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Providing Counsel to Children in Dependency Proceedings in Florida

Michael J. Dale*

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I. INTRODUCTION

Florida has a long and ignominious history of failing to provide protection and safety to children in its child welfare system. Years of investigations, newspaper articles, and lawsuits demonstrate the pervasiveness of the problem and the degree to which children are unprotected.¹ Large numbers

* Professor of Law, Nova Southeastern University Law Center. The author thanks Sheena Benjamin-Wise, Amy Bloom, Mark Earles, Garrett Franzen, Tracey McPharlin, Joan Morrison, and Elizabeth Shaw who assisted in the preparation of this article.

1. See, e.g., *Dep't of Children & Family Servs. v. I.C.*, 742 So. 2d 401 (Fla. 4th Dist. Ct. App. 1999); *White Found., Inc., v. Migdal*, 720 So. 2d 568 (Fla. 4th Dist. Ct. App. 1998); Jane H. Shaeffer, *Representation of Children in Dependency Actions: The Child's Unfulfilled and Illusory Right*, 66 FLA. BAR J., 64 (1992); Christina A. Zawisza, *Child Welfare Managed Care in Florida: Will It Be Innovation or Abdication?* 25 NOVA L. REV. 619 (2001); RICHARD WEXLER, NAT'L COALITION FOR CHILD PROT. REFORM, *THE LENGTHENING SHADOW: HOW FLORIDA'S CONTINUING FOSTER CARE PANIC ENDANGERS CHILDREN* (1st ed. Feb. 2001);

of children are subject to abuse and neglect.² Children often come into state care who should not be there, and then they remain for extended and unreasonable periods of time.³ Decision-making as to whether children should be given the opportunity to be adopted, placed in long-term care, including independent living, or sent home, are often delayed for inordinately long periods of time.⁴ Neither a coherent system for deciding which children should enter state care exists, nor do procedures that provide guidelines for what to do with the children once they enter the Florida child welfare system and come before the court. The lack of an efficient system of placement and supervision is exacerbated by the fact that the conditions into which children are placed are fundamentally unsafe.⁵ The irony is self-evident. During this entire process of removal from a home claimed to be unsafe and placed into a foster home or congregate care facility that may be even more unsafe, very few of Florida's children receive any independent legal representation.⁶

Fred Grimm, *Foster Care System Doomed to Failure*, MIAMI HERALD, Nov. 11, 2001, at 1BR; Carol Marbin Miller, *Consultant Says Foster Care in County as Bad as Any in U.S.*, MIAMI HERALD, Oct. 5, 2001, at 3B; Richard Wexler, *Claims of Checks, Balances far from Reality at Child Agency*, ST. PETERSBURG TIMES, Mar. 8, 2000; Curtis Krueger, *So Many Children*, ST. PETERSBURG TIMES, Mar. 8, 2000, at 1D; *DCF Now Has to Deliver*, SUN-SENTINEL (Ft. Lauderdale), February 21, 2000, at 26A; Shana Gruskin, *Report Blasts DCF Workers Staff Ignored Court Order to Interview Kids Children Placed in Dangerous Home*, SUN-SENTINEL (Ft. Lauderdale) Feb. 18, 2000, at 3B; OFFICE OF THE STATE COURTS ADM'R, ASSESSMENT OF THE DEP'T OF CHILDREN AND FAMILIES FED. COMPLIANCE REVIEW (2001) [hereinafter OFFICE OF THE STATE COURTS]; 1998 BROWARD COUNTY GRAND JURY INTERIM REP. [hereinafter INTERIM REPORT].

2. The data is complex. In 1998 the legislature determined that "[t]he incidence of known child abuse, abandonment and neglect has increased rapidly over the past [five] years." FLA. STAT. § 39.001(6) (2000). Interestingly, a recent national study of child abuse crimes indicates that child sexual abuse has diminished. Lisa Jones & David Finkelhor, *The Decline in Child Service Abuse Cases*, U.S. DEP'T OF JUSTICE, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION (Jan. 2001).

3. *Id.*

4. See FLA. STAT. § 39.621–.624 (2000) setting forth options. The Circuit Court jurisdiction over the child ends when the child reaches 18. FLA. STAT. § 39.013(2) (2000); Randi Mandelbaum, *Revisiting the Question of Whether Young Children in Child Protection Proceedings Should be Represented by Lawyers*, 32 LOY. U. CHI. L.J. 1 (2000).

5. See discussion *infra* Part II. Conditions in child welfare systems in other states are also dramatically inadequate. See Jill Chaifetz, *Listening to Foster Children in Accordance with the Law: The Failure to Serve Children in State Care*, 25 N.Y.U. REV. L. & SOC. CHANGE 1, 8 (1999) (finding that in 1995, 22 states and the District of Columbia were under court supervision for problems in care of foster children); National Center for Youth Law, *Foster Care Reform Litigation*, Docket 2000.

6. See discussion *infra* Part II.

For at least the past forty years, the major focus of the American response to child welfare problems has been the use of juvenile or family court to decide issues concerning removal of abused and neglected children from their homes, placement and care in the child welfare system, and then either returning them home or looking toward termination of parental rights and adoption.⁷ Given the system primarily involves the use of courts, and Florida's history of failing to protect children in the system from harm, children in Florida's dependency proceedings need maximum assistance to safeguard them. Of course, endemic problems in providing a workable and protective child welfare system is not limited to Florida. Problems exist nationwide.⁸ The National Center for Youth Law reported in its Foster Care Reform Litigation Docket 2000 that major litigation directed to foster care over the past ten years has been brought in at least thirty-two states.⁹ There have been a plethora of books and articles addressing the American child welfare system, both in popular¹⁰ and scholarly¹¹ literature. Particularly prophetic is the description of the system by Professor Martin Guggenheim. Speaking with specific reference to the Adoption Assistance and Reform Act of 1980, Professor Guggenheim said:

7. Douglas Besharov, Practice Commentaries, N.Y. FAM. CT. ACT § 241 (McKinney 1999).

8. See Santosky v. Kramer, 455 U.S. 745 (1982); DALE ET AL., REPRESENTING THE CHILD CLIENT (2000); Martin Guggenheim, *The Effects of Recent Trends to Accelerate the Termination of Parental Rights of Children in Foster Care—An Empirical Analysis in Two States*, 29 FAM. L.Q. 121 (1995) [hereinafter Guggenheim, *The Effects of Recent Trends*]; H. Lila Hubert, *Comment: In the Child's Best Interests: The Role of the Guardian Ad Litem in Termination of Parental Rights Proceedings*, 49 U. MIAMI L. REV. 531, 538 n.38 (1994) (referring to the crisis in the early 1990s); Mandelbaum, *supra* note 4. The problems are just as great in the Juvenile Justice System. See generally Michael J. Dale, *Lawsuits and Public Policy: The Role of Litigation in Correcting Conditions in Juvenile Detention Centers*, 32 U.S.F. L. REV. 675 (1998); PATRICIA PURITZ & MARY ANN SCALI, *Beyond the Walls: Improving Conditions of Confinement for Youth in Custody*, AMERICAN BAR ASS'N (1998).

9. NAT'L CTR. FOR YOUTH LAW, FOSTER CARE REFORM LITIGATION DOCKET (2000).

10. See, e.g., NINA BERNSTEIN, *THE LOST CHILDREN OF WILDER* (2001); JOHN CUTNER & JILL WOLFSON, *SOMEBODY ELSE'S CHILDREN: THE COURTS, THE KIDS, AND THE STRUGGLE TO SAVE AMERICA'S TROUBLED FAMILIES* (1996); JENNIFER TOIH, *ORPHANS OF THE LIVING: STORIES OF AMERICA'S CHILDREN IN FOSTER CARE* (1997); Elizabeth Gleick, *The Children's Crusade*, TIME MAG., June 3, 1996.

11. See, e.g., ELIZABETH BARTHOLOT, *NOBODY'S CHILDREN: ABUSE AND NEGLECT, FOSTER DRIFT, AND THE ADOPTION ALTERNATIVE* (Beacon Press 1999); BAZELON CENTER FOR MENTAL HEALTH LAW, *MAKING CHILD WELFARE WORK: HOW THE R.C. LAWSUIT FORGED NEW PARTNERSHIPS TO PROTECT CHILDREN AND FAMILIES* (1998); JEAN KOH PETERS, *REPRESENTING CHILDREN IN CHILD PROTECTIVE PROCEEDINGS: ETHICAL AND PRACTICAL DIMENSIONS* (1997).

When foster care is overused, when policymakers do not take into account the circumstances under which children are separated from their families, when the proposals to terminate parental rights of children in foster care are the only features of a comprehensive foster care reform that are assiduously enforced, one must ask whether the termination provisions are appropriate. Justice Fortas' well-worn commentary on the realities of the juvenile justice system in the 1960s is fully appropriate in this context; under the Adoption Assistance and Reform Act of 1980, children appear to receive "the worst of both worlds." They are placed in foster care too easily, without sufficient safeguards ensuring that they remain with their families whenever they could be safely kept at home. Then, once they enter foster care, the rules authorizing termination of parental rights—which were enacted based on the premise that foster care would be a last resort—are fully enforced.¹²

There have also been articles specifically addressing the problems in Florida.¹³ The child's innate vulnerability, combined with defects in the dependency system and external threats of harm, brew a dangerous concoction that can irreparably harm Florida's youth.¹⁴ Once a child acquires dependency status¹⁵ in Florida, jurisdiction over the child vests in both the judicial and executive branches.¹⁶ Although parental involvement in these

12. Guggenheim, *The Effect of Recent Trends*, *supra* note 8, at 140.

13. See, e.g., Timothy Arcaro, *Florida's Foster Care System Fails Its Children*, 25 NOVA L. REV. 641 (2001); Hubert, *supra* note 8; Renee Goldberg & Nancy Palmer, *Guardian Ad Litem Programs: Where Have They Gone and Where Are They Going*, 69 FLA. B.J. 83 (1995); Carolyn S. Salisbury, *The Legality of Denying State Foster Care to Illegal Alien Children: Are Abused and Abandoned Children the First Casualties in America's War on Immigration?*, 50 U. MIAMI L. REV. 633 (1996); Shaeffer, *supra* note 1, at 64.

14. See *White Found, Inc. v. Migdal*, 720 So. 2d 568 (Fla. 4th Dist. Ct. App. 1998); Bruce A. Boyer, *Jurisdictional Conflicts Between Juvenile Courts and Child Welfare Agencies: The Uneasy Relationship Between Institutional Co-Parents*, 54 MD. L. REV. 377 (1995).

15. Under Florida law abuse and neglect cases are referred to as dependency proceedings. See FLA. STAT. § 39 (2000). Section 39 contains two separate procedures dealing first with dependency proceedings and second with termination of parental rights proceedings. See §§ 39.501–.510, .521–.522, .801–.817. Other jurisdictions use other terms for dependency proceedings, such as abuse and neglect proceedings. See Besharov, *supra* note 7, § 241 (McKinney 1999). Other commentators have referred to the combination of dependency and termination proceedings as "child protection proceedings." See Mandelbaum, *supra* note 4, at 90 n.2. For simplicity purposes, this article refers to both dependency and termination proceedings in Florida generically as dependency proceedings.

16. § 39.501–.510, .521–.522, .801–.817.

matters can be significant, in many situations the courts and child welfare agencies are the primary decision makers in the determination of what is in the best interests of the child, which also makes conflicts of interest more common.¹⁷ Even when there is no conflict, the court and the agencies are often unable to protect the children.

By statute in Florida, parents are now entitled to counsel at all stages of the dependency and termination of parental rights proceeding.¹⁸ For the past decade, the Department of Children and Family Services ("Department"), Florida's child welfare agency, has been required to appear through counsel in dependency proceedings pursuant to an order of the Supreme Court of Florida.¹⁹ On the other hand, children have no lawyer in dependency proceedings in Florida either by constitutional right or by statute.²⁰ Rather, the only form of representation they receive is on an ad hoc basis through a volunteer guardian ad litem system, and very little representation by attorneys.²¹ Children have received representation in some form across the country for the past twenty-five years,²² sometimes by a lawyer and other times through a guardian ad litem program, which was first instituted in 1974 through the federal Child Abuse Prevention and Treatment Act.²³ The problem in Florida, unlike other jurisdictions whose systems are discussed later in this article, is that the child has no entitlement to a lawyer and often does not even obtain the services of a volunteer guardian ad litem. The child needs an attorney, and the legislature should provide for one.

This article first describes the nature of the problem in terms of both inadequacies in the child welfare system and the failure of the current approach to protect children in Florida's courts. The article then analyzes the source of authority to protect children in dependency procedures, focusing on federal statutes and Florida state law. It then briefly surveys the variety of approaches to protecting children in child protection proceedings across the country. Finally, it proposes that independent representation of dependent children by a lawyer is a crucial factor in facilitating a rapid and safe outcome for children in abuse and neglect proceedings. It asserts that the

17. See Boyer, *supra* note 14, at 383.

18. § 39.013(1); *R.M. v. Dep't of Children. & Family Servs.*, 770 So. 2d 295 (Fla. 1st Dist. Ct. App. 2000).

19. § 39.402(8)(c)1., .807(2), .822; FLA. R. JUV. P. 8.215, 8.305(b)(7)(A), 8.510(a)(2)(c); Supreme Court of Fla., Amended Administrative Order, *In re Guardian Ad Litem Program Standards of Operation*, Preamble (1995).

20. See chapter 39 of the *Florida Statutes* and discussion *infra* pp. 782–84.

21. § 39.402(8)(c)1., .807(2)(a), .822.

22. Martin Guggenheim, *Counseling Counsel for Children*, 97 MICH. L. REV. 1488, 1488 (1999) [hereinafter Guggenheim, *Counseling Counsel*].

23. 42 U.S.C. § 5105–5107 (1994).

appointment of a guardian ad litem is an appropriate and worthwhile approach to protecting children. However, despite the presence of the guardian ad litem, appointment of counsel, both as a general proposition and specifically because of Florida's historic failure to protect its children in the dependency system, is essential to protecting children in the state's child welfare system.

II. STATEMENT OF THE PROBLEM

Although Florida statutory law recognizes the need for and appears to require that all children receive representation through a guardian ad litem during dependency proceedings,²⁴ many children involved in abuse and neglect proceedings are not provided with representation of any kind. The urgent need for consistent and competent representation of children in dependency proceedings is demonstrated first by state reporting statistics, which show that 30,065 of the state's children were found to be victims of substantiated maltreatment during 1998,²⁵ and that state court proceedings were undertaken for 14,980 of these victims.²⁶ Parents were by far the most common perpetrators, contributing to 18,429 of 23,790, or seventy-seven percent, maltreatment cases.²⁷ Close to 800 perpetrators were either foster parents, residential faculty staff, or child day care providers.²⁸ The fact that fifty-four child deaths in Florida were attributed to maltreatment²⁹ evidences the need for a voice to zealously advocate the child's interests in these proceedings. The trial and appellate courts have publicly expressed this concern for children in foster care.³⁰

Second, there is substantial evidence that Florida's system is in a state of crisis. Indeed, both Governor Bush and the Secretary of the Department reported as much in a federal court hearing in January 1999.³¹ The very

24. § 39.402(8)(c)1., .807(2)(a), .822(1).

25. U.S. DEP'T OF HEALTH & HUMAN SERVS., SUMMARY DATA COMPONENT SURVEY 1998 § 4.1 & COMMENT (1998) [hereinafter SUMMARY DATA COMPONENT SURVEY].

26. *Id.* § 4.8.

27. *Id.* § 6.1.

28. *Id.* § 6.1.

29. *Id.* § 5.1.

30. See discussion *infra* pp. 781-86.

31. I am here to tell you that this administration is committed to transforming our child welfare system across the board, not just foster care, but from the beginning to the very end to place children that abused and neglected to a much higher priority that has been in the past.

serious operational problems that create issues of dangerous conditions for children are compounded by Florida's planned dramatic revamping of its system. State legislation requires plans for privatizing the state's child welfare system, except for child protected intake and investigation, by 2003.³²

Two recent federal court class action lawsuits in Florida, one in Broward County in which the governor and secretary appeared and one state-wide,³³ have highlighted the problems in foster care in the state.³⁴ A third federal lawsuit, a decade old, raising issues about the mental and health

The legislature is a partner in this, and I intend to use the resources and the bully pulpit and the power that the executive branch has to make that partnership work.

We have a temporary problem that we are going to solve, we are going to work on. A lot of the problems that exist, sadly we don't even have a baseline numbers to measure – how we measure progress.

We are so far behind. It is such a tragedy to see how the mismanagement combined with the lack of resources has developed this situation

Gov. Jeb Bush, Transcript Motion for Preliminary Injunction Before the Honorable Federico A. Moreno, United States District Judge, 18–19, Jan. 11, 1999.

Sir, no one is more cognizant than I of the situation in Broward County. When I see the style of this case, I see the real names of the children and the real faces of the children and what has occurred to those children.

So, I am aware of the crisis that truly faces Broward County and the entire state.

. . . .

I have found that the department is, in fact, in a state of crisis. Secretary Kearney, pp. 20–21, Transcript Motion for Preliminary Injunction Before the Honorable Federico A. Moreno, United States District Judge, January 11, 1999. Very recently, Department of Children and Families Secretary Kearney has said that the system has gotten much better. "I have witnessed tremendous improvement made possible by unprecedented funding increases championed by Governor Jeb Bush and the legislature." Kathleen Kearney, *Keeping Children in Loving Homes*, MIAMI HERALD, Dec. 16, 2001, at 5L.

32. Lisa Snell, *Child-Welfare Reform and the Role of Privatization*, POLICY STUDY NO. 271, REASON PUB. POL'Y INST. (2000); see also Michael J. Dale, *Juvenile Law: 2000 Survey of Florida Law*, 25 NOVA L. REV. 91 (2001). For a detailed discussion of this topic, see Zawisza, *supra* note 1.

33. See Order Approving Settlement Agreement, *Ward v. Kearney*, No. 98-7137-CIV-MORENO (S.D. Fla.) (settlement approved May 31, 2000) (court jurisdiction ended on Nov. 30, 2001); *Foster Children Bonnie L. v. Bush*, Case No. 00-2116-Civ-Moreno (S.D. Fla.) (A recent opinion by the trial court on December 4, 2001, granted defendant state officials' motion to dismiss the major claims in the case on *Younger v. Harris* abstention grounds).

34. Foster care is defined as "care provided a child in a foster family or boarding home, group home, agency boarding home, child care institution, or any combination thereof." § 39.01(29).

needs of dependent children, was recently settled.³⁵ The Broward County, Florida Grand Jury Interim Report of Spring 1998 also substantiates this problem. The Report expressed deep concerns that children in the District's foster care system are exposed to continuous danger while under the Department's care, stating:

It is the opinion of your Grand Jury that the problems facing the Department are extensive and so systemic that the children in the custody of or under the protection of the Department are in peril. We also found that the problems in the child welfare system extend beyond the Department into the courts as well.³⁶

While acknowledging that the Department is equipped with some dedicated personnel, the investigation portrays deplorable conduct from the Department's staff, ranging from poor handling of files, misrepresentations to the court, and even criminal behavior from persons associated with the Department.³⁷ Children are placed with persons who have been the subject of previous allegations of abuse and in homes that are overcrowded and poorly supervised.³⁸ As this article is being written, another grand jury investigation of the foster care system is on-going in Broward County.³⁹ The Supreme Court of Florida has recognized that the dependency courts are overburdened, and that acceptable case loads are central to the appropriate functioning of the dependency court.⁴⁰ It has said, "[a]s a result of the backlog inherent in termination cases, many children are left in legal limbo as their custody status is argued in the courts."⁴¹ The intermediate appellate courts have also recognized the problems in the system. Recently, the Fourth District Court of Appeal, in a case involving allegations of conditions problems in a DCF assignment center, recognized the need for representation of the child.⁴² Commenting on the horrendous number of abused and aban-

35. See Settlement Agreement, *M.E. v. Bush*, Case No. 90-1008-Civ-KEHOE (S.D. Fla.) (settlement approved May 31, 2001).

36. INTERIM REPORT, *supra* note 1, at 1.

37. *Id.* at 37-39; see also Carol Marbin Miller, *Child Welfare Law in Fixing Blame*, MIAMI HERALD, Nov. 8, 2001.

38. *Id.* at 22-23.

39. Telephone call from Assistant State Attorney John Countryman (Feb. 10, 2001) (requesting that the author testify before the grand jury investigating foster care in District 10).

40. See *M.W. v. Davis*, 756 So. 2d 90, 108 (Fla. 2000).

41. *J.B. v. Fla. Dep't of Children & Family Servs.*, 768 So. 2d 1060, 1065 (Fla. 2000).

42. See *Dep't of Children. & Family Servs. v. I.C.*, 742 So. 2d 401, 406 (Fla. 4th Dist. Ct. App. 1999).

doned children, and the difficult caseloads of both the case workers and the courts in juvenile proceedings, the court said:

What would help considerably is if each child could have a guardian *ad litem* or attorney *ad litem* who could be in contact with the child on a more regular basis and serve as the child's advocate. Parents are represented in these proceedings, but the child, the alleged object of everyone's concern, has no voice and no capacity to reach the court in many cases. We commend the bar volunteer projects such as Lawyers for the Children of America, for their representation of dependent children.⁴³

Regretfully, as this article demonstrates, the guardian ad litem program is unable to fully protect children for several reasons. First, in Florida, it is a voluntary system with the result that in many instances there is no guardian ad litem available to represent the child. Second, the state appellate courts, although expressing a recognition of the need for a guardian ad litem, have held that there is no absolute right to a guardian ad litem despite the fact that chapter 39 of the *Florida Statutes* appears to be absolute on its face,⁴⁴ and despite the existence of the federal statute that requires appointment of a guardian ad litem.⁴⁵ Third, the Florida dependency and termination statutes establish a complex set of procedures, which are quite time consuming and require a lawyer's intervention to move the proceeding on behalf of the child.⁴⁶ Unfortunately, the *Florida Statutes* and *Rules of Juvenile Procedure*

43. *Id.* at 406.

44. In termination of parental rights cases, the statute is clearly absolute. FLA. STAT. § 39.807(2)(a) (2000). In dependency cases, section 39.822 is absolute, stating that "[a] guardian ad litem shall be appointed by the court at the earliest possible time to represent the child in any child abuse, abandonment, or neglect Judicial proceeding . . ." (emphasis added). Section 39.402(8)(c)(1) provides that at the shelter hearing the court shall "[a]ppoint a guardian ad litem to represent the best interest of the child, unless the court finds that such representation is unnecessary." These two provisions ought not to be read as contradictory. Section 39.402 should be read solely as a limitation at the shelter housing stage. See Letter from Secretary Kathleen A. Kearney, Fla. Dep't of Children & Families, to Congressman E. Clay Shaw, Jr., (July 7, 2000).

45. CAPTA, 42 U.S.C. § 5101-5107; 45 C.F.R. § 1340.14(g); Letter from Carlis V. Williams, Southeast Regional Hub Director, Administration for Children & Families, U.S. Dep't of Health and Human Services, to Florida D.C.F. Secretary Kearney (Oct. 16, 2000).

46. See *Davis v. Page*, 442 F. Supp. 258, 263 (S.D. Fla. 1977). The need for counsel was recently rendered more urgent by the federal district court's opinion in *Foster Children Bonnie L. v. Bush*. The court dismissed the central claims in a statewide class action challenging conditions in foster care in Florida in part on grounds that there was an adequate state

specifically prohibit legal representation by the lay guardian ad litem. In light of these problems and the Florida courts' inconsistent but nonetheless deeply held concern about lack of guardians ad litem and the resulting adverse effect on children, it is appropriate to review the federal and state statutory sources of guardian ad litem representation of children in dependency proceedings, as well as Florida's compliance with the federal and state laws pertaining to guardians ad litem, to understand the shortcomings.

III. FEDERAL STATUTES APPLICABLE TO DEPENDENCY PROCEEDINGS

Over the past twenty-five years, the federal government has recognized the severe problems in the nation's child welfare system by enacting three major funding statutes that create complimentary requirements and incentives to improve state practices in child welfare proceedings. Florida receives money under these laws and is obligated to be in compliance with enumerated statutory duties.

The first and most significant federal statute for the purpose of this article, is the Childhood Abuse Prevention and Treatment Act of 1974 ("CAPTA").⁴⁷ This law profoundly influenced the nation's approach to representation of children in dependency proceedings.⁴⁸ This statute requires guardian ad litem representation in dependency proceedings, creating a great need for legal services and its funding.⁴⁹ CAPTA is a federal funding statute providing incentives to states for improving the operation of their child protective services.⁵⁰ The Act requires the states to submit plans to the Secretary of Health and Human Services, indicating to which child welfare programs the states will apply their federal funds.⁵¹ Under the statute, states must implement procedures that require the appointment of guardians ad litem in all dependency cases.⁵² In every case involving an abused or neglected child resulting in a judicial proceeding, the state must provide the child with a guardian ad litem to represent them, in order to receive federal

forum in which the children could obtain relief. The federal court abstained in light of "the ongoing jurisdiction and ability of plaintiffs to raise constitutional claims in dependency court." *Foster Children Bonnie L. v. Bush*, Case No. 00-2116-CIV-MORENO, at 24 (Dec. 4, 2001). The federal court never discussed who would raise these claims or how they would do it.

47. 42 U.S.C. § 5101-5119 (1994 & Supp. 1999).

48. For discussion of the Act, see JEAN KOH PETERS, REPRESENTING CHILDREN IN CHILD PROTECTIVE PROCEEDINGS: ETHICAL AND PRACTICAL DIMENSIONS 28 (1997); Mandelbaum, *supra* note 4.

49. PETERS, *supra* note 48, at 28; see *In re Gault*, 387 U.S. 1 (1967).

50. See 42 U.S.C. § 5106a(a) (1994 & Supp. 1999).

51. § 5106a(c).

52. § 5106a(b)(6).

funds.⁵³ CAPTA states that the guardian ad litem may be an attorney or a court appointed specialist.⁵⁴ The guardian ad litem must “obtain first-hand, a clear understanding of the situation and needs of the child” and “make recommendations to the court concerning the best interests of the child.”⁵⁵ Florida receives funding under CAPTA and must provide guardians ad litem in dependency cases.⁵⁶ Unfortunately, as the discussion in section IV.B of this article shows, children are not regularly represented by a guardian ad litem in dependency proceedings in Florida. To the contrary, guardians ad litem who are volunteers are appointed in less than fifty percent of the cases. The Florida courts have done nothing to enforce the right to a guardian ad litem, which is mandatory under CAPTA.

CAPTA also requires states to provide reports to the United States Department of Health and Human Services, which include, among other items, “the number of children for whom individuals were appointed by the court to represent the best interests of such children and the average number of out of court contacts between such individuals and children.”⁵⁷ Despite this federal requirement, Florida’s Department of Children and Family Services has not provided this information to the Secretary.⁵⁸ The Department’s explanation in its report to the Secretary for the 1998 reporting year is that the information is “not available” at this time, and that this data will be made available with the implementation of a new statewide information system in the year 2003.⁵⁹ Recently, the Department of Health and Human Services asked Florida’s Department of Children and Family Services to develop a corrective action plan, looking at the case of appointment of guardians ad litem.⁶⁰ The state’s failure to fully staff the guardian ad litem does not appear to be a recent development.⁶¹ Unfortunately, in Florida, the only means to ensure appointment of guardians ad litem pursuant to CAPTA is through action taken by the federal agency. There appears to be no in-

53. § 5106(c).

54. § 5106a(b)(2)(A)(iv)(I)–(II) (1994).

55. *Id.*

56. FLA. STAT. § 39.822 (2000). In 1999–2000, the State of Florida received approximately \$1,000,000 in CAPTA funds.

57. 42 U.S.C. § 5106a(d)(12) (1994 & Supp. IV 1998).

58. See SUMMARY DATA COMPONENT SURVEY, *supra* note 25, § 4.9–.10.

59. *Id.*

60. See Letter from Carlis V. Williams, *supra* note 45.

61. See Daniella Levine, *To Assert Children’s Legal Rights or Promote Children’s Needs: How to Attain Both Goals*, 64 *FORDHAM L. REV.* 2023, 2032 (1996) (reporting that only half of children alleged to be abused or neglected receive GAL representation.); Shaeffer, *supra* note 1, at 64 (citing to state statistics showing that during fiscal year 1990–91, 40% of new dependency cases went unrepresented.).

stance yet where a state lost funding as a result of a Department of Health and Human Resources finding of non-compliance with CAPTA. Litigation by private parties to enforce CAPTA is problematic at best. While there is no reported opinion directly on point, where parties litigated to enforce the CAPTA provisions regarding the provision that there be a guardian ad litem in each dependency case, a body of case law does suggest that the courts interpreted other provisions of the Act's requirements leniently, based upon an analysis that the provisions are vague and do not mandate very particularized procedures or protective steps to be taken.⁶²

The second major federal statute is the Adoption Assistance and Child Welfare Act ("AACWA"),⁶³ which was enacted in 1980 in response to criticisms of the system during the 1970s.⁶⁴ The Act provides for incentives to the states to improve their foster care system by funding placements, protective services, and family preservation and reunification services. The state must submit a plan in this regard.⁶⁵ The purpose of the plan was to establish standards for the foster care system including those aimed at reduction in the use of foster care.⁶⁶ AACWA also encourages increased state court involvement by requiring the state courts to perform two functions. The courts must encourage and monitor families in need of services in addition to protecting the welfare of the child.⁶⁷ The Act provides that courts shall ensure that child welfare agencies have made reasonable efforts to provide services to the family that may eliminate the need for termination of parental rights.⁶⁸ Courts review the progress the welfare agencies make toward the permanent placement of the child and must implement procedural protections for parents involved in these proceedings.⁶⁹ Efforts to enforce the AACWA through a private right of action have uniformly failed. The United States Supreme Court rejected the approach in *Suter v. Artist M*⁷⁰ in 1990.⁷¹ Subsequent cases here fared no better,⁷² with the result that the

62. See *Fein v. D.C.*, 93 F.3d 861 (D.C. Cir. 1996); *Tony L. v. Childers*, 71 F.3d 1182 (6th Cir. 1995); *Blondis v. Thompson*, 967 F. Supp. 1104 (E.D. Wis. 1997).

63. Susanne Di Pietro & Teresa W. Carns, *Improving the Court Process for Alaska's Children in Need of Aid*, 14 ALASKA L. REV. 1 (1997).

64. 42 U.S.C. § 622(b) (1994 & Supp. 1999). For an overview of the Act, see Guggenheim, *supra* note 8; Alice C. Shotten, *Making Reasonable Efforts in Child Abuse and Neglect Cases: Ten Years Later*, 26 CAL. W.L. REV. 223 (1990).

65. § 622(a).

66. § 625(a)(1).

67. § 622 (b)

68. Di Pietro, *supra* note 63, at 4-5.

69. *Id.* at 5.

70. 503 U.S. 347 (1990).

71. *Id.*

major remedy for violation of the Act is through federal governmental agency enforcement. The lack of an enforceable means to protect children under AACWA is particularly unfortunate due to the unintended result of the Act. Research suggests that while it is the child's parents who have their parental rights terminated, the child experiences the negative effects considering that many children are not subsequently adopted.⁷³ It should be noted that the Congress did amend the AACWA after *Suter* to allow some limited form of a private right of action.⁷⁴ Unfortunately, the limited reinstatement of the private right of action does not affect the right to enforce guardian ad litem provisions in the CAPTA law.

Congress recently passed a third act, the Adoption and Safe Families Act of 1997⁷⁵ ("ASFA"), to address concerns about the effectiveness of AACWA. ASFA allows for greater discretion regarding the definition of statutorily required reasonable efforts of state based services and is more flexible in allowing states to remove children from dangerous homes.⁷⁶ ASFA also attempts to speed up the dispositional stage and increase adoptions in certain situations involving extreme circumstances.⁷⁷ Unfortunately, ASFA does not provide a process by which the federal government evaluates the judicial determination requirement so as to guarantee that reasonable efforts have been made by state agencies in performing their duties under this statute.

72. See, e.g., *Yvonne L. v. N.M. Dep't of Human & Rehab. Servs.*, 959 F. 2d 883 (10th Cir. 1992); *E.F. v. Scafadi*, 851 F. Supp. 249 (S.D. Miss 1994); *Eric L. v. Bird*, 848 F. Supp. 303 (D.N.H. 1994).

73. Margaret Beyer and Wallace J. Mlyniec, *Lifelines to Biological Parents: Their Effect on Termination of Parental Rights and Permanence*, 20 FAM. L.Q. 233 (1986); Guggenheim, *supra* note 8.

74. 42 U.S.C. § 1320a-10 (1994), Effect of failure to carry out State plan, provides: In an action brought to enforce a provision of this chapter, such provision is not to be deemed unenforceable because of its inclusion in a section of this chapter requiring a State plan or specifying the required contents of a State plan. This section is not intended to limit or expand the grounds for determining the availability of private actions to enforce State plan requirements other than by overturning any such grounds implied in *Suter v. Artist M.*, 112 S. Ct. 1360 (1992), but not applied in prior Supreme Court decision respecting such enforceability: *Provided, however*, that this section is not intended to alter the holding in *Suter v. Artist M.*, that 671(a)(15) of this title is not enforceable in a private right of action.

75. 42 U.S.C § 761 (1994 & Supp. 1998).

76. Shawn L. Raymond, *Where are the Reasonable Efforts to Enforce the Reasonable Efforts Requirement?: Monitoring State Compliance Under the Adoption Assistance and Child Welfare Act of 1980*, 77 TEX. L. REV. 1235, 1237-38 (1999).

77. See 42 U.S.C. § 673 (2000).

Thus, each of the three federal statutes contains extremely important protections for the child. However, because none of the laws provides the child the ability to obtain affirmative relief to enforce rights through a private right of action in the courts, leaving only administrative remedies through the federal agencies that fund the states, the need to enforce the conceptual provisions of the laws in individual cases in the juvenile court becomes much more significant. Specifically, the lack of a private right of action under the federal statutes to enforce the right to a guardian ad litem as well as other protections means that a lawyer representing a child in the dependency proceeding becomes more important. However, as the following section demonstrates, there is no right to legal representation for a child in Florida, and the statutory and juvenile court rule provisions governing guardian ad litem representation are ill-defined and imprecise.

IV. DEPENDENCY REPRESENTATION IN FLORIDA

A. *Federal and Florida Case Law Governing the Right to Counsel*

The United States Supreme Court has never ruled on the question of whether a child has a right to counsel and, if indigent, counsel free of charge in a dependency or termination of parental rights proceeding. The Court held, in *In re Gault*,⁷⁸ that a child does have a right to counsel in a juvenile delinquency case premised on the proposition that children do have a protected liberty interest under the Fourteenth Amendment when their freedom is in jeopardy.⁷⁹ However, in *Lassiter v. Department of Social Services*,⁸⁰ the court held that parents do not have a right to counsel, as a matter of constitutional law, in a termination of parental rights proceeding.⁸¹ The court did recognize that counsel should be evaluated on a case-by-case basis as a matter of fundamental fairness in termination of parental rights ("TPR") cases.⁸² Despite rejecting an absolute right to counsel, the court said: "[i]nformed opinion has clearly come to hold that an indigent parent is entitled to the assistance of appointed counsel not only in the parental termination proceedings, but in dependency and neglect proceedings as well."⁸³ Nonetheless, the combination of the two cases makes it difficult to be sure that the United States Supreme Court would ever hold that children have an

78. 387 U.S. 1 (1967).

79. *Id.* at 42.

80. 452 U.S. 18 (1981).

81. *Id.* at 24-32.

82. *Id.* at 31-32.

83. *Id.* at 33-34.

absolute right to counsel in dependency cases.⁸⁴ On the one hand, there is a clear deprivation of liberty when children are removed from their home and placed in state care.⁸⁵ On the other hand, the court has held that the loss of a family member—in *Lassiter* it was the loss of a child permanently—is not a significant enough loss to require the right to counsel in all cases.⁸⁶

In the case *In re D.B.*,⁸⁷ the Supreme Court of Florida held that children do not have a right to counsel in dependency cases.⁸⁸ The court acknowledged that a “guardian ad litem must be appointed in any child abuse judicial proceeding”⁸⁹ under *Florida Statutes*, but in all other instances, the appointment of a guardian ad litem is left to the discretion of the trial court and should be made only when required under rule 8.3 of the *Florida Rules of Juvenile Procedure*.⁹⁰ The interests of the child are considered “protected” when the interests of a parent who is a party are not adverse to the child’s interests.⁹¹ However, children do have due process rights when the interests of the child may be adverse to the interests of the parent,⁹² as is commonly the situation in dependency proceedings. This has never been translated into a right to counsel by either the courts⁹³ or the Florida Legislature.

84. See Shaeffer, *supra* note 1, at 64. For a brief discussion of the history of children rights and the Supreme Court’s approach to these rights, see Marvin R. Ventrell, *Rights & Duties: An Overview of the Attorney-Child Client Relationship*, 26 LOY. U. CH. L.J. 259 (1995); Michael J. Dale, *Children Before the Supreme Court: In Whose Best Interests*, 53 ALBANY L. REV. 513 (1989).

85. *Deshaney v. Winnebago County Dep’t of Soc. Servs.*, 489 U.S. 189 (1989).

86. *Lassiter*, 452 U.S. at 34.

87. 385 So. 2d 83 (Fla. 1980).

88. *Id.* at 87; see also, *Dep’t of Health & Rehab. Servs. v. Kahn*, 639 So. 2d 689, 690 (Fla. 5th Dist. Ct. App. 1994); Michael J. Dale, *Role of the Lawyer in Dependency Cases, Chap. 10 in Florida Juvenile Law and Practice*, § 10.6 (Fla. Bar Continuing Legal Educ. 1999) Florida has not expanded the *Gault* holding and limits the appointment of counsel for an indigent child to a delinquency proceeding that might result in detention. *In re D.B.*, 385 So. 2d at 90. It is a fundamental error in Florida to both deny this right and fail to comply with FLA. R. JUV. P. 8.165. *A.G. v. State*, 737 So. 2d 1244, 1247 (Fla. 5th Dist. Ct. App. 1999); see also *State v. Steinhauer*, 216 So. 2d 214, 218 (Fla. 1968) (holding that where a waiver hearing does not “inexorably lead to a jail or detention home” that a juvenile is not constitutionally required to a right to counsel).

89. *In re D.B.*, 385 So. 2d at 91.

90. *Id.*

91. *Mistretta v. Mistretta*, 566 So. 2d 836, 837 (Fla. 5th Dist. Ct. App. 1990) (finding that wife’s interest in obtaining child support coincided with the best interests of the child, thus, the child’s representation was adequate).

92. *Id.*

93. For opinions following *In re D.B.*, see *In re Adoption of T.G.L.*, 606 So. 2d 730, 732 (Fla. 4th Dist. Ct. App. 1992).

The Supreme Court of Florida very recently held that the appointment of counsel is mandatory when a child objects to being placed into a residential treatment center after an adjudication of dependency.⁹⁴ The court ruling in the form of amending the Florida Rules of Juvenile Procedure to provide for counsel in this limited setting arose from the court's decision in *M.W. v. Davis*.⁹⁵ In that case, it held that when a court ordered a dependant child in the temporary custody of the Department of Children to be placed into residential treatment, an evidentiary hearing that complied with Florida's civil commitment statute, known as the Baker Act, was not required,⁹⁶ but that certain due process hearing rights did apply.⁹⁷ The court sent the matter to the Juvenile Court Rules Committee to prepare and submit proposed rules to cover the situation,⁹⁸ which resulted in the order amending the juvenile court rules. In so doing, the court explicitly said that it was not addressing the issue of whether an attorney is constitutionally required when a child is being committed to a residential treatment center.⁹⁹

While children have no statutory right to counsel, including appointed counsel if indigent, in dependency proceedings in Florida, their parents do.¹⁰⁰ For a number of years by statute, Florida had provided that parents were entitled to counsel only if their parental rights were to be terminated.¹⁰¹ Parents were not entitled to counsel in a dependency proceeding unless, and the Florida statutory scheme was rather odd in this respect, there was some indication that parental rights would be terminated.¹⁰² This statutory approach produced a body of appellate case law in which the appeals court judges routinely reversed trial court determinations of termination of parental rights where there had been no counsel to the parents at the dependency stage.¹⁰³ This problem was ultimately resolved in 1998 when the Florida Legislature amended chapter 39 to provide for the right to counsel to parents at all stages of dependency proceedings in addition to all stages of termina-

94. FLA. R. JUV. P. 8.250 (amended on Oct. 25, 2001).

95. 756 So. 2d 90 (Fla. 2000).

96. *Id.* at 109.

97. See Michael J. Dale, *Juvenile Law: 2000 Survey of Florida Juvenile Law*, 25 NOVA L. REV. 91, 105-07 (2000).

98. *M.W.*, 756 So. 2d at 109.

99. See FLA. R. JUV. P. 8.250 (amended on Oct. 25, 2001).

100. FLA. STAT. § 39.013(1) (2000).

101. § 39.807.

102. See *J.S.S. v. Dep't of Health & Rehab. Servs.*, 680 So. 2d 548 (Fla. 1st Dist. Ct. App. 1996); *White v. Dep't of Health & Rehab. Servs.*, 483 So. 2d 861 (Fla. 5th Dist. Ct. App. 1986); see also Michael J. Dale, *Juvenile Law: 1996 Survey of Florida Law*, 21 NOVA L. REV. 189, 218-20 (1996).

103. See *J.J.S.*, 680 So. 2d at 548; *White*, 483 So. 2d at 861; Dale, *supra* note 97.

tion of parental rights proceedings.¹⁰⁴ The result of the legislative change was to protect the interest of parents throughout the proceedings. That scheme and the *Florida Rules of Juvenile Procedure* which implement it “make elaborate provision for appointment of counsel and for procedures concerning waiver of counsel”¹⁰⁵ by parents. Obviously, it did nothing to protect the interest of children.

Florida’s child welfare agency—the Department of Children and Family Services (formerly known as the Department of Health and Rehabilitative Services)—also appears by counsel. It must do so because of a series of Advisory Opinions issued by the supreme court in the late 1980s responding to the practice of then HRS nonlawyer counselors appearing in court. In the first opinion, *Florida Bar In re Advisory Opinion HRS Nonlawyer Counselor*,¹⁰⁶ the Department of Health and Rehabilitative Services petitioned the Florida Bar Standing Committee on the Unlicensed Practice of Law for an opinion.¹⁰⁷ The court addressed the issue of whether the preparation of documents by lay counselors and the presentation of non-contested dependency court cases by lay counselors, including the filing of the documents, presentation of the case, request for relief, and testimony of the counselors are the “unauthorized practice of law.”¹⁰⁸ The Bar Standing Committee found that HRS counselors were engaged in the unauthorized practice of law by drafting pleadings, legally binding agreements, and representing others in court.¹⁰⁹ The court held that the types of activities required by chapter 39 and this form of representation of children constituted the practice of law.¹¹⁰

While the court agreed with the Committee that HRS counselors were engaged in the practice of law, the court did not find that such practice was the cause of the alleged harm or that enjoining it was the most effective solution.¹¹¹ Thus, the court granted temporary authorization for HRS counselors to continue their activities pending the report of court appointed ad hoc committee.¹¹² Most importantly, the Committee reported the problems in allowing lay counselors or guardians ad litem to perform such legal activities, finding that “HRS lay counselor mistakes and delays result in

104. FLA. STAT. § 39.807 (2000). The purpose of the appointment, according to the Supreme Court, is to “ensure that the final result is reliably correct.” *J.B. v. Fla. Dep’t of Children. & Family Servs.*, 768 So. 2d 1060, 1068 (Fla. 2000).

105. *S.S. v. DCF*, 764 So. 2d 718, 719 (Fla. 2d Dist. Ct. App. 2000).

106. 518 So. 2d 1270 (Fla. 1988).

107. *Id.*

108. *Id.*

109. *Id.* at 1271.

110. *Id.* at 1272.

111. *Fla. Bar In re Advisory Opinion HRS Nonlawyer Counselor*, 518 So. 2d at 1272.

112. *Id.*

public harm, due in part to a lack of adequate training and supervision in the proper procedures and legal ramifications of the dependency process."¹¹³ This opinion is significant because it recognizes the problems of nonlawyer and inadequate representation of children in dependency proceedings.

In a second opinion in 1989, *Florida Bar In re Advisory Opinion HRS NonLawyer Counselor*,¹¹⁴ the court reviewed a report of the Supreme Court Committee on HRS Nonlawyer Counselors, which found that HRS, guardians ad litem, and others are unable to process cases within the statutory time limits for children in emergency care or foster homes.¹¹⁵ The Committee concluded that the problem of extensive delays was partially attributed to the insufficient involvement of lawyers in the juvenile process.¹¹⁶ The Committee suggested "a greater investment of time by lawyers in the system . . . to protect the important rights of the children and families whose lives come under the control of the system."¹¹⁷ The report further stated the Committee had knowledge of harm suffered by children through the current practice of allowing nonlawyer counselors to oversee dependency cases without legal representation.¹¹⁸

The Committee concluded that, as the system was presently arranged, HRS counselors failed their clients in two ways.¹¹⁹ First, their experience and training prepared them for social work and not legal services; thus, they were not adequately equipped to perform legal services.¹²⁰ Second, the time spent preparing for legal services takes away from time that would be best spent improving the case management aspect of their jobs.¹²¹ Due to the lack of legal background and large case loads, the Committee found that it was inappropriate for HRS counselors to handle dependency cases without legal representation.¹²²

The supreme court held that adequate legal representation on behalf of HRS is required at every stage of juvenile dependency hearings conducted pursuant to part III of chapter 39 of the *Florida Statutes*.¹²³ An attorney's presence is required in all court proceedings and supervision in the prepara-

113. *Id.*

114. 547 So. 2d 909 (Fla. 1989).

115. *Id.* at 910.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Fla. Bar In re Advisory Opinion HRS Nonlawyer Counselor*, 547 So. 2d at 910.

120. *Id.*

121. *Id.*

122. *See id.*

123. *Id.* at 911.

tion of all legal documents.¹²⁴ The court extended its holding to include all foster care proceedings, all child-in-need-of-services proceedings, and all termination of parental rights proceedings.¹²⁵ Further, it held that HRS must end its practice of law by lay person counselors under these statutes and ordered the Juvenile Rule Committee of the Florida Bar to draft amendments to the present laws and submit to the court.¹²⁶

B. *Florida's Statutory Scheme Governing Representation of Children*

The legislature's purpose in enacting chapter 39 was "[t]o provide for the care, safety, and protection of children in an environment that fosters healthy social, emotional, intellectual, and physical development; to ensure secure and safe custody; and to promote the health and well-being of all children under the state's care."¹²⁷ The chapter provides that the state's judicial and other procedures must "assure due process through which children . . . and other interested parties are assured fair hearings . . . and the recognition, protection, and enforcement of their constitutional and other legal rights."¹²⁸ The dependency process comprises of a "complex body of substantive law and evidentiary rules,"¹²⁹ as well as a "compendium of relevant sociological, psychological, and medical data."¹³⁰ The law provides for a detailed system of taking children into custody, arraignments,¹³¹ shelter hearings,¹³² mediation, injunctions to prevent abuse,¹³³ adjudicatory hearings,¹³⁴ dispositional hearings,¹³⁵ periodic judicial reviews,¹³⁶ and appeal.¹³⁷

124. *Fla. Bar In re Advisory Opinion HRS Nonlawyer Counselor*, 547 So. 2d at 911.

125. *Id.*

126. *Id.*

127. FLA. STAT. § 39.001(1)(a) (2000). The legislature also enacted a set of goals for dependent children, a form of bill of rights, in 1999. The goals are virtually meaningless because the legislature explicitly made them unenforceable. § 39.4085.

128. § 39.001(1)(f).

129. *Davis v. Page*, 442 F. Supp. 258, 263 (S.D. Fla. 1977).

130. *Id.* There are also detailed statutory provisions governing medical, psychiatric and psychological examinations and treatment of the child. § 39.407.

131. § 39.506.

132. § 39.401, .402(1), (2), (8)(a), (h), .01(65).

133. § 39.504.

134. § 39.507.

135. § 39.521.

136. § 39.701.

137. §§ 39.510, .815. The statute provides that any party affected by an order may appeal. By definition this includes both the child and guardian ad litem because each is a party in a dependency proceeding.

It includes “[a]n independent, trained advocate, when intervention is necessary and a skilled guardian or caregiver in a safe environment when alternative placement is necessary.”¹³⁸ The process is both complex and time consuming. One commentator has concluded that, with delays, it is possible that as many as sixteen court hearings may take place in a year.¹³⁹ Additionally, the courts and other commentators have commented on the delays.¹⁴⁰ It is also highly subjective.¹⁴¹ For these reasons—reduction in delays and dealing with the complexity and subjectivity of the process—among others, this article urges representation of children by counsel in dependency and termination of parental rights cases.

Courts are required by statute to appoint guardians ad litem¹⁴² at the earliest possible time in child abuse, abandonment, or neglect proceedings.¹⁴³ The *Florida Rules of Juvenile Procedure*, *Florida Statutes*, and two orders of the Supreme Court of Florida codify the operation of guardian ad litem programs in the state.

The statutes enumerate a list of persons that can qualify as a guardian ad litem including:

[A] certified guardian ad litem program, a duly certified volunteer, a staff attorney, contract attorney, or certified pro bono attorney working on behalf of a guardian ad litem or the program; staff members of a program office; a court-appointed attorney; or a responsible adult who is appointed by the court to represent the best interests of a child in a proceeding as provided for by law, including, but not limited to, this chapter, who is a party to any judicial proceeding as a representative of the child, and who serves until discharged by the court.¹⁴⁴

138. § 39.001(3)(h).

139. Michael T. Dolce, *A Better Day for Children: A Study of Florida's Dependency System with Legislative Recommendations*, 25 NOVA L. REV 547 (2001).

140. See, e.g., OFFICE OF THE STATE COURTS, *supra* note 1; Ritter v. Dep't of Children & Family Servs., 700 So. 2d 805, 805 (Fla. 5th Dist. Ct. App. 1997); Fla. Bar *In re* Advisory Opinion HRS Nonlawyer Counselor, 547 So. 2d 909, 910 (Fla. 1989); *In re* S.B.B., 379 So. 2d 395, 398 (Fla. 4th Dist. Ct. App. 1980).

141. Santosky v. Kramer, 455 U.S. 745 (1982).

142. One court has described the court's power to appoint a guardian ad litem as “inherent.” Simms v. Dep't of Health & Rehab. Servs., 641 So. 2d 957, 961 (Fla. 3d Dist. Ct. App. 1994). The *Florida Statutes* call persons who act on behalf of a drug dependent newborn a “Guardian advocate.” § 39.820(2); Amended Administrative Order, *supra* note 19.

143. § 39.822(1); see FLA. R. JUV. PROC. 8.170.

144. § 39.820(1).

Parents who can afford to must reimburse the court for all or part of the cost of the guardian ad litem.¹⁴⁵

Significantly, the *Florida Rules of Juvenile Procedure* and *Florida Statutes* consider guardians ad litem, and sometimes the local guardian ad litem program and the child as parties to the action who have standing to participate in the proceedings.¹⁴⁶ This status as a party raises questions concerning the relationship among the court, the child, and the other parties. It has generated a substantial body of case law.¹⁴⁷ Guardians ad litem are statutorily responsible to review dispositions, must be present at all important stages of the dependency proceeding, must submit written reports to the court,¹⁴⁸ may waive the child's right to confidentiality,¹⁴⁹ and may file appeals on behalf of the child.¹⁵⁰ The report must include the wishes of the child and the recommendations of the guardian ad litem.¹⁵¹ These laws put the guardian in the position of a witness in the case. In the past, courts had even gone so far as to order the guardian ad litem to make unannounced visits to a parent's home.¹⁵² Recently, the Florida Legislature amended the statutory provision regarding the duties of the guardian ad litem, specifically to remove the section which had given the court authority to order a guardian ad litem to provide such services.¹⁵³ However, the statute continues to provide that the guardian ad litem's duty is to "represent" the child.¹⁵⁴ The *Florida Rules of Juvenile Procedure* expressly forbid the practice of law by

145. § 39.822(2).

146. § 39.01(51).

147. See *Simms v. Dep't of Health & Rehab. Servs.*, 641 So. 2d 957 (Fla. 3d Dist. Ct. App. 1994); *In re Adoption of T.G.L.*, 606 So. 2d 730 (Fla. 4th Dist. Ct. App. 1992); *Dep't of Health & Rehab. Servs. v. Coskey*, 599 So. 2d 153, 157 (Fla. 5th Dist. Ct. App. 1992); *Brevard County v. Dep't of Health & Rehab. Servs.*, 589 So. 2d 398 (Fla. 5th Dist. Ct. App. 1991); *Brevard County v. Lanford*, 588 So. 2d 669 (Fla. 5th Dist. Ct. App. 1991); *Marion County v. Johnson*, 586 So. 2d 1163 (Fla. 5th Dist. Ct. App. 1991); *Dep't of Health & Rehab. Servs. v. Cole*, 574 So. 2d 160 (Fla. 5th Dist. Ct. App. 1990); *In re D.B.*, 385 So. 2d 83, 91 (Fla. 1980).

148. FLA. STAT. § 39.822(3) (2000).

149. *Dep't of Health & Rehab. Servs. v. A.N.*, 604 So. 2d 11 (Fla. 3d Dist. Ct. App. 1992).

150. § 39.815(1) (2000).

151. FLA. R. JUV. PROC. 8.215(c)(1).

152. *Lewis v. Dep't of Health & Rehab. Servs.*, 670 So. 2d 1191 (Fla. 5th Dist. Ct. App. 1996).

153. See § 39.807(2)(b); *but see Dep't of Health & Rehab. Servs. v. B.J.M.* (Fla. 1995) (approving trial court order appointing legal services program in dependency case and empowering it to act in proceedings outside the dependency proceeding which resulted in the filing of damage action against the Department).

154. § 39.807(2)(a).

lay guardians,¹⁵⁵ although the guardian ad litem is authorized to file dependency petitions and petitions to terminate parental rights.¹⁵⁶ The structure of the guardian ad litem role is thus internally inconsistent. The guardian is obligated at times to be confidante of the child, a witness, and an advocate. These roles can be entirely contradictory.

At the same time, the Supreme Court of Florida Amended the Administrative Order, governing the standards of operation of the guardian ad litem program, and *Florida Rules of Juvenile Procedure*, creates an inherent conflict for a lawyer who acts as a guardian ad litem. The supreme court Order and the rules provide on the one hand that the lawyer may not practice law, which seems to suggest somehow that a lawyer who is a guardian ad litem might practice law.¹⁵⁷ However, the rules also provide for the appointment of the lawyer as an "attorney ad litem" who has different responsibilities.¹⁵⁸ The attorney ad litem represents the child. It thus becomes unclear whether, given Florida's statutory provisions that make the guardian ad litem a party, how the lawyer as a guardian ad litem can practice law given his or her party status. The federal statute, CAPTA, expressly provides that a guardian ad litem may be an attorney but does not create the conundrum found in the Florida law.¹⁵⁹ Thus a conflict results having to do with the lawyer's professional responsibility under the *Rules of Professional Conduct*. Arguably, when an attorney acts as a guardian ad litem, that attorney is not relieved of the responsibilities provided by the *Rules of Professional Conduct*.¹⁶⁰ Yet if the lawyer as a guardian ad litem is a party who may testify among other things, an inherent conflict is raised.

Another prospective conflict, although one not recognized by the court, concerns the issue of separation of powers. "The guardian ad litem program is administered by the Office of the State Court Administrators under the supervision and control of the supreme court."¹⁶¹ As such, although the

155. FLA. R. JUV. P. 8.215(c)(4)(f).

156. *Simms v. Dep't of Health & Rehab. Servs.*, 641 So. 2d 957, 960 (Fla. 3d Dist. Ct. App. 1994); *Lupineck v. Firth*, 619 So. 2d 379, 390 (Fla. 5th Dist. Ct. App. 1993).

157. FLA. R. JUV. P. 8.215(f); Amended Administrative Order, *supra* note 19, at Preamble § (c)-(e).

158. FLA. R. JUV. P. 8.215(c).

159. 42 U.S.C. § 5106a(b)(2)(A)(ix) (Supp. IV 1999).

160. See ANN. M. HARALAMBE, *THE CHILD ADVOCATE* 6 (1993); Ventrell, *supra* note 84, at 268; David R. Katner, *Coming to Praise, Not to Bury, the New ABA Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases*, 14 GEO. J. LEGAL ETHICS 103 (2000).

161. *In re J.M.*, 579 So. 2d 820, 821 (Fla. 1st Dist. Ct. App. 1991); see also *Dep't of Health & Rehab. Servs. v. Cole*, 574 So. 2d 160, 162-63 (Fla. 5th Dist. Ct. App. 1990).

guardian ad litem is a separate and distinct party from DCF,¹⁶² the guardian ad litem remains, in essence, responsible to the supreme court. The Third District Court of Appeal dismissed this problem over a vigorous dissent by Chief Judge Schwartz¹⁶³

Another problem is the lack of the assignment of a guardian ad litem in many cases. In addition to being required by federal law,¹⁶⁴ the need for guardians ad litem for children in dependency proceedings has been recognized as necessary by dependency judges. One trial court judge "characterized the absence of an active guardian as fundamental and an impediment to her ability to conclude that the grounds for termination were established by clear and convincing evidence."¹⁶⁵ However, the appellate court in this case held that this absence did not prevent the trial court from readjudicating children dependent based on specific allegations of abuse.¹⁶⁶ This opinion represents part of a growing body of Florida case law in which the appeals courts have inexplicably accepted the failure to either appoint or continue in place a guardian ad litem in a dependency or termination of parental rights proceeding.¹⁶⁷ In *Vestal v. Vestal*,¹⁶⁸ the appeals court relied upon several prior cases in the Second and Fifth District Courts of Appeal to hold that the failure to appoint a guardian ad litem in a termination of parental rights case is not fundamental error.¹⁶⁹ The problem with these opinions is they find an exception in the Florida law where none exists. The statute is absolute and mandatory on its face.¹⁷⁰ Furthermore, the federal funding statute, CAPTA,

162. *In re J.M.*, 579 So. 2d at 821.

163. *See Simms v. Dep't of Health & Rehab. Servs.*, 641 So. 2d 957, 963 (Fla. 3d Dist. Ct. App. 1994).

164. 42 U.S.C. § 5106(b)(2)(A)(ix) (Supp. IV 1999).

165. *W.R. v. Dep't of Children & Family Servs.*, 701 So. 2d 651, 652 (Fla. 4th Dist. Ct. App. 1997). In its Draft Report to the Senate on the Legal Needs of Children, Report No. 2002-140 (Nov. 2001), at page 18, the Committee on the Judiciary found that guardians ad litem have provided representation in only 58% of the dependency cases to which the court appointed a guardian ad litem and only 36% of the petitions for dependency have a guardian ad litem assigned.

166. *Id.*

167. *W.R. v. Dep't of Children & Family Servs.*, 757 So. 2d 605 (Fla. 5th Dist. Ct. App. 2000); *Vestal v. Vestal*, 731 So. 2d 828, 829 (Fla. 5th Dist. Ct. App. 1999); *In re E.F.*, 639 So. 2d 639, 643 (Fla. 2d Dist. Ct. App. 1994). This issue has been raised by this author in prior Florida Juvenile Law Survey articles. *See, e.g., Dale, supra* note 97, at 222-24.

168. 731 So. 2d 828 (Fla. 5th Dist. Ct. App. 1999).

169. *Id.* (citing *Fisher v. Dep't of Health & Rehab. Servs.*, 674 So. 2d 207 (Fla. 5th Dist. Ct. App. 1996); *In re E.F.* 639 So. 2d at 639. *See also Dale, supra* note 97, at 222-24 (criticizing the *Fisher* decision).

170. *See FLA. STAT. § 39.807(2)(a)* (2000).

is also absolute, as this article demonstrates.¹⁷¹ The Florida courts have never commented upon the application of CAPTA to failure to provide or continue in place a guardian ad litem. Courts simply conclude using “no harm no foul” language, finding that while the statute may be mandatory on its face, the failure to provide a guardian ad litem is not fundamental error. Applying the same logic, if a parent did not have a lawyer in a termination of parental rights case, which is statutorily although not constitutionally mandated, would the court find that there is no fundamental error, or would the court say that the right is more significant for the parent than for the child and thus fundamental as to the parent but not as to the child.

Although there is no statutory right to counsel for children in dependency proceedings, occasionally a lawyer does represent a child in a dependency or termination of parental rights proceeding. This occurs on an ad hoc, irregular, and infrequent basis. The sources of representation are varied. First, the court appears to have authority where necessary to appoint an attorney ad litem to represent a child by virtue of language in the 1995 Supreme Court Administrative Order Relating to the Standards of Operation of Guardian Ad Litem Programs.¹⁷² The only language in chapter 39 referring to attorneys ad litem is in the bills of rights for children¹⁷³ and in reference to a pilot attorney program in Orange and Osceola Counties.¹⁷⁴ Thus, for example, a trial court does not have a duty to appoint counsel for a minor simply because a representative from the guardian ad litem program requests the appointment.¹⁷⁵ The court may use its discretion to make an appointment, with “independent judgment after reviewing the need for the requested appointment.”¹⁷⁶ In *Davis v. Page*,¹⁷⁷ the federal Fifth Circuit Court of

171. See 42 U.S.C. § 5101-06 (1994 & Supp. IV 1999).

172. Amended Administrative Order, *supra* note 19, § (e):

(e) Role of the Pro Bono Attorney

The role of the pro bono attorney is to provide legal assistance to the guardian ad litem when such assistance is necessary for the guardian ad litem to effectively represent the best interest of the child. The pro bono attorney may also provide legal support to the GAL Program under separate and specific order of appointment. [For purposes of these standards, the role of the pro bono attorney is distinguished from that of an attorney ad litem, who is appointed by the court and is independent of the GAL Program, to provide legal representation to the child.]

173. § 39.013(1).

174. § 39.4086.

175. *Dep't of Health & Rehab. Servs. v. Coskey*, 599 So. 2d 153, 156 (Fla. 5th Dist. Ct. App. 1992).

176. *Id.*

177. 714 F.2d 512 (5th Cir. 1984).

Appeals held that the right to counsel in Florida dependency proceedings should be determined on a case-by-case basis.¹⁷⁸

Second, a number of the law schools in Florida, including Nova Southeastern University, the University of Miami, the University of Florida, and Florida State University, have clinical programs where students, as interns, represent some children in dependency proceedings.¹⁷⁹ In addition, a national nonprofit organization, Lawyers for Children America, Inc., represents children in Miami. Based upon a model introduced in Hartford, Connecticut in 1995, Lawyers for Children America, Inc. recruits volunteer lawyers from law firms and corporate legal departments to represent children in a multi-disciplinary approach in the dependency court.¹⁸⁰ Several legal aid programs also represent children in dependency proceedings.¹⁸¹

Most recently, during the 2000 legislative session, the Florida Legislature enacted an attorney ad litem pilot program aimed at assigning lawyers to represent certain children in out-of-home care.¹⁸² The statute provides that the Office of State Courts Administration establish an agency to provide representation.¹⁸³ The result has been the development of a program through Barry University School of Law in Orlando.¹⁸⁴ The statute, in the form of a demonstration project, is both limited in scope and unclear in approach. In fact, it appears that the largest sums appropriated by the legislature are being used to fund guardian ad litem programs in Orange and Osceola counties.¹⁸⁵ Of the \$1.8 million appropriated, only \$300,000 goes to lawyer representation.¹⁸⁶

178. *Id.* at 514.

179. Florida Senate Committee on the Judiciary Draft Report 2002-140, *Legal Needs of Children*, at 16 (Nov. 2001).

180. Helen Stein, Esq. & Candace L. Maze, Esq., *Lawyers for Children America, Inc.—A Unique Model of Pro Bono Representation for Abused and Neglected Children, Improving the Professional Response to Children in the Legal System*, 2000 Children's Law Manual Series, National Association of Counsel for Children.

181. Telephone Interview with David Bazerman, Legal Aid Society of Broward County (Dec. 1, 2001); Telephone Interview with Barbara Burch, Legal Aid Society of Palm Beach County (Mar. 28, 2001).

182. FLA. STAT. § 39.4086(2) (2000).

183. *Id.*

184. Ninth Judicial Circuit Attorney Ad Litem Project, Barry University's Report Presented to the Florida Bar Commission on the Legal Needs of Children (June 21, 2001); Telephone conversations with Gerard Glynn, Director of Clinical Programs, Barry University School of Law (Oct. 21, 2001).

185. *Id.*

186. *Id.*

Even when attorneys represent children in abuse and neglect proceedings there are questions as to who pays for their services.¹⁸⁷ When a lawyer is appointed as an attorney ad litem because of the failure of a previously appointed guardian ad litem to perform his or her duties, the Department of Children and Family Services is responsible for paying the attorney ad litem's fees.¹⁸⁸ Further, the Department is not responsible for the operational costs of guardian ad litem programs, programs that "it did not create and over which it has no control."¹⁸⁹

The Florida Guardian Ad Litem Program, a member of National CASA, has twenty-one programs located in the twenty judicial circuits.¹⁹⁰ The program functions in every county except Orange County where the Legal Aid Society serves as the guardian ad litem. The Florida Guardian Ad Litem Program operates under the auspices of the judicial branch. The mission of the program is to recruit, train, and supervise volunteers to advocate for the best interests of the children who are alleged to be abused, neglected, or abandoned, and who are involved in court proceedings.¹⁹¹ Each county's program may consist of different divisions within the program structure with coverage extending to domestic relations and other custody matters. For example, the Broward County Guardian Ad Litem Program of the Seventeenth Judicial Circuit has three divisions: Dependency, Family Law, and Criminal.¹⁹² The program literature explains that volunteers for these programs do not need to be attorneys because they are acting as advocates for these children, not legal counsel.¹⁹³ For example, criminal court guardians ad litem are appointed when there are criminal proceedings in which a child may be asked to testify.¹⁹⁴

The Legal Aid Society of the Orange County Bar Association was founded thirty-eight years ago to help indigent individuals in the commu-

187. Dep't of Health & Rehab. Servs. v. Coskey, 599 So. 2d 153, 157 (Fla. 5th Dist. Ct. App. 1992); Brevard County v. Dep't of Health & Rehab. Servs., 589 So. 2d 398 (Fla. 5th Dist. Ct. App. 1991); Brevard County v. Lanford, 588 So. 2d 669 (Fla. 5th Dist. Ct. App. 1991).

188. Marion County v. Johnson, 586 So. 2d 1163, 1167 (Fla. 5th Dist. Ct. App. 1991).

189. Dep't of Health & Rehab. Servs. v. Cole, 574 So. 2d 160, 163 (Fla. 5th Dist. Ct. App. 1990).

190. OFFICE OF STATE COURT ADM'R, FLA. GUARDIAN AD LITEM TRAINING MANUAL, Introduction & Overview, at 7 [hereinafter FLA. GUARDIAN AD LITEM TRAINING MANUAL].

191. *Id.*

192. *See generally* BROWARD COUNTY GUARDIAN AD LITEM TRAINING MANUAL.

193. FLA. GUARDIAN AD LITEM TRAINING MANUAL, *supra* note 190, Roles & Responsibilities of the Guardian Ad Litem Program, at 2.

194. *Id.*

nity.¹⁹⁵ The Orange County Guardian Ad Litem Program is not part of the state nor a member of National CASA. This organization acts as attorneys for abused, neglected, or abandoned children. Orange County, Florida of the Ninth Judicial Circuit began and continues to provide pro bono attorney guardians ad litem in its volunteer program through Legal Aid Society.¹⁹⁶

In summary, the appellate opinions, ad hoc independent programs, and legislative pilot project all demonstrate that a child's representative, whether by an attorney in addition to or as an alternative to a guardian ad litem, is recognized as a critical participant in facilitating the child's best interests and advocating for the child in the context of a system that is unable to efficiently and safely care for children in its care. The following section, in brief survey fashion, demonstrates that, while other states uniformly recognize this need for children's representation in dependency proceedings, their implementation of representation is quite diverse and eclectic with no single approach standing out as a most accepted model.

V. A SURVEY OF OTHER JURISDICTIONS

Statutory frameworks providing for child representation vary throughout the country, requiring or allowing discretionary appointment of an attorney, a Guardian Ad Litem, or a Court Appointed Special Advocate (CASA) volunteer.¹⁹⁷ No two states or local jurisdictions within a state

195. Letter from Mary Ann Morgan, President of the Legal Aid Society of the Orange County Bar Ass'n; *see also* ORANGE COUNTY BAR ASS'N, INC., LEGAL AID SOC'Y, INFO. PACKET [hereinafter ORANGE COUNTY BAR ASS'N].

196. ORANGE COUNTY BAR ASS'N, *supra* note 189.

197. *See generally* Laurie K. Adams, *CASA: A Child's Voice in Court*, 29 CREIGHTON L. REV. 1467 (1996); Jennifer E. Alexander, *Is There a New Guardian Ad Litem Just Around the Corner in Missouri*, 54 MO. B.J. 242 (Sept./Oct. 1998); Kristin G. Brewer, *Utah Office of Guardian Ad Litem*, 9 UTAH B.J. 21 (May 1996); Linda D. Elrod, *Responses to the Conference: An Analysis of the Proposed Standards of Practice for Lawyers Representing Children in Abuse and Neglect Cases*, 64 FORDHAM L. REV. 1999 (1996); Albert E. Hartmann, *Note: Crafting an Advocate for a Child: In Support of Legislation Redefining the Role of the Guardian Ad Litem in Michigan Child Abuse and Neglect Cases*, 31 U. MICH. J.L. REFORM 237 (1997); William R. Joiner, *Juvenile Proceedings, Parental Rights: Provide for Appointment of Counsel or Court Appointed Special Advocate as Guardian Ad Litem for a Minor in Deprivation Cases*, 15 GA. ST. L. REV. 49 (1998); William Wesley Patton, *Family Law Corner: Who Speaks for the Child in Abuse Cases: Autonomy or Best Interests?* 40 ORANGE COUNTY LAWYER 40 (Nov. 1998); Melissa D. Protzek, *A Voice for the Children: Court-Appointed Child Advocates are Trying to Make a Difference One Case at a Time in the Lives of Children in the Juvenile Court System*, 22 PA. LAWYER 26 (Jan./Feb. 2000); Robert E. Shepherd, Jr. & Sharon S. England, *"I Know the Child is My Client, But Who am I?"* 64

share the same system for representing children in dependency proceedings, although all have some form of representation.¹⁹⁸ Thus, it is difficult to make generalizations about the different state or county models.¹⁹⁹ However, it appears that all of the jurisdictions were influenced by a combination of the Supreme Court opinion in *In re Gault*, the passage of CAPTA, and the advent of the CASA movement.²⁰⁰ Although jurisdictions differ in their choice of terminology and practices, their approaches share several common traits.²⁰¹ First, in 1996, at least thirty-eight states linked the role of the child representative to the “best interests” of the child, despite employing different labels for this concept.²⁰² Second, there is no consensus as to what is meant by the “best interests” concept.²⁰³ Third, the models are greatly influenced by budgetary concerns.²⁰⁴ Essentially, there are two approaches or models, sometimes separate and sometimes mixed. They include representation by counsel or guardian ad litem, of which the CASA is one format or approach.

A. *Guardian Ad Litem & CASA*

Twenty-two states provide for a guardian ad litem,²⁰⁵ Twenty-three

FORDHAM L. REV. 1917 (1996); Christopher N. Wu, *Conflicts of Interest in the Representation of Children in Dependency Cases*, 64 FORDHAM L. REV. 1857 (1996); Geoff Yuda, *Protecting Pennsylvania's At-Risk Children: The Role of Court-appointed Special Advocates*, 22 PA. LAWYER 30 (Jan./Feb. 2000).

198. Final Report on the Validation and Effectiveness Study of Legal Representation Through Guardian Ad Litem (1993).

199. PETERS, *supra* note 48, at 26.

200. *Id.* at 27–28.

201. *Id.* at 30.

202. *Id.* at 30–31.

203. *Id.* at 32.

204. PETERS, *supra* note 48, at 32.

205. ALA. CODE § 12-8 (2000); ALASKA STAT. § 47.10.050 (Michie 2000); ARIZ. REV. STAT. § 8-522 (2000) (special advocate); CONN. GEN. STAT. ANN. §§ 25-62, 44-20, 46b-129a (West 2000); FLA. STAT. § 39.4086, .820–822 (2000); FLA. R. JUV. P. 8.215; HAW. REV. STAT. § 587-34 (2000); IDAHO CODE § 16-1618, 1630–1632 (2000); IOWA CODE § 232.2, 232.71C, 232.89 (2000); MASS. GEN. LAWS §§ 119, 29 (2000); MINN. STAT. § 260C.163(5) (2000); MINN. R. JUV. P. 62.01; MISS. CODE ANN. § 43-21-121 (2000); MONT. CODE ANN. § 41-3-303 (2000); NEV. REV. STAT. § 432B.500–505 (2000); N.M. STAT. ANN. § 32A-4-10, -18-1 (Michie 2000); N.M. R. CT. 10-305; N.C. GEN. STAT. § 7B-601 to 1200 (2000); N.D. CENT. CODE § 50-25.1-08 (2000); N.D. CENT. CODE § 50-25.1; OHIO REV. CODE ANN. § 2151.281 (West 2000); FRANKLIN COUNTY COMM. PLEAS. JUV. CT. R. 15, 27; S.C. CODE ANN. § 20-7-110 to 121 (Law. Co-op. 2000); S.D. CODIFIED LAWS § 26-8A-20 (Michie 2000); VT. STAT. ANN. tit. 33, § 5525 (2000); WASH. REV. CODE § 26.12.175 (2000), .44.053 (2000); WIS. STAT. § 44.235 (2000).

states provide for a CASA,²⁰⁶ and eleven states provide for both.²⁰⁷ However, in most jurisdictions, there is little difference between the duties and powers of the guardian ad litem and CASA.²⁰⁸ Instead, the difference seems to be simply that of different organizational structures and recruiting pools rather than a true dichotomy of roles. In some jurisdictions, like Florida, a lawyer may act as a guardian ad litem but not practice law in that capacity.

In 1976, Judge David Soukup in Seattle, Washington, began using community volunteers trained in making decisions for abused and neglected children to recommend to the court what they felt would be in the best interest of the child.²⁰⁹ By 1977, the idea expanded and was encouraged by the National Council of Juvenile and Family Court Judges.²¹⁰ The National Court Appointed Special Advocate Association was formed in 1982, and in 1990, the Victim of Child Abuse Act was passed by Congress. CASA is a national organization based in Seattle, Washington.²¹¹ This organization participates in the training, recruiting, and management of CASA volunteers. There are 800 local programs, 48,000 volunteers, 44 state organizations, 12 state administered programs, and 183,000 children being served.²¹² Although CASA volunteers go through extensive training, they do not require their volunteers to be attorneys.²¹³ The role of a CASA volunteer is not to give legal representation for children but to investigate, report, and to recommend

206. ARK. CODE ANN. § 9-27-401, 9-27-316 (Michie 2000); GA. CODE ANN. § 15-11-170 to 174 (Office of the Child Advocate); KY. REV. STAT. ANN. § 620.100, .500, .505, .515, .525, .530 (Banks-Baldwin 2000); LA. REV. STAT. CHILDREN'S CODE § 424-424.3 (West 2000); MD. CODE ANN. § 3-834-834.1 (2000); OR. REV. STAT. § 419A.004, 419A.170 (2000); 42 PA. CONS. STAT. § 6342 (2000); TEX. FAM. CODE § 264.601-264.612 (2000) (court appointed volunteer advocate); VA. CODE ANN. § 9-173.6-13 (Michie 1999); W. VA. R. CT. 3 & 52.

207. These include: Arkansas, Colorado, Delaware, Illinois, Indiana, Kansas, Missouri, Nebraska, Oklahoma, Rhode Island, Tennessee. See *supra* notes 190-200.

208. In fact, in Florida the guardian ad litem program is a member of the National CASA Association. FLA. GUARDIAN AD LITEM TRAINING MANUAL, *supra* note 190, Introduction & Overview, at 7.

209. For a detailed discussion of the CASA approach see Adams, *supra* note 191. See also BROWARD COUNTY GUARDIAN AD LITEM TRAINING MANUAL, *supra* note 192, at 3; Daniella Levine, *To Assert Children's Legal Rights or Promote Children's Needs: How to Attain Both Goals*, 64 FORDHAM L. REV. 2023, 2025 (1996).

210. *Id.*

211. NAT'L CASA ASS'N, Strategic Plan 1995-2000, at http://www.casenet.org/ncasaa/national_casa_policies/strategi.htm (last visited Nov. 1999) [hereinafter NAT'L CASA ASS'N, Strategic Plan].

212. NAT'L CASA ASS'N, 1999 STATE OF THE STATES 3 [hereinafter STATE OF THE STATES].

213. BROWARD COUNTY GUARDIAN AD LITEM TRAINING MANUAL, *supra* note 192, at 3.

to the court what would be in the best interests of the child in abuse and neglect cases.²¹⁴

The 1998 statistics on Child Abuse, Foster Care, Adoption, and CASA Report states that, in 1997, there were 2,943,829 children reported as abused and neglected.²¹⁵ According to the 1997 Child Welfare League of America's Stat Book, 520,000 children were in foster care between October 1, 1997 and March 31, 1998.²¹⁶ The 1998 National CASA Association Annual Program Survey National Totals states that 183,339 children were represented by CASA volunteers.²¹⁷ There are a total of 3331 United States jurisdictions of which 906 have a CASA Program.²¹⁸ Between 206,000 and 425,000 children in communities with CASA programs are not represented.²¹⁹ This is often due to the lack of volunteer resources or CASAs not being appointed, a situation also present in Florida.

The Guardian Ad Litem Program is another organization, often voluntary in nature, that assigns individuals to specific cases to investigate, monitor, and make recommendations to the court for the best interests of the child in abuse and neglect cases.²²⁰ State Guardian Ad Litem Programs often are members of the National CASA Organization and recruit and train their volunteers employing the National CASA Organization Standards.²²¹ Mandatory guardian ad litem appointments have existed in the United States since Colorado enacted the first such program in 1963.²²² The programs are of varying formats. Some operate through a state or local office of court administration. There are also guardian ad litem programs administered by organizations such as a legal aid society.²²³ As noted earlier, Orange

214. *Id.*

215. 1998 Statistics on Child Abuse, Foster Care, Adoption & CASA, at 2, available at <http://www.casenet.org/library/abuse/abuse-stats98.htm> (last visited Nov. 1999) [hereinafter 1998 Statistics on Child Abuse].

216. See generally State Child Welfare Agency Survey, Child Welfare League of America (1999).

217. 1998 Statistics on Child Abuse, *supra* note 215.

218. *Id.*

219. *Id.*

220. FLORIDA GUARDIAN AD LITEM PROGRAM, Consumer Services, available at <http://www.flabar.org/new/flabar/consumerservices/General/CallALaw/CAL1068.html> (last visited Nov. 1999).

221. FLA. GUARDIAN AD LITEM TRAINING MANUAL, *supra* note 190, Introduction & Overview, at 7.

222. Brian G. Fraser, *Independent Representation for the Abused and Neglected Child: The Guardian Ad Litem*, 13 CAL. W.L. REV. 16, 17 n.7 (1976).

223. See FLA. GUARDIAN AD LITEM TRAINING MANUAL, *supra* note 190; ORANGE COUNTY BAR ASS'N, *supra* note 195.

County, Florida has adopted the Legal Aid Society as its Guardian Ad Litem program structure. This program provides legal services to indigent persons and children in dependency or abuse and neglect cases.²²⁴ Here, guardians ad litem assist in recommending what is in the best interests of the child as well as advocating the legal rights of the child.²²⁵

Many states have specific statutes mandating when a guardian ad litem or CASA should be appointed.²²⁶ A guardian ad litem is a specially trained volunteer appointed as an officer of the court to ensure that the best interests of the child are protected while the child is a ward of the court.²²⁷ In Florida, the guardian ad litem has five basic roles. They are investigator, reporter, protector, spokesperson, and monitor of services provided to the children.²²⁸ The guardian ad litem does not replace legal counsel or the social worker.²²⁹ Guardian ad litem programs that are run under a state model often use volunteers from the community, individuals with varying backgrounds.²³⁰

CASA, as well as Guardian Ad Litem programs, can be state organizations under the judicial branch of government, as in Florida, state organizations under the executive branch, or private nonprofit organizations with no state funding.²³¹ The structure can vary from state to state and county to county. An advantage of being a state agency is that the program will receive annual funding. A private not-for-profit organization must generate funding through fund-raising and grants. This affects the amount of money the program has to operate as well as the staff available for recruitment, training, and management.²³² Some counties have community agencies that help fund CASA and Guardian Ad Litem Programs. Colorado receives funding from the National CASA Association and foundations.²³³ In Colorado, all CASA programs are private non-profit organizations or come under a non-profit umbrella organization.²³⁴ These programs do not get state funding. In Florida, Speak Up For Children, Voices for Children Foundation, Inc., and the

224. ORANGE COUNTY BAR ASS'N, *supra* note 195.

225. See FLA. GUARDIAN AD LITEM TRAINING MANUAL, *supra* note 190, Roles & Responsibilities of the Guardian Ad Litem, at 3 (listing the general roles of a guardian ad litem in Florida, including the responsibilities of a guardian ad litem in Orange, County).

226. See, e.g., NAT'L CASA ASS'N, *supra* note 211.

227. FLORIDA GUARDIAN AD LITEM PROGRAM, Consumer Services, *supra* note 220.

228. *Id.*

229. *Id.*

230. GA. CASA, INC., TRAINING MANUAL, What is CASA, at 3 (1999).

231. NAT'L CASA ASS'N, Strategic Plan, *supra* note 212.

232. Telephone Interview with Barbara Mattison of Colorado CASA (Oct. 28, 1999).

233. NAT'L CASA ASS'N., Stategic Plan, *supra* note 212.

234. Telephone Interview with Barbara Mattison, *supra* note 232.

State of Florida provide funding to Guardian Ad Litem programs.²³⁵ Georgia receives funding from the state, National CASA Association, foundations, dues, and conference fees.²³⁶ The Legal Aid Society of Orange County, Florida is supported by various funding sources, including private donations, government grants, foundations, and general public support.²³⁷

In Georgia, CASA is the only nonprofit organization of volunteer advocates for "deprived" children funded by the Office of Juvenile Justice & Delinquency Prevention.²³⁸ Georgia CASA has thirty programs in forty-three counties.²³⁹ In 1999, approximately 3522 children were served,²⁴⁰ and over 19,000 children were in the legal custody of the state per month.²⁴¹ On average, 197.6 incidents of child abuse and neglect are reported daily in Georgia.²⁴² In fiscal year 1999, the year-end report total number of cases was 2057, with the number of children at 3522, and number of CASA volunteers at 1004.²⁴³ Georgia ranks as the fifth highest state in the nation in the number of children who have been abused and neglected.²⁴⁴

The CASA volunteer, in Georgia, is a lay individual from the community who works with other service providers to act as an independent voice for an abused or neglected child.²⁴⁵ These volunteers do not act as attorneys, although they may assist attorneys who are representing the individual parties, including children. The training consists of forty hours, which include courtroom procedure, child advocacy techniques, neglect, physical abuse and sexual abuse training, early childhood development, and adolescent behavior.²⁴⁶ The volunteer's role is to advocate for a child from the beginning of the case until it is resolved, attend all legal proceedings, assess all of the facts in the case, and to make recommendations in the child's best interests.²⁴⁷ Volunteers must be twenty-one years of age.²⁴⁸ The potential volunteer is given a personal interview, which includes a screening for

235. *About Voices for Children*, available at http://www.voicesgal.org/about_vfc.html (last visited Nov. 1999).

236. NAT'L CASA ASS'N, Strategic Plan, *supra* note 212.

237. ORANGE COUNTY BAR ASS'N, *supra* note 195.

238. See GA. CASA, INC., *supra* note 230, History of CASA.

239. *Id.*

240. *Id.*

241. *Id.* at CASA Facts.

242. *Id.*

243. GA. CASA, INC., *supra* note 230, at 6.

244. *Id.* at CASA Facts.

245. *Id.* at What is CASA.

246. *Id.*

247. *Id.*

248. GA. CASA, INC., *supra* note 230, at What is CASA.

objectivity, competence, and commitment, and a fingerprint and background check is also conducted.²⁴⁹ No special or legal background is required to be a CASA.²⁵⁰ After training, each volunteer is sworn in by a juvenile court judge prior to the assignment of a first case.²⁵¹ Each volunteer takes either one or two cases at a time, a significantly lighter caseload than the Department of Children and Families' caseload of thirty.

B. *Counsel*

Presently, twenty-four states have promulgated laws declaring that children in dependency hearings may have some form of appointed counsel.²⁵² Five states only provide for counsel with no separate provision for a GAL or CASA.²⁵³ The states vary as to what is required of the attorney and the rights of the child. For example, Nebraska requires that the guardian ad litem be an attorney except in cases when there are special reasons why a particular lay person would be appropriate.²⁵⁴ In Virginia, all guardians ad litem are attorneys.²⁵⁵

New York provides a system of counsel for children in its dependency system.²⁵⁶ The lawyer for the child in the New York system by statute is

249. *Id.*

250. *Id.*

251. *Id.* at CASA Facts.

252. ALA. CODE §§ 12-15-1, 26-14-11 (2000); ALASKA STAT. § 47.10.050 (Michie 2000); ARIZ. REV. STAT. § 8-221 (2000); ARK. CODE ANN. § 9-27-316 (2000); CAL. WELF. & INST. § 317 (West 2000); CONN. GEN. STAT. § 46b-129a, -136 (West 2000); DEL. CODE ANN. tit. 10, § 925 (2000); HAW. REV. STAT. § 587-34 (2000). IOWA CODE § 232.89 (2000); LA. REV. STAT. § 607 (West 2000); MD. CODE § 3-834 (2000); MICH. COMP. LAWS & 712A.17d (2000) (attorney guardian ad litem); MISS. CODE. § 43-21-121 (2000); N.H. REV. STAT. ANN. § 169-C:10 (2000) (guardian ad litem may be an attorney); N.J. STAT. ANN. § 9:6-8.23 (West 2000) (law guardian); N. MEX. STAT. § 32A-1-4(J) (2000); N.D. CENT. CODE § 50-25.1-08 (2000); N.D. R. Ct. 8.7 (2000); S.D. CODIFIED LAWS & 26-8A-18 (Michie 2000); UTAH CODE ANN. § 78-7-0, -3a-911-912 (1996 & Supp. 2000) (attorney guardian ad litem); VA. CODE ANN. § 16.1-266-266.1 (Michie 2000); W. VA. CODE § 49-7-2 (Michie 2000); WYO. STAT. ANN. § 14-3-211 (Michie 2000).

253. *See, e.g.*, ALA. CODE § 26-14-11 (1996); COLO. REV. STAT. ANN. §§ 19-1-103 (West 2000), 19-3-602; MD. CODE ANN. CTS. & JUD. PROC. § 3-821, 3-834 (2000); W. VA. CODE § 49-6-2 (Michie 2000).

254. R.R.S. NEB. CODE § 43-272(3) (2000).

255. VA. CODE ANN. § 16.1-266 (Michie 2000).

256. Besharov, *supra* note 7, § 242; *see also* Sheri Bonstelle & Christine Schessler, *Adjourning Justice: New York State's failure to Support Assigned Counsel Violates the Rights of Families in Child Abuse and Neglect Proceedings* 28 FORDHAM URBAN L.J. 1151 (2001) (discussing lack of attorney representation for parents in abuse and neglect cases).

known as a law guardian.²⁵⁷ Perhaps the best known law guardian program in New York, and certainly the oldest, is the Legal Aid Society of New York.²⁵⁸ The Legal Aid Society helps provide legal counsel to indigent persons within the community in a variety of settings, including criminal defense, domestic relations, civil, and juvenile matters.²⁵⁹ The Legal Aid Society represents ninety-percent of the children who appear before the Family Court in New York City in matters involving child abuse and neglect, juvenile delinquency, and children alleged to be persons in need of supervision.²⁶⁰ The Legal Aid Society acts as Law Guardians to more than 40,000 children and represents more than 38,000 families.²⁶¹ The Legal Aid Society's policy is to co-advise and counsel their clients and then to advocate the clients' interests and wishes.²⁶²

Illinois is one of the states that passed a statute that either requires or permits the appointment of independent counsel for children in a variety of judicial and administrative settings.²⁶³ Thus, children who are the subjects of proceedings under the Juvenile Court Act and the Mental Health Code must be represented by a guardian ad litem, and that guardian ad litem is represented by an attorney.²⁶⁴ The court must also appoint a guardian ad litem in each case involving a child not of the age of majority who is the subject of a proceeding under the state's Juvenile Court Act or Mental Health Code.²⁶⁵ The guardian ad litem shall represent the minor's best interests.²⁶⁶ It is the guardian ad litem's responsibility to form the required relationships and investigation necessary to represent the best interests of the child.²⁶⁷ The Juvenile Court Act provides that no hearing on any petition or motion filed under the Act may be commenced unless the minor who is the

257. *Id.*

258. Besharov, *supra* note 7, § 241; see Janet A Chaplan, *Youth Perspectives on Lawyers' Ethics: A Report on Seven Interviews*, 64 FORDHAM L. REV. 1763 (1996). The author served as an attorney in the Legal Aid Society of the City of New York Juvenile Rights Division from 1974-78.

259. ORANGE COUNTY BAR ASS'N, *supra* note 195.

260. THE LEGAL AID SOCIETY, available at <http://www.legal-aid.org/legal.htm> (last visited May 2001).

261. *Id.*

262. Besharov, *supra* note 7, § 241.

263. 705 ILL. COMP. STAT. 405/2-17(1), (2) (West 1999).

264. *Id.*

265. *Id.*

266. *Id.* at (1)(b).

267. *See id.* at (8).

subject of the proceeding is represented by counsel.²⁶⁸ When the court has appointed a guardian ad litem that is not an attorney at law, the court must appoint an attorney at law to represent the guardian ad litem.²⁶⁹ The court is also allowed to appoint a community volunteer, such as a court appointed special advocate or a person from CASA.²⁷⁰ Usually, these individuals are not legally trained.²⁷¹

California's approach is different. State statutes provide that in all cases in which an abuse and neglect petition has been filed, the probation officer or social worker who filed the petition shall serve as the guardian ad litem to the child, unless the court in its discretion appoints another adult guardian ad litem to represent the child's interests.²⁷² The statute clarifies that the guardian ad litem shall not be the attorney responsible for proving abuse or neglect.²⁷³ Unlike mandatory appointment of guardians ad litem, the appointment of legal counsel in California is discretionary.²⁷⁴ The courts may appoint counsel for the minor when it appears to the court that "the minor would benefit from the appointment of counsel."²⁷⁵ Although California enumerates the responsibilities of the child's counsel in dependency proceedings including interests "beyond the scope of the juvenile proceeding,"²⁷⁶ the statutes emphasize that the child's attorney is "not required to assume the [duties] of a social worker and is not expected to provide nonlegal services to the child."²⁷⁷

In the Colorado juvenile court, the attorney is formally called the guardian ad litem.²⁷⁸ *Colorado Revised Statutes* section 19-1-103 defines the guardian ad litem as a person appointed by a court to act in the best interests of a person.²⁷⁹ The child is not a client, and it is not the job of the guardian to parrot the request of the child. The unique role of the guardian ad litem is to represent the best interests of the child.²⁸⁰ Colorado recognizes that the

268. 705 ILL. COMP. STAT. 405/1-5(1); see also Diane Geraghty, *Ethical Issue in the Legal Representation of Children in Illinois: Roles, Rules & Reforms*, 29 LOY. U. CHI. L.J. 289, 291 (1998).

269. *Id.* at (4); Geraghty, *supra* note 268, at 291.

270. 705 ILL. COMP. STAT. 405/2-17.1.

271. *Id.*

272. CAL. WELF. & INST. CODE § 326 (West 2000).

273. *Id.*

274. See § 317(c).

275. *Id.*

276. *Id.* § 317(e).

277. *Id.* § 326.

278. COLO. REV. STAT. ANN. § 19-1-103 (West 2000).

279. *Id.*

280. *Id.*

role of the attorney representing children is different than the attorney's role in other court proceedings. As a result, the Colorado State Bar has adopted guardian ad litem standards.²⁸¹ The guidelines require that an attorney participating in the Colorado guardian ad litem program is mandated to have a minimum of ten hours of specialized training or self education.²⁸² Inexperienced attorneys appointed as guardian ad litem must complete eight hours of accredited training on the role of the guardian ad litem.²⁸³

In most counties in Colorado, the guardian ad litem is appointed under a contract system.²⁸⁴ This is the case in most abuse and neglect cases. Through the contract system of appointing guardian ad litem, the attorney does not work for the government, a government agency, or institution, but as an independent attorney. The attorneys contract directly with the state judicial department or district court.²⁸⁵ The contract creates an ethical obligation to carry out a case similar to the obligation that is created when an attorney accepts money and creates a retainer agreement in the private bar. However, the major difference is that the agreement is not between the client (the party being represented) and the attorney, but between the court and the attorney.²⁸⁶ This model has been criticized because it sometimes creates a conflict of interest.²⁸⁷ The attorney often finds himself appearing before judges who sign his or her contracts. Critics believe that this makes the attorney obligated to the judge as well as the child.²⁸⁸ Another problem is the rates paid to attorneys who contract with the court system tends to be low.²⁸⁹ As a result, very few attorneys want to participate. In addition, because the contract rates are so low, many contracting attorneys contract for more cases than they can handle, causing the same attorneys to appear in court four to five days a week.²⁹⁰ This may lead to attorneys becoming overly familiar with the judges and other agencies involved.²⁹¹ It is the duty

281. Marie Walton & Donna Schmalberger, *Final Draft of Proposed GAL Standards of Practice*, 22 COLO. LAW. 1907 (1993).

282. *Id.* at 1910.

283. *Id.*

284. *Id.*

285. *Id.* at 1909–10.

286. Nancy J. Moore, *Conflicts of Interests in the Representation of Children*, 64 FORDHAM L. REV. 1819, 1842 (1996).

287. *Id.*

288. *Id.*

289. Nancy Nerras, Comment, *The Non-Lawyer Guardian Ad Litem in Child Abuse and Neglect Proceedings: The King County, Washington Experience*, 58 WASH. L. REV. 853, 866 (1983).

290. Walton, *supra* note 281, at 1907.

291. *Id.*

of the district court judges to monitor the guardian ad litem attorneys and preside over the dependency proceeding.²⁹² This double-duty also creates a conflict of interest that is one of the concerns of critics of the Colorado system.²⁹³

As this brief survey shows, there are two different approaches to the appointment of an attorney as counsel for a child. These approaches include the attorney for the child²⁹⁴ and a guardian ad litem who is an attorney. A survey of national standards for a child's attorney by the American Bar Association defines the attorney-appointed guardian ad litem in the following way: "a lawyer appointed as 'guardian ad litem' for a child is an officer of the court appointed to protect the child's interests without being bound by the child's expressed preferences."²⁹⁵ These standards do not apply to nonlawyers when such persons are appointed as guardians ad litem or as "court appointed special advocates The nonlawyer guardian ad litem cannot and should not be expected to perform any legal functions on behalf of a child."²⁹⁶

VI. THE CASE FOR LEGAL REPRESENTATION

There are numerous organizations, books, articles, and professional publications that present strong public policy arguments for the use of attorneys in all proceedings in which juveniles are before the court in dependency and termination of parental rights cases.²⁹⁷ Foremost is the American Bar Association, which has introduced national standards for the representation of children, including representation in dependency proceed-

292. *Id.*

293. *Id.*

294. Sometimes referred to as attorney ad litem, as in the Supreme Court of Florida Order, or law guardian, as in New York.

295. A.B.A., *Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases* (Feb. 5, 1996), available at <http://www.abanet.org/child/rep-preface.html> [hereinafter A.B.A. Standards].

296. *Id.*; Institute of Judicial Administration/American Bar Association, *Standards Relating to Abuse and Neglect Cases* (1980).

297. See, e.g., Leonard P. Edwards, *A Comprehensive Approach to the Representation of Children: The Child Advocacy Coordinating Counsel*, 27 FAM. L.Q. 417 (1993). But see Jan Pudlow, *Should All Children in Court be Represented?* 28 Fla. Bar News 21, at 1, 9 (Nov. 1, 2001) (quoting Ninth Judicial Circuit Judge Daniel Dawson that "[i]t's philosophically dangerous to have attorneys for every child. I have parents' attorneys who come before me. And because they are skilled in the law, they do things that are bad for children.")

ings.²⁹⁸ The National Association of Counsel for Children (NACC) “believes that attorneys representing children and families should have a combination of knowledge, training, experience, and ability which allows them to effectively discharge their duties to their clients.”²⁹⁹ NACC asserts that all parties should be represented by counsel, including children in abuse and neglect related proceedings.³⁰⁰ NACC is trying to encourage federal law to mandate that independent attorneys be appointed to represent the interests of children in such proceedings.³⁰¹ NACC firmly believes that CASA volunteers are important to ensure families receive appropriate services and assistance, but children’s attorneys remain uniquely qualified to provide a legal voice for the child.³⁰² Therefore, CASA volunteers can work alongside children’s attorneys but cannot take the place of the children’s legal voice.³⁰³ On August 8, 1994, CASA summarized a Validation and Effectiveness Study on Legal Representation through Guardian Ad Litem, which identify the role of attorneys, guardians ad litem, and CASA.³⁰⁴ The report states that:

CASAs provides a different style of advocacy and perform many activities that attorneys do not CASAs tend to avoid the legal aspects of representation, and place greater emphasis on promoting cooperation among the parties. CASAs and attorneys prioritize their time differently, reflecting their areas of training and expertise —attorneys in legal representation and courtroom activities, CASAs in nonlegal and social service activities outside the courtroom.

Training, Accountability and Quality Control Findings . . . [stated that] [s]taff attorneys probably receive more training than CASAs; private attorneys less. CASA training, however, covers more top-

298. See AMERICA’S CHILDREN STILL AT RISK (executive summary), AMERICAN BAR ASS’N (2001); Linda Elrod, et al. *Representing Children Standards of Practice Committee, Proposal Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases*, 29 FAM. L.Q. 375 (1995). See generally Katner, *supra* note 160.

299. NAT’L ASS’N OF COUNSEL FOR CHILDREN POLICY AGENDA, available at <http://www.naccchildlaw.org/policy/policy.htm> (last visited Nov. 1999).

300. *Id.*

301. *Id.*

302. *Id.*

303. *Id.*

304. *The Validation and Effectiveness Study of Legal Representation Through Guardian Ad Litem, Summary of Findings Affecting CASA*, Aug. 8, 1994 at <http://www.casanet.org/library/guardian-ad-litem/eff.htm>.

ics . . . [but] puts less emphasis on the child welfare system and courts (7.8%) CASAs generally lacked information about immunity and liability issues.

The study expresses concern about CASAs' low level of courtroom activity. CASAs have less legal experience, and place less emphasis on attending hearings. In contested proceedings where there is a CASA but no lawyer, legal representation will be inadequate.³⁰⁵

A general recommendation from this study is to use the CASA training, caseloads, supervision and evaluation to model attorney Guardian Ad Litem programs.³⁰⁶

In addition, many but not all, authors who have written on the subject have argued in favor of counsel for children.³⁰⁷ The work of Martin Guggenheim,³⁰⁸ Jean Koh Peter,³⁰⁹ and Anne Harralambe³¹⁰ all support representation of children in dependency proceedings by lawyers. The core debate among scholars involves what role the lawyer should play as legal representative of the child—advocate for the child's express wishes or the child's best interests.³¹¹ *Florida Statutes* do not currently require counsel to children in Florida's dependency system in either form, and the statutory guardian ad litem mandate is not consistently followed. For reasons discussed throughout this article, Florida should follow the lead of other states that require legal representation of children in dependency proceedings and incorporate the independent counselor requirement in its dependency statu-

305. *Id.*

306. *Id.*

307. Mandelbaum, *supra* note 4, at 29–33; *see also* Daniella Levine, *To Assert Children's Legal Rights or Promote Children's Needs: How to Attain Both Goals*, 64 *FORDHAM L. REV.* 2023, 2028–33 (1996); Katherine Hunt Federle, *The Ethics of Empowerment: Rethinking The Role of Lawyering in Interviewing and Counseling the Child Client*, 64 *FORDHAM L. REV.* 1655, 1680 (1996); Bruce C. Hafen & Jonathan O. Hafen, *Abandoning Children to Their Autonomy: The United Nations Convention on the Rights of the Child*, 37 *HARV. INT'L L.J.* 449 (1996).

308. Martin Guggenheim, *Reconsidering the Need for Counsel for Children in Custody, Visitation and Child Protection Proceedings*, 29 *LOY. U. CHI. L.J.* 299 (1998) [hereinafter Guggenheim, *Reconsidering the Need for Counsel*].

309. PETERS, *supra* note 48.

310. ANN M. HARRALAMBE, *THE CHILD'S ATTORNEY: A GUIDE TO REPRESENTING CHILDREN IN CUSTODY, ADOPTION AND PROTECTION CASES* (1993).

311. *See generally* Special Issue, *Ethical Issues in the Legal Representation of Children*, 64 *FORDHAM L. REV.* 4 (1996); Mandelbaum, *supra* note 4, at 30–31; Katner, *supra* note 160.

tory provisions subject to variation based upon the child's capacity to direct the representation.³¹²

Conceptually, the appointment of counsel for all children in dependency proceedings makes sense for two major reasons. First, in light of the fact that the context in which decisions are made about children's life circumstances and services to be provided to them are made almost exclusively in a court setting, a lawyer for the child has the unique set of skills and authority to advocate and demonstrate the required right of the child to receive services. In the absence of counsel for the child, none of the other parties to the proceeding—the Department of Children and Family Services, the guardian ad litem, the attorney representing the Department, the parent and lawyer for the parent—is necessarily going to make motions to the court to order the provision of services, hold the other parties accountable to prove their assertions, and double check the collection of factual information to prove or disprove claims or defenses. The guardian ad litem is the person who most closely carries out these responsibilities. As the American Bar Association has explained, the guardian ad litem is also responsible in many jurisdictions to submit a report or testify as a back or expert witness. Such tasks are inconsistent with the function of the lawyer.³¹³

Second, the lawyer for the child is the only individual other than the guardian ad litem whose sole interest is protecting the child from harm. All the other parties have conflicts and have primary interests which are self- or inner-directed. The evidence of the Department of Children and Family Services' failure to provide safety is amply demonstrated by the long history and multiple reports of dangerous conditions in the child welfare system. Parents' position is often to obtain the return of the child even where there may be dramatic and dangerous shortcomings in the parent's ability to look after the child. The guardian ad litem is not always present, and where one is present, he or she is usually a volunteer, perhaps unsophisticated, and certainly without the ability or authority to make motions to the court and seek orders obligating the parties to comply with statutes and rules aimed at protecting the child.

Several arguments are often made against providing lawyers for children in dependency proceedings. The three major ones are disruption of the dependency court proceeding, advocating inappropriate goals for the child, and cost. The first complaint is that adding lawyers will further disrupt the

312. *Recommendations of the Conference on Ethical Issues in the Legal Representation of Children*, 64 *FORDHAM L. REV.* 1301, 1312–14 (1996); Bruce A. Green & Bernardine Dohrn, *Foreward: Children and the Ethical Practice of Law*, 64 *FORDHAM L. REV.* 1281, 1295 (1996).

313. A.B.A. Standards, *supra* note 289, at pt. I, § A-2.

dependency court proceeding. Of course, as anyone who has been in the Florida dependency court knows, the proceedings are anything but efficient and formal. This issue was raised before the Supreme Court of Florida in *M.W. v. Davis*³¹⁴ in which the Court was asked to determine whether the hearing requirements under the Baker Act for Civil Commitment apply when the child has been in the legal custody of the Department of Children and Family Services and is in need of residential treatment.³¹⁵ The court recognized that the reality was that the system is overburdened.³¹⁶ The answer lies in part in providing enough judges to adequately hear the statutorily mandated dependency proceedings.³¹⁷

With regard to the second issue, the concern is that lawyers, unlike guardians ad litem and other representatives in the court, will seek to represent what the child wants as opposed to what the child needs with the result that somehow the outcome of the court proceeding will be antithetical to the best interest of the child. The argument goes something like this: the lawyer argues for a result that will be harmful to the child and will succeed with the result that the child will be harmed. The premise of this argument is that lawyers are obligated by the rules of professional conduct to advocate their client's interest as opposed to their client's best interest. Of course, this topic has been the subject of extended discussion in the professional literature. In fact, in December of 1995 a national conference on representing children in dependency proceedings took place at the Fordham University Law School dealing in major part with just this issue.³¹⁸ It would appear that it is rare that lawyers find themselves in positions that they represent interests of children which are opposed to what is best for children. The reality is that because most children represented in dependency proceedings are quite young, the issue does not arise. Although there does not appear to be clear national data evaluating the age of children in dependency proceedings, at least one commentator concluded that most children are under the age of eight when the proceeding begins and a high percentage are under the age of three.³¹⁹

In addition, the argument that somehow lawyers will represent clients whose wishes are antithetical to their best interests and will then somehow cause harmful results for their children is based upon an implausible prem-

314. 756 So. 2d 90 (Fla. 2000).

315. *Id.* at 92.

316. *Id.* at 108.

317. *See id.* at 108-09.

318. *See generally* Green, *supra* note 312.

319. *See* Guggenheim, *Counseling Counsel*, *supra* note 22, at 1495; Guggenheim, *Reconsidering the Need for Counsel*, *supra* note 308, at 327 n.129.

ise. The premise is that the lawyer, by representing the child's professed interest as opposed to the child's best interest, will somehow fool everyone else in the courtroom, with the result that the court will enter an order that will be antithetical to the child's best interests. This defies reality. In addition, a lawyer is rarely placed in the position of representing the child's interests that might differ from the child's best interests.

A more important issue involves a lawyer or a guardian ad litem representing the child's best interests. As the work of Professors Peters,³²⁰ Guggenheim,³²¹ and Randi Mendelbaum³²² demonstrate, there is a deep concern that by representing the child's best interest, the lawyer may be representing positions that are based upon the lawyer's or guardian ad litem's own value structure or biases, which may in fact not be in the child's best interest from the vantage point of the child, the parents, and the community.³²³ In summary, the concern about lawyers not protecting children's best interests but instead representing the child's professed interests is, as a practical matter, more of a scholarly debate than a widely documented problem. This author supports the pure advocate approach for several simple reasons: counsel has a duty to counsel clients against unwise decisions, the courts will not be fooled by poor judgment-based decisions, and, in the overwhelming number of cases, the lawyer will advocate the child's best interests because they coincide with the child's interests.³²⁴

More significantly, a consensus has grown as to how lawyers should approach representation. According to Professor Guggenheim:

Until very recently, it may have greatly mattered what particular views the attorney assigned to represent a child happened to possess. As this Article will indicate, however, those days appear to be behind us as a growing consensus of scholars and practitioners increasingly insist that personality, personal opinions, values, and

320. PETERS, *supra* note 48.

321. Martin Guggenheim, *A Paradigm For Determining the Role of Counsel for Children*, 64 FORDHAM L. REV. 1399 (1996) [hereinafter Guggenheim, *Paradigm*]; Martin Guggenheim, *The Making of Standards for Representing Children in Custody and Visitation Proceedings: The Reporter's Perspective*, 13 J. AM. ACAD. MATRIM. LAW. 35 (1995) [hereinafter Guggenheim, *The Making of Standards*].

322. Mandelbaum, *supra* note 4.

323. See PETERS, *supra* note 48; Guggenheim, *Paradigm*, *supra* note 321; Guggenheim, *The Making of Standards*, *supra* note 321; Ventrell, *supra* note 84, at 269.

324. See also Katner, *supra* note 160 (discussing the ethical conflicts that arise when the lawyer acts as both guardian ad litem and lawyer).

beliefs should play as small a role as possible in carrying out the responsibilities of representing a child in a legal proceeding.³²⁵

Lawyers for Children America, Inc., based in Miami, has addressed the problem in the following way:

The attorney must be able to communicate effectively her role in the nature of the court proceedings in an age appropriate manner. The attorney must know how to listen to the wishes of her child client and to counsel a child about her various options. She must be able to balance her client's express wishes with what is in the child's best interest, and to help her client make informed decisions.³²⁶

The third issue is one of cost. Regretfully, there is virtually no literature studying the cost of attorneys in the dependency and termination of parental rights proceeding.³²⁷ The questions are obvious. How much will it cost to operate an attorney program? How much does the guardian ad litem cost the state? What benefit will attorneys produce financially by causing children to either be made available for adoption or returned to natural parents in faster and more efficient ways?

An additional, more technical question is how expansive should the lawyer's role be. This question arises in the context of the dependency and termination of parental rights proceeding and beyond. Within the dependency setting, the lawyer ought to have the same range of responsibilities as any other lawyer acting on behalf of a client including filing writs and taking and defending appeals. Should the lawyer have the responsibility to commence independent actions arising from information the lawyer obtains during representation in the dependency proceedings, though? Two examples are damage actions³²⁸ and individual and class actions for declaratory and injunctive relief.³²⁹

What, then, should the statute requiring counsel look like in Florida? Although the guardian ad litem provision is located in a separate "Part" of

325. Guggenheim, *Reconsidering the Need for Counsel*, *supra* note 302, at 301; see also Guggenheim, *Paradigm*, *supra* note 321, at 1399 (discussing the particular difficulties in establishing how to represent young children).

326. Stein, *supra* note 180, at 2.

327. Levine, *supra* note 307, at 2031.

328. Dep't of Health & Rehab. Servs. v. B.J.M., 656 So. 2d 906 (Fla. 1995).

329. See *Ward v. Kearney*, No. 98-7137-CIV-MORENO (S.D. Fla. 2001); *Foster Children v. Bush*, Case No. 00-2116-CIV-MORENO (S.D. Fla. 2000).

Chapter Thirty-Nine, the dependency proceeding chapter is organized chronologically. Thus, because the dependent child should have immediate access to a lawyer who will independently represent him, this should be addressed where dependency proceeding begins in the *Florida Statutes*, following the petition provision, at a new number, 39.5011. It preferably should follow the current placement of the guardian ad litem provisions as "Part X," and it should precede the guardian ad litem Part, which will be renumbered as "Part XI." The proposed provision should read:

Appointment of attorney for abused, abandoned, or neglected child.—

(1) An attorney shall be appointed by the court at the earliest possible time to represent the child's legal interests in any abuse, abandonment, or neglect judicial proceeding, whether criminal or civil.

(2) This requirement cannot be satisfied with the appointment of a guardian ad litem in s. 39.822.

(3) Attorneys representing children under this subsection should not assume responsibilities that are not consistent with those of an attorney for the child.

(4) If the court determines the child has the capacity to direct the representation, the lawyer has the same ethical duties as he would if he were representing an adult client as governed by the Florida Rules of Professional Conduct.³³⁰ If the child cannot direct the representation, the lawyer must decide what position or range of positions to present to the court.

(5) Duties and responsibilities of the child's attorney:

a. The lawyer must explain his role to the client so that the child will be willing to communicate the information the attorney will need for adequate representation.

b. In situations where a reasonable likelihood exists that the child's interests will conflict with another child or another client, the lawyer shall not provide joint representation.

330. See FLA. STAT. § 39.822(1) (2000).

VII. CONCLUSION

The need for attorney representation of children in the context of dependency proceedings is irrefutable. A dependent child may suffer irreparable harm while in the state's care, and there is a need for efficient disposal of dependency cases so that children may quickly return to an appropriate caregiver. Florida courts have acknowledged the inherent vulnerability children face in its dependency system and problems within the system. The Florida Legislature has enacted provisions requiring the appointment of guardians ad litem to protect children in this context, but these provision are not consistently followed throughout the state. To make matters worse, often times, nonlawyer advocates are not capable of representing children in a legal setting. While CASA and similar programs are effective in promoting the child's best interests, the reality is that children lack adequate and consistent representation. The dependent child's fate and safety are decided by the court. Thus, the individual most qualified to advocate for the child and speak to the court is one with training, skill, and experience for the job—an attorney to represent the child in his or her legal capacity.