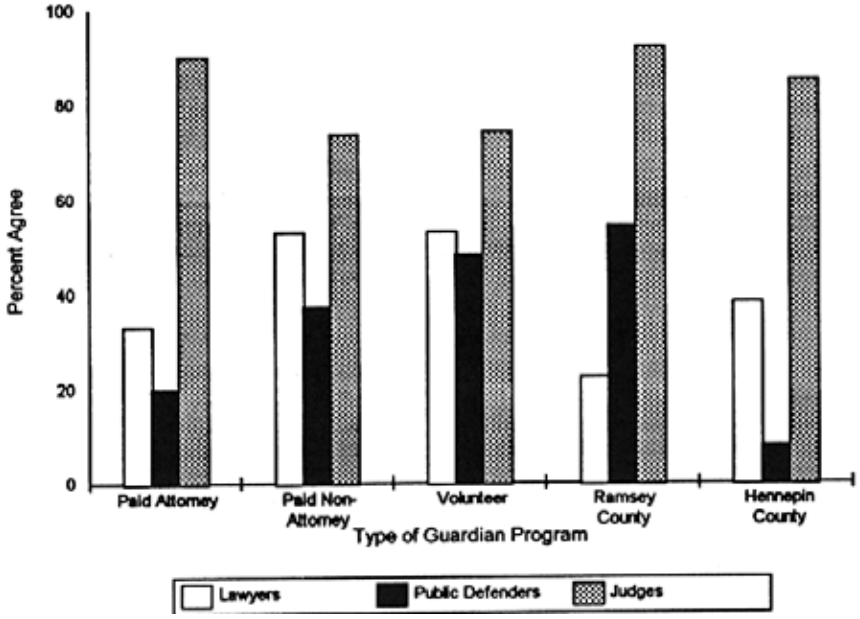
6 Public defenders in Hennepin County were very negative.

Figure 4.6: Percent of Lawyers, Public Defenders, and Judges Agreeing that Guardians Do Not Conduct Themselves in a Professional Manner



Note: Data from Hennepin and Ramsey counties were evaluated separately from other types of guardian programs. Respondents were asked to indicate how strongly they agreed with the statement, "Guardians often do not conduct themselves in a professiional manner."

Figure 4.7: Percent of Lawyers, Public Defenders, and Judges Agreeing that Guardians Do Not Show Bias



Note: Data from Hennepin and Ramsey counties were evaluated separately from other types of guardian programs. Respondents were asked to indicate how strongly they agreed with the statement, "Most guardians do not show obvious bias toward involved party."

We asked court administrators and judges to describe the process they used to handle complaints about guardians. We found:

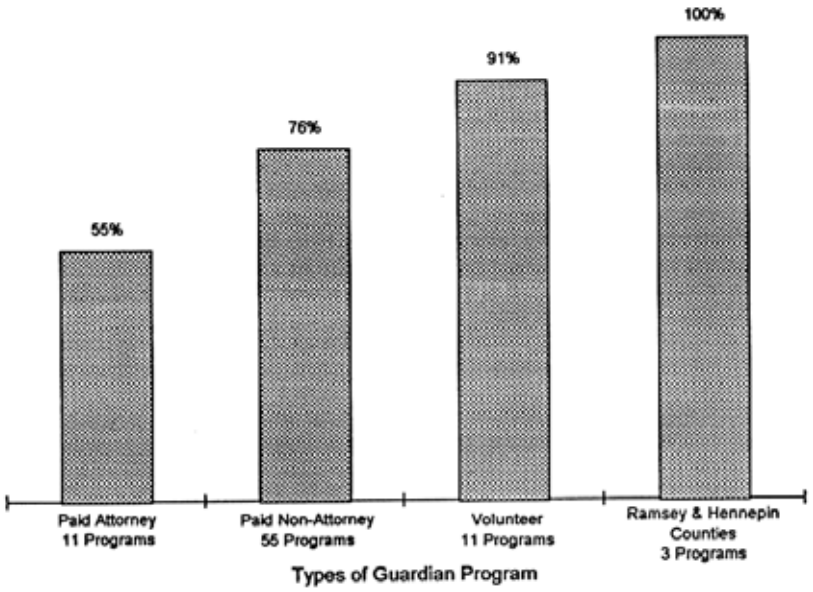
- **All volunteer programs and about one-third of paid non-attorney programs have a formal complaint process, but only the judge who appointed a guardian can remove that guardian from a specific case.**

Parent advocacy groups often expressed concern about the mechanism for complaining about a guardian. Complaints included a guardian's general qualifications or his or her actions in a specific case. As shown in Figure 4.8, court administrators with paid attorney and paid non-attorney programs were least likely to report having a complaint process, and for most of these programs, complaints went directly to the judge who appointed the guardian. Programs with a formal complaint process reported using court services or administration or program coordinators, alone or in combination with judges, to review complaints. Complaints were usually submitted in writing to the program coordinator, court administrator or the judge, usually through a lawyer.

With the exception of the Hennepin County paid attorney program, the largest guardian programs did report having a formal process for complaint. Several program coordinators told us that individual guardians might not be assigned cases if the coordinator did not feel their performance was adequate. Once a guardian is assigned to a case, only the judge has the power to remove the guardian, and we were told that removal has been infrequent.[7] Generally parents

Some counties do not have a formal process for complaints against guardians.

Figure 4.8: Percent of Programs Reporting that They Have a Formal Process for Complaints



Note: Data from Hennepin and Ramsey counties were evaluated separately from other types of guardian programs. Court administrators were asked, "Is there a mechanism parents or others may use to complain if they are dissatisfied with the actions of the guardian?"

7 Most programs do not keep records of complaints or removal, and we cannot accurately estimate either.

do not have any input into the selection of a guardian, although they can petition the judge for removal of a guardian from a specific case.

Some parents are not comfortable complaining to the judge about a guardian.

We were told that parents are not comfortable bringing complaints about a guardian to the judge who appointed the guardian and who is presiding over the case. However, parents do not have another, formal mechanism to have their complaints heard. Procedures to complain about a guardian do not exist as they do for other professionals such as lawyers. The Office of Lawyers Professional Responsibility has declined to review attorneys acting as guardians.[8]

An independent mechanism for guardian supervision and evaluation is necessary to identify potential problems with guardian performance and correct borderline behavior. There are times when individuals behave in an unprofessional manner, and there should be a mechanism for complaints, correction, and removal. We recommend that:

- **The Supreme Court should develop standards for guardian evaluation and removal in its revised guidelines, and each guardian *ad litem* program should have in place specific procedures for administering these standards.**

The program coordinator should have authority to discipline, suspend, and remove guardians from their program (as opposed to a specific case) after a regular review. Coordinators should also be involved in any process to remove a guardian from a specific case, although the final authority should rest with the judge. The standards for such removal should be clearly defined and as consistent as possible across districts. Retaining flexibility at the local level allows counties to use boards, independent agencies, or other means to facilitate administration.[9]

A guardian oversight board at the district level could be modeled on the Lawyers Professional Responsibility Board.

We agree that the issue of guardian accountability is important. While we think that increased supervision and clarification of guardian roles will increase accountability, we suggest:

- **The Supreme Court should direct that a guardian *ad litem* oversight board be established within each district court to provide an avenue for complaints about guardians, appeals of program coordinator decisions, and a mechanism to generally review guardian programs in that district.**

There is currently no such board available, at the district or state level, even for attorney guardians.[10] This board could be modeled on the Lawyers Professional Responsibility Board, appointed by the judiciary, with a membership representing judges, lawyers, guardians *ad litem*, and community members. The board's responsibilities could include reviewing and investigating complaints about guardians, removing guardians from programs for cause, and hearing grievances of guardians who are removed at the local level.

8 Letter from Marcia Johnson, Office of Lawyers Professional Responsibility, June 28, 1994, in reference to a complaint against a Hennepin County guardian *ad litem*.

9 Local level can be county, multi-county, or judicial court district, depending on how guardian programs are organized.

10 We were told that the Lawyer's Responsibility Board will decline to hear cases of attorneys acting as guardians, as cited above.

THE COORDINATION OF GUARDIAN PROGRAMS

Just under half of Minnesota guardian programs have coordinators, although they are generally the largest programs. Twelve out of 13 volunteer programs have coordinators and about 40 percent of paid non-attorney programs told us that they have coordinators. The presence of a program coordinator, whether at the county, multi-county, or district level, promotes impartiality and accountability and minimizes the perception of undue guardian influence with the court. A coordinator performs an important function in recruiting, facilitating training, and supervising new and experienced guardians.

Program coordinators can promote impartiality and accountability.

Coordinators are an important component of guardian programs. We recommend:

- **Key characteristics of the coordinator role should be defined in the guardian guidelines developed by the Supreme Court, including selection criteria, responsibilities, and necessary training.**

Program coordinators could maintain records for the guardian program, including financial information, number of cases and children served, data on guardian training, evaluation, and complaints. These data could be used to periodically monitor guardian services in the state. Defining standards for the coordinator role should help create more consistency across programs, but still retain flexibility at the local level for program administration. Some programs may be so small that it is not feasible to have a coordinator at the county level and in these cases many of the coordinator duties may be performed by the court administrator or at the regional or court district level.

IMMUNITY

Guardians' immunity from civil liability is an important issue for some critics of the current guardian *ad litem* system, who say that, with immunity, guardians have free rein to make recommendations affecting families without any accountability for a vigorous and absolute investigation or freedom from bias. As noted earlier, some parents have said they are not comfortable bringing complaints to the judge, and currently do not have another, formal, mechanism to have their complaints heard. They contend that a civil lawsuit would be a mechanism for parents to ensure guardian accountability.

An Overview of Immunity

Civil lawsuits are a mechanism to redress injuries due to the negligent actions of another person. Degrees of negligence define the extent to which behavior departs from a standard of ordinary care, and may include ordinary and gross negligence. Ordinary negligence is defined as an absence of such care and

diligence as a person of ordinary care would exercise under the same or similar circumstances.[11] Ordinary care is defined as the care that an average reasonable man exercises to prevent harm to the person or property of others.[12] Gross negligence involves total or nearly total disregard for the rights of others and indifference to the consequences of an act.[13] The result of a determination of negligence might be the awarding of damages, if injury is demonstrated, or reversal of a previous judicial order or decision. Malicious and willful acts involving behavior with intent go beyond the usual definitions of negligence and may make the actor criminally liable.

Some parents equate guardian immunity with a lack of accountability.

Immunity, or protection from civil suit, may be "absolute" or "qualified."[14] Absolute or complete immunity refers to the right to be free from the consequences of the litigation's results and from the burden of defending oneself altogether. Qualified immunity only shields a person from liability for actions taken or not taken in good faith within the scope of an office. Thus, qualified immunity does not have the effect of immunizing an individual from suit, but only affords an affirmative defense against the claims made in the complaint.[15] Under absolute immunity, a lawsuit could be summarily dismissed so long as a person is acting within the scope of his or her appointment or authority, with no need to demonstrate the reasoning for an action or failure to act. Qualified immunity helps protect against an adverse judgment, but requires an investment of money and time to defend the case.

Public officers are often given immunity from liability for persons who may be injured as the result of a mistaken decision, no matter how wrong that decision might be, provided that the mistake was made within the scope of the official's authority, that the official was acting in good faith, and without willfulness, malice, corruption, or oppression in that office.[16]

A guardian is usually regarded as an officer of the court.

A guardian *ad litem* appointed to represent a child is usually regarded as an officer of the court, charged with the duty to identify and protect the rights of the child, and to inform the court of those rights. Guardians' status derives from their appointment by the court, although the court does not direct their activities, but merely sets them in action. Other officers of the court may include appointed witnesses, court administrators, and public defenders. The degree to which guardians are immune from lawsuit varies across the United States, as discussed below.

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11 Common law in some jurisdictions also recognize slight negligence, which involves the failure to exercise a great degree of care. *Webster's Third International Dictionary of the English Language Unabridged* (G. & C. Merriam Company, Springfield, Massachusetts: 1971), 2142.

12 *Webster's*, 1589.

13 *Webster's*, 1002.

14 This discussion focuses on liability for negligent acts and omissions, for which an aggrieved party could bring a civil lawsuit. We found no source that suggested guardians would ever be granted immunity from prosecution for criminal activity.

15 63A Am Jur 2d, Public Officers and Employees § 360.

16 63A Am Jur 2d, Public Officers and Employees § 362.

Immunity In Other States

Guardian immunity in other states is defined through statute or case law, if it is defined at all. A 1991 report by the U.S. Department of Health and Human Services reviewed guardian programs nationwide and found that: "most states have not considered the issue and lack clear policy and guidance from legislators and judicial precedence."[17] We did not attempt to exhaustively review statutes and case law, but relied on several national studies which included reviews of immunity.

Statutory Definitions of Immunity

One national study identified twelve states that provide some type of immunity through statute.[18] We found additional immunity language in Idaho statutes, and another article referred to statutory language in Colorado and Georgia.[19] Most of these statutes refer to coverage for the guardian (or guardian program personnel) to cover acts, errors, or omissions for actions undertaken within the scope of his or her duties. Of these 15 statutory references, about half appeared to provide for absolute immunity. The remaining statutes provide immunity so long as the guardian acts in good faith and/or is not guilty of gross negligence. The Health and Human Services report also noted that attorney guardians are often assumed to be covered by malpractice insurance, and many states mostly use attorney guardians.

Immunity in Case Law

A recent national review of guardian liability summarized case law for cases involving negligence, and concluded that:

> the courts held or recognized that where a guardian functions as an "arm of the court" and is an integral part of the judicial proceedings, the guardian is entitled to quasi-judicial immunity, reasoning that a guardian must be free to engage in a vigorous and autonomous representation of the child, and immunity is necessary to avoid harassment from parents who may take issue with the guardian's actions.[20]

Various cases cited discussed the role of the guardian, the expectations of the court, and mechanisms for ensuring guardian accountability, including the role of

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17 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.: October 1990), 39.

18 The Health and Human Services study cited Alaska, Delaware, Florida, Hawaii, Indiana, North Carolina, and South Carolina. The same study found that Arizona, Maryland, Oklahoma, Texas and Virginia have immunity for volunteer guardians.

19 Susan L. Thomas, "Liability of guardian ad litem for infant party to civil suit for negligence in connection with suit ", *American Law Reports, 5th Series* (1993), Volume 14, 932.

20 Thomas, "Liability of guardian *ad litem*....", 938. The article cited cases from Colorado, Delaware, Georgia, Maine, Minnesota, Missouri, New Mexico, Ohio, and South Carolina. We also identified Iowa, Illinois, and Mississippi case law.

judicial review in a case on appeal. The same review also found that guardians generally had no duty to the parents of a child, as opposed to the child himself.[21]

Case law from other states has generally found that guardians have absolute immunity.

Guardians themselves often do not know the extent to which they are immune from civil suit for negligence. One national study found that guardians were about as likely to report that they thought they had qualified (12 percent) as absolute immunity (10 percent); about one-third thought they had no immunity and almost 40 percent of respondents did not know.[22] The study underscores the complexity of the immunity issue, since most of the respondents in this survey were lawyers.[23]

In general, the immunity conferred on guardians through case law seems broader than that specifically defined by statute. The issue of good faith immunity has been raised in case law, but generally courts have ruled that guardians, in the absence of specific state law to the contrary, have absolute immunity from liability for negligence. The effect of that immunity is that cases are summarily dismissed if the only allegation is one of negligence.

Immunity In Minnesota

Statutory Definitions of Immunity

Minnesota statutes are silent on the issue of guardian immunity. However, the *Guidelines*, citing a 1985 case, state that guardians are absolutely immune.[24] The *Guidelines* also recommend that guardians carry liability insurance either as individuals or through the county guardian program.[25] The *Guidelines* do not in themselves have the weight of law, but have been cited in several cases.[26] Finally, the *Guidelines* specifically recommended that absolute guardian immunity be written into statute. Nothing was ever put into statute, and in 1988 Minnesota courts clearly defined guardian immunity in case law, eliminating the need to define immunity in statute.[27]

Immunity in Case Law

Minnesota case law is clear on the issue of immunity. A 1988 case found that a guardian *ad litem*, acting within the scope of his duties, is entitled to absolute immunity from claims arising from alleged negligent performance of his statutory responsibilities.[28] The court noted that this immunity was the same as that extended to other quasi-judicial officers and to the court itself, and dismissed the

21 However, a guardian might be liable for monetary damages to a child, in cases where such damages resulted from culpable omission or neglect. Thomas, *American Law Reports*, 944.

22 U.S. Department of Health and Human Services, *Final Report*, 4-14.

23 The balance of respondents were volunteers. This study did not look at any paid non-attorney models and as such has limited usefulness in comparison with Minnesota.

24 Minnesota Judges Association, *Guidelines for Guardians Ad Litem* (St. Paul: June 1986), 38.

25 The court cases suggest that guardians could be sued if, by action or inaction, there was monetary damage to a child, such as might occur if the guardian controlled a child's financial affairs.

26 *Welfare of J. S.*, 470 N.W.2d (Minn. App. 1991) and *Tindell v. Rogoshske*, 421 N.W.2d 340 (Minn. App. 1988).

27 *Tindell v. Rogoshske*, 428 N.W.2d 387 (Minn. 1988).

28 *Tindell v. Rogoshske.*

Minnesota case law clearly defines guardian immunity as absolute.

case based on the pleadings. This case has been cited, and supported, in other cases in Minnesota and elsewhere. As recently as April 1994, a federal case cited *Tindell* and cases from Missouri, New Mexico, and Ohio in sustaining the absolute immunity of an Illinois guardian *ad litem* when her actions were closely related to her assigned judicial duties.[29]

Minnesota courts have also addressed a variety of other issues, including whether guardian reports must be accepted by the court and when a guardian must be appointed. Some of these issues have been addressed in statute, especially the identification of the type of cases to which guardians must or may be appointed.

In a 1993 case, the Minnesota Supreme Court extended absolute immunity to public defenders.[30] In that decision the court cited *Tindell* as persuasive, and noted the need for independence and the existence of judicial review as a remedy for any injustice. Moreover, the Court stated that:

> the cost in money and resources to defend against malpractice suits is at least as important, if not more important than the cost of any possible damage awards...Substantial time, energy and money are consumed in discovery.[31]

The court went further, and tied this burden to the impact on the program, not just the individual. The court concluded that without immunity, limited public defender program resources would be negatively impacted, including a likely increase in caseloads, and recruitment of new public defenders could be hindered.

After reviewing the issue of immunity and negligence as defined in Minnesota case law and case law and statute in selected other states. We found:

- **Minnesota case law is similar to case law in other states, although such case law is broader than statutory definitions of immunity in some other states.**

- **The Legislature does not need to statutorily define immunity in order to simply codify existing case law.**

Case law on immunity is quite clear and easily identified. If case law were complex or located in a variety of sources, codification might be helpful. However, the court has been quite clear and consistent on this issue. If the Legislature chooses to restrict guardian immunity, it should consider ensuring consistency with immunity currently enjoyed by other officers of the court such as public defenders. There are mechanisms available to rectify problems within the guardian system. Improving training, providing supervision and evaluation, and creating a district review board will put guardians on a more professional level.

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29 Scheib v. Grant, 22 F.3d 149 (7th Cir. 1994), 156.

30 Dziubak v. Mott, 503 N.W.2d 771 (Minn. 1993).

31 Dziubak v. Mott, 776.

Limiting guardian immunity could have a chilling effect on vigorous representation of the child's best interests.

One option for Minnesota would be to give guardians only qualified immunity. Under this option, lawsuits could proceed, requiring guardians and guardian programs to expend resources and time to defend a case. This issue is in part one of perception, that if a negligence case cannot be summarily dismissed, the party with the best lawyer is more likely to win or force an undesirable settlement. And if the aggrieved party is driven as much by emotion as reason, lawsuits may become a weapon against an individual or a jurisdiction. This could then have a chilling effect on vigorous pursuit of guardian investigations and make it even more difficult to recruit guardians. The courts in Minnesota and elsewhere have cited concern about inhibiting guardian activity in ruling that guardians have absolute immunity. Restricting guardian immunity would set guardians apart from other officers of the court who currently have absolute immunity.

As noted above, we were told by advocates about allegations that individual guardians exceeded their authority and exacerbated what were already difficult situations. We have no way of determining the true extent of such problems, because programs often do not keep accurate statistics on the number and type of cases assigned to guardians or the number and type of complaints. It is beyond the scope of this report to recommend that specific guardians receive additional training, closer evaluation, or be dismissed. However, to allow fair treatment in all counties, it is necessary that all guardian programs be designed to facilitate adequate scrutiny.

Current guardian immunity refers to the guardian working within the boundaries of an appointment. We do not think a change in guardian immunity is needed, but:

- **Better definition of general guardian roles and responsibilities in Minnesota statutes, updated Supreme Court guidelines and specific judicial orders, would better identify what it is appropriate for guardians to do for the purpose of guardian immunity.**

Guardians need to know what is expected of them and be held accountable through supervision and review to an acceptable level of performance. Failure to adequately define the guardian role is a disservice to the guardian, children, and parents. Costly civil suits are the least desirable of all solutions to what is essentially a problem of individual and program accountability.

SUMMARY

We found that recruitment methods are varied and that programs have difficulty finding minority guardians. Selection criteria are not uniform, even within similar types of guardian programs, and many court administrators were unwilling or unable to specify their standards. Like other aspects of Minnesota's guardian programs, supervision and evaluation of guardians is inconsistent across the state. Judges play an important role in many guardian programs.

Many of the problems of parents and others may not be amenable to systemic solutions.

In our view, many of the problems parents and others have may not be amenable to systemic solutions. Some problems are confined to individual guardians, they may relate to the family turmoil that necessarily exists before a guardian would be appointed to a case, or they may result from a misunderstanding of the guardian's role on the part of parties to the case. While a few guardian programs are more frequently criticized than others, we think that updating the *Guidelines* developed by the Supreme Court, adopting them as rule, and allowing some local flexibility in their interpretation and administration, will result in stronger guardian programs throughout the state.