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REPRESENTING THE CHILD : THE EVOLUTION OF THE  
GUARDIAN AD LITEM IN CARE PROCEEDINGS

Susan A. M. Cooper

M.A. 1993

The aim of the study is to illuminate the legal, social and administrative context of the "safeguarding" and representational role of the guardian ad litem in care proceedings, a senior social worker appointed by the court to represent the child and to act independently of the other parties. The study sets out to compare this role with representational roles in other kinds of proceedings where the "best interests" of a child are a consideration, and to evaluate its effectiveness. The areas of enquiry that are addressed are: the historical background, the legal context, representation in other child-related proceedings, the administrative structure, and the role and professional practice of the guardian ad litem. The study reveals that, owing to the separate evolution of the various pieces of legislation concerning the care and upbringing of children, there is only a tenuous connection between these representational arrangements. It also reveals that, while the role of the guardian ad litem in care proceedings was originally conceived as an extra safeguard to protect children from parental abuse and neglect at a time when social workers were considered not interventionalist enough, the role under the Children Act 1989 reflects a new perception of children's interests, and an awareness that public care holds its own dangers. Although the guardian, in partnership with the child's solicitor, is the advocate of the child's case, case law has defined the role as essentially investigative and advisory; having no legal powers, the guardian must seek to bring about change through persuasion. It may be, however, that through his or her very presence as an outside observer, important influences on the dynamics of the situation may result. Whilst the role is hindered by certain legal and administrative constraints, which are examined in detail in the study, it also has important strengths relating to child advocacy, to the courts and to the local authorities.

University of Durham  
Faculty of Social Sciences

REPRESENTING THE CHILD:  
THE EVOLUTION OF THE GUARDIAN AD LITEM  
IN CARE PROCEEDINGS

SUSAN A. M. COOPER

Dissertation submitted to the University of Durham  
for the degree of Master of Arts

1993

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## GENERAL NOTES

### Gender terminology

The guardian ad litem has been referred to throughout as "she", as the majority of guardians are female. This does, of course, include male guardians also. Other references are normally shown as s/he.

### Abbreviations

ACC	-	Association of County Councils
ADSS	-	Association of Directors of Social Services
AMA	-	Association of Metropolitan Authorities
BAAF	-	British Agencies for Adoption and Fostering
BASW	-	British Association of Social Workers
DHSS	-	Department of Health and Social Security
DoH	-	Department of Health
GALRO	-	Guardians ad litem and Reporting Officers
IRCHIN	-	Independent Representation for Children in Need
SSI	-	Social Services Inspectorate

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## CHAPTER 1

### INTRODUCTION

The inspiration and impetus for this piece of work arose early in 1987 when I was working as a Senior Caseworker (Guardian ad litem) in a Social Services Area Team. I had been appointed to this post in October 1984, as part of the local authority's response to a government decision to implement, in May of that year, Sections 64 and 65 of the Children Act 1975, which are concerned with the representation of the child in care proceedings in the juvenile court. Because guardian ad litem duties formed only a part of the overall workload, experience was perhaps gained slowly, but after two years or so of carrying out this role, it had become apparent to me that there was much that I did not understand, not so much about the guardian ad litem role itself, but about the legal context in which it operated. Particularly puzzling were the nature of care proceedings themselves, a curious hybrid of civil and criminal law, and the disparate and seemingly illogical arrangements for representing children in other kinds of proceedings that affected them, such as wardship, adoption and marital breakdown.

Sections 64 and 65 of the Children Act 1975 made provision for the appointment of a guardian ad litem to act in care proceedings, who would be an experienced social worker who would act on behalf of a child to safeguard his/her interests by conducting an independent



investigation into the circumstances. The idea, subsequently incorporated into the Act, took its inspiration from the Inquiry into the death of Maria Colwell, a little girl who had been returned to her own family from foster parents and who had been subsequently murdered by her stepfather. The Inquiry concluded that if someone who was independent both of the parents and of the local authority had investigated Maria's circumstances and taken greater heed of what Maria herself was saying, the tragedy might have been averted.

The tragedy therefore highlighted a need for an independent investigator and reporter; but it also highlighted the need for the independent representation of the child in court. For historical reasons, which will be discussed more fully in the next chapter, the parties in care proceedings, that is those people who are entitled to legal representation, are the applicant (the local authority) and the child. Because it is generally held that children, especially if young, cannot instruct solicitors, then in practice the solicitor is instructed by the parent, as happened in the Maria Colwell case. However, if it is alleged that the parent has harmed the child, there is then an obvious conflict of interest. Sections 64 and 65, therefore, made provision, not just for the appointment of a guardian ad litem, but also for separate

representation of the child, by debarring the parent from acting on the child's behalf.

Social workers were already accustomed to acting as guardians ad litem in adoption proceedings, and in May 1984 other parts of the Children Act 1975 were implemented, which related to adoption. From then on, guardians were only appointed in those cases where the natural parents were refusing to give consent, or where there were unusual circumstances. In uncontested cases a new role of Reporting Officer was created, which was focussed on safeguarding the rights of the natural parent in the matter of agreement.

The task of setting up panels of social workers to act as guardians ad litem in care proceedings and contested adoptions, and as reporting officers in uncontested adoptions, was given to the local authority social services departments. In adoption proceedings, anyone who had, or whose agency had had, any part in placing the child, was disqualified from acting. Confusingly, probation officers could act as "GALROs" in adoption proceedings, but not in care proceedings. In care proceedings the anomaly was that, in most cases, the local authority would also be a party. In order to create some distance between themselves and panel members (the direct employment of guardians was felt to be altogether too compromising), local authorities were given some leeway as to how to organise these, using free-lance workers, voluntary agency workers, or

entering into reciprocal arrangements with one or more neighbouring authorities. In Durham (where I was working at the time) the County Council made arrangements with neighbouring Cleveland to supply guardians for each other's panels of Senior Practitioner (level 3) grade, who would carry out their existing duties at the same time. Thus panel members would be independent of the local authority bringing the case, and the cost of running the service would be minimised as no extra staff were recruited.

What the job would actually entail was largely a matter of guesswork at that stage. It was expected that, as level 3 workers, we would already possess the necessary knowledge and skills to be adequate guardians ad litem and that we would have sufficient experience of court proceedings concerning children, of theories of child development, of separation and attachment and of the range of substitute care that local authorities could provide. It must have been expected, also, that the job would not involve much extra work. The "job description", such as it was, was laid down in the Magistrates' Courts (Children and Young Persons) Rules, 1970 (as amended) (Magistrates Courts 1970), and the DHSS Guide for Guardians ad litem in the Juvenile Court (DHSS Guide 1984), given to each guardian, expanded and interpreted these, and gave some guidance as to how the enquiry and the presentation of the report should be

executed. Thus armed, and with an initial briefing, we were left to get on with it.

It soon became apparent that the work we had begun to undertake as guardians in care proceedings had elements in it that were spectacularly new. The first was the intensity of our involvement in legal matters. The second was the unaccustomed professional autonomy; the Guide made it clear that, as guardians ad litem, we were to act as independent practitioners, and that our work would not be subject to the scrutiny of seniors and managers (DHSS Guide 1984, para 7). The third new area was working in partnership with a solicitor; and fourth was the confrontational aspect of the role, especially with regard to the actions of the local authority which was party to the case. As reciprocating guardians, salaried and with the degree of job security commensurate with that status, the potential for that conflict to compromise our independence was not immediately obvious.

Two specific experiences aroused my interest sufficiently to spur me to undertake post-graduate studies in this subject. Both of these highlighted my inexperience in the law, a situation not uncommon amongst social workers. A constant criticism of social work courses is that the teaching of law is often inadequate (Ball et al, 1988). Apart from some instruction in the Mental Health Act, the legal content of my own course focussed upon divorce law, not

especially relevant, in the years before the Children Act 1989, for social workers who needed greater familiarity with the laws regulating state intervention into family life; and consumer law, which was scarcely relevant at all. As a hitherto generic worker, I had had some experience of care proceedings in the juvenile court but, in common I suspect with many colleagues, rather more experience in the juvenile justice field, which has essential differences.

The first of these experiences arose just before Christmas 1986, when I was acting as guardian ad litem for three children in an appeal to the Crown Court against the making of care orders. Because I did not fully understand the underlying principles, nor the procedures whereby such appeals are regulated, I did not fully understand my own role and was, therefore, unable, when it came to the hearing, to report on all matters that were relevant. This experience provoked such feelings of professional angst that it was the original impetus for my determination to acquire a better understanding of the legal context of the work.

The second experience occurred in the summer of 1987, when the now infamous "Cleveland crisis" erupted. It was my fate to be appointed in June of that year as guardian ad litem to three children where medical opinion as to their possible sexual abuse was divided. In conjunction with the children's solicitor and with

the local authority's consent (there are restrictions on the use of wardship following the case of *A v. Liverpool City Council*, 1982) we made the children wards of court, and assumed that my role as guardian ad litem would continue. I had no idea at the time how potentially foolhardy this action had been, not for the children, but for myself in terms of having a proper legal standing in the proceedings and of being paid for my professional time. It was the gradual realisation of these complications that gave further urgency to the need to make sense of this confusing world.

The questions to which I sought immediate answer were these: firstly, if care proceedings are civil rather than criminal in nature, why were appeals heard in the Crown Court, which is a criminal court, and secondly, if the Official Solicitor carries out a well-established guardian ad litem role in wardship, what is the relationship, if any, between that jurisdiction and care proceedings in the juvenile court? How does the guardian ad litem in adoption relate to both of these? In a wider sense, I was hoping to illuminate the social and legal context of a representational role concerning children. Following from this, it is hard to avoid the central question: if the purpose of the role was to contribute significantly to the protection of children, to what extent had this been promoted or hampered by the legal and administrative systems within which it operated?

The search for the answers to these questions opened up several areas of enquiry which are pursued in this thesis. Care proceedings are about the right of the state to challenge parental autonomy in the upbringing of children. The role of the guardian is to challenge parental autonomy yet further by disqualifying the parent and, as a state-appointed person, taking on the role of representing the child's interests instead. At the time this thesis was begun, the forum for doing this was the juvenile court, which had both a criminal and a civil jurisdiction. Thus, what needed to be examined was the development of a social policy towards children and families, especially as it related to the juvenile court. This had its beginnings in the 19th Century, when children began to be recognised as needing to be treated and regarded as children, rather than little adults, and the state began to assume a role in child welfare. This developed throughout the 20th Century, culminating in our current sophisticated systems, where the state can play a significant part in family life, and of which the social worker, including the social worker as guardian ad litem, is a part. The second area of enquiry concerns representation of the child in other court proceedings. Legal representation relates to whether the child is a party, and whether the child is a party seems to be a matter of historical accident, according to the kind of court proceedings in question, all of which appear to have



their own individual evolution. The development of the solicitor/guardian partnership in care proceedings is a saga in itself, and closely related to the recognition (which was a new pre-occupation in the 1970s) that children's rights are sometimes different from those of parents. By way of comparison, the role of the guardian in adoption and the role of the Official Solicitor in wardship is examined, as well as the role of the Court Welfare Officer in matrimonial and guardianship proceedings.

The third area of enquiry concerns the administrative arrangements for the provision of a guardian ad litem service, with reference to qualifications of members, recruitment, training and monitoring. Recurring themes are independence, both professional and organisational, and the persistent problem of supply and demand.

Fourthly, the role and practice of the guardian ad litem is examined, especially the way that guardians interpreted this and how it led to much controversy about the boundaries of the role and its interface with that of the individual social worker, and more controversially still, with the social services decision-making machinery and the courts. Because of the widespread breakdown of reciprocal arrangements, administering authorities began to recruit "free-lance" guardians, contracted on a sessional basis to carry out

the work. This opened up the opportunity for panel members to be self-employed, a way of working that was dramatically different from the bureaucratically-controlled setting of the social services department.

Finally, changes brought about by the Children Act 1989 are discussed; significantly, the emphasis is now on panel management rather than administration, and organisational independence is enhanced in some ways and eroded in others. The Children Act 1989 introduces a new philosophy very different from that of the Children Act 1975; there is now a statutory duty on local authorities to promote the upbringing of children by their families and the distinction between children's rights and parents' rights has become blurred. Guardians will now be appointed in almost all cases and in a wider range of proceedings, and although the safeguarding role remains the same, guardians now have a case-management role as well, which seems to reflect government pre-occupations with the efficient processing of cases through the courts.

In conclusion the central question is addressed: how effective has the guardian been as part of the child protection machinery and a safeguarder of children's interests under the old law; and how effective is it likely to be under the new?

This is a study which draws on secondary sources with occasional reference to my own experience as a guardian ad litem. As far as I could ascertain, there

had been no comprehensive study of the representation of children in civil proceedings in England and Wales. The study entitled The Representation of the Child in Civil Proceedings, carried out by Murch, Hunt and MacLeod in the period 1985-89, covered care, matrimonial and domestic proceedings, but not adoption and wardship (Murch et al 1990).

For the historical context, the study relies on individual commentaries on wardship, adoption and care proceedings. The literature relating to care proceedings, both historical and analytical, is complicated by the entwinement of the legislation relating to children in need of care and children who commit offences, and by the dual functions of the juvenile court in carrying out both a civil and a criminal jurisdiction.

Two important pieces of research were carried out in the interregnum between the passing of the Children Act 1975, which identified the potential problem of conflict of interest between parent and child in care cases, and the implementation of the sections relating to guardians ad litem in May 1984. The first of these was Hilgendorf's study, Social Workers and Solicitors in Child Care Cases (Hilgendorf 1981). The second was The Representation of Children and Parents in Child Care Proceedings, the report of research carried out by

Malos and MacLeod in the period November 1983-December 1984 (Malos and MacLeod 1984).

The first study to address the actual setting up of the Guardian ad litem and Reporting Officer (GALRO) panels was carried out by Murch and Bader, Separate Representation for Parents and Children : an examination of the initial phase, published in December 1984 (Murch and Bader 1984). Two years later, in 1986, there were two further studies: Guardians/Curators ad litem and Reporting Officers (BASW 1986), and Panels of Guardians ad litem and Reporting Officers, a joint ADSS/ACC/AMA Officers' Working Party Report (ADSS 1986). Other pieces of research on which I have relied are: In the Interests of Children, a report by the Social Services Inspectorate (SSI 1990); Speaking out for children (Hunt and Murch 1990); and the conclusions of Murch, Hunt and MacLeod's study mentioned above (Murch et al 1990).

Other source material includes the relevant government circulars and guidance, the Report of the Inquiry into Child Abuse in Cleveland 1987 (Secretary of State 1988), the debates relating to the passage of the Children Act 1989 through parliament, and the case law that has helped to determine the role of the guardian ad litem as it has evolved.

The first area of enquiry will be the historical and legal context, which will be examined in Chapters 2 and 3.

## CHAPTER 2

### THE HISTORICAL AND LEGAL CONTEXT (1)

#### Introduction

This chapter will examine the historical and legal context of the work of the guardian ad litem and the development of a social policy towards children and families, especially as it relates to the juvenile court, in the period up to the CYP Act 1969. The historical information is drawn from the following publications: Frost and Stein (1989), Heywood (1978) and Holman (1988).

The new legislation contained in the Children Act 1989 asserts the need to make a distinction between children who are the victims of family breakdown or abusive or inadequate parenting, and those who commit crimes. This is reflected, also, in a new court structure which emphasises the difference between the civil and the criminal law. The legislation and court structure that previously prevailed, however, provided the context for the guardian ad litem's work for the first seven years of the service. In order to understand the Children and Young Person's Act, 1969, which was the relevant legislation at the time, and the peculiarities of the juvenile court, it is necessary to examine the origins and development of the various strands of child welfare legislation which the Act inherited.

The CYP Act 1969 defines the specific grounds for intervention by the state in care proceedings. These are: that there is evidence of abuse or neglect or that there is a likelihood of abuse or neglect because of the fate of another child in the same household; that the child is in moral danger; beyond the control of parent or guardian; failing to attend school; or has committed an offence. The Act illustrates concerns about children that can be traced to the origins of child welfare legislation in the 19th Century, in particular, the tension between the need to protect children from harm and the need to protect society from troublesome children. The preoccupations that have taxed the legislators' minds from the beginning are the relationships between neglect and subsequent crime, the value of education both as a preventive and a rehabilitative process, the extent of parents' rights over their children and the need to balance an approach which recognises the dependent status of children with the need for legal safeguards. The distinguishable lines of legislation from which the Act is derived are: first, the legislation directed at parents who treated their children with cruelty; secondly, the legislation relating to the Industrial Schools Act 1866 (moral danger and being beyond parental control); the third derives from the Education Act of 1944. The final source is the criminal law as applied to juveniles in

the juvenile courts originally set up by the Children Act 1908 (Eekelar, Dingwall and Murray 1982, p.71).

Factors Influencing the Development of Child Welfare Legislation in the 19th Century

Two major factors influencing the development of child welfare legislation in the 19th Century were the Industrial Revolution on the one hand and an acknowledgment by society of the particular state of childhood, on the other. The Industrial Revolution changed society from a predominantly agricultural one to a predominantly urban one, and once people began to live in large industrial conurbations social problems became much more acute.

Frost and Stein (1989) argue that there is a complex relationship between the rise of modern western society and the creation of defined class and age groups, including the idea of "childhood". Davin points out that of the many variables concerning childhood in this period, the one that stands out is the difference between rich and poor children, which was ideological as well as economic. Upper and middle class children were regarded as dependent and subservient; playing and learning in their own protected world which was segregated from adults. In industrial urban working class households, children and adults lived closely together, in an economic unit to which they were all expected to contribute. Girls took an early responsibility in helping to look after the younger

children, and boys augmented the family fortunes by scavenging in the streets. Many children were orphaned, abandoned because they were illegitimate, or became destitute because of family breakdown caused by poverty and unemployment. Some of these children would have been accommodated in the workhouse, or their families helped via "outdoor relief" under the Poor Law, but many actually lived on the streets, where there was a good chance of becoming involved in prostitution or crime in order to survive.

Nineteenth Century reformers began, to some extent, to see all children as dependent beings who needed special legislation. One of the earliest examples of protective legislation is the reform of employment conditions, regulating both the age at which children were allowed to work, and the hours; though it must be remembered that there may have been vested interest on the part of the legislators in protecting adult jobs as well. (Fraser 1984, p.13). Sadly, in an age before education had become compulsory, these reforms had the concomitant effect of swelling the numbers of street children with the potential for inflicting damage on the community. A somewhat ambivalent attitude to children developed, where children were seen as being in need of control as well as protection. The link between parental neglect and potential delinquency (children as threats), as well as legislation directed at the young offender, therefore received earlier attention than



legislation to protect children from cruelty specifically.

Troublesome children - children as threats

Early in the century, the Report of an Unofficial Committee of the Society for Investigating the Causes of the Alarming Increase in Juvenile Delinquency in the Metropolis (1816), (cited by Eekelar et al 1982, p.71), found the causes to be: improper conduct of parents; want of education; want of suitable employment. Later in the century, these views were shared by those reformers such as Dr. Barnado and the Reverend Stephenson, Edward Rudolf and Cardinal Vaughan who were developing their own forms of residential care as an alternative to the workhouse. These philanthropic gentlemen were motivated by concern for the children's physical and spiritual welfare but they also wanted to "save" children from the dangerous influences of a bad environment. It was, therefore, never part of the plan to return children to their families and, indeed, many children were sent to begin a new life in the colonies. (Holman 1988, p.7). The Poor Law Commissioners were quick to see the preventative value of education, and Poor Law children received some education from the passing of the Poor Law Amendment Act of 1834.

The work of the Reformatory movement, aimed at the problem of the juvenile offender, was inspired by the same idea and received statutory recognition in the

Youthful Offenders Act of 1854. In the early part of the nineteenth century, children who broke the law were treated as adults, even at the age of eight or nine, being sentenced to death or imprisonment or deportation. (Frost and Stein 1989, p.24). The thinking behind this legislation owes much to the work of Mary Carpenter, daughter of a Unitarian minister. During the 1840s she became a pioneer of the Ragged Schools Movement which provided Sunday and evening refuge for children living at home or maintaining themselves, on the streets, outside the Poor Law. Feeling that the Ragged Schools were insufficient to meet the needs of these children, some of whom had already served prison sentences, and inspired by experiments both abroad (the Rauhe Haus at Hamburg) and at home (a farm school run by the Philanthropic Society at Redhill in Surrey) where the emphasis was on reform and rehabilitation rather than on punishment, she set about stimulating public interest in this work. In the winter of 1851 she published her book "Reformatory Schools for the Children of the Dangerous and Perishing Classes and for Young Offenders". The "dangerous" classes encompassed children who had already been convicted of crimes and, as an alternative to prison, Mary Carpenter successfully campaigned for penal Reformatory Schools. Because, in common with other Victorians, she saw a causal link between early neglect and later delinquency, the "perishing" classes were those whose destitution might eventually lead to

crime. She therefore campaigned for an alternative kind of school, with a preventative aim, called an Industrial School to which could be sent, by warrant of a magistrate, children who were charged with vagrancy, or found begging, wandering, or in the company of reputed thieves. From 1861 children under 12 who were convicted of offences could also be sent to these schools, as well as children declared by their parents to be "uncontrollable" (Heywood 1978, p.44; Eekelar, Dingwall and Murray 1982).

#### Children as the victims of cruelty

In the last thirty years of the 19th Century we can begin to trace the growth of measures intended to protect the child within his own home, or whose circumstances of birth or illegitimacy were exploited for private profit. From 1868, boards of guardians had power to prosecute parents who wilfully neglected their children, such as to endanger their health but this provision only applied to children who came within the Poor Law. In 1872 the Infant Life Protection Act outlawed the practice of "baby-farming", where mothers, often unmarried, reluctant to enter the workhouse and intent if possible to carry on in employment, entrusted their children to women to be looked after for a weekly fee or lump sum. Since every death opened the way for a further lucrative transaction, there was some incentive to neglect these children and many died.

It was the voluntary societies which took the initiative in recognising the need to protect children within their own homes, an initiative which had begun in America with the formation of the Society for the Prevention of Cruelty to Children. The impetus in the United States was the death of a child called Mary Ellen, seriously ill-treated by her adoptive parents who insisted that it was their parental right to treat her as they wished. So reluctant was society to challenge the sacred sanctum of the family that there were laws to protect animals, but not children, so action had to be brought on behalf of the child as a member of the animal kingdom. A Liverpool merchant, Thomas Agnew, heard about this case on a visit to America, and on his return founded the Liverpool SPCC. Other locally based societies followed which were eventually amalgamated into the NSPCC.

In 1889 the NSPCC successfully initiated the Protection of Children and the Prevention of Cruelty Act. The Act made cruelty to children (a "child" was defined at the time as a boy under 14 and a girl under 16) a criminal offence. "Cruelty" was defined as wilful ill-treatment, neglect or abandonment in a manner likely to cause unnecessary suffering or injury to health. On conviction, the court could commit the child to the care of a "fit person" such as a relative; though the term also covered the Industrial Schools and the charitable

institutions. It is important to understand that the courts were given no power to take action on behalf of an ill-treated child where there had not been a successful criminal prosecution of an adult until 1952 (Heywood 1978; Frost and Stein 1989).

### Twentieth Century developments

#### **The Juvenile Courts**

The Juvenile Courts, set up under the Children Act 1908, established the curious blend of civil and criminal proceedings which was to characterise this court for most of the 20th Century. Its aim was to abolish imprisonment and to deal with juvenile offenders, as the criminal part of its jurisdiction, in a way that would recognise them as a separate category. In addition, rather reflecting Mary Carpenter's distinction between the "dangerous" and "perishing" classes, it would have a civil jurisdiction to take action on behalf of non-criminal children who were deemed to be in need of care or protection. These children were those found begging, wandering or destitute, in the care of a criminal or drunken parent, in the company of thieves or prostitutes, or with a father who had been convicted of certain sexual offences.

#### **Children and Young Persons Act 1933**

Further development of policies in relation to children involved in juvenile court proceedings was

initiated by the 1927 Departmental Committee on Young Offenders (Cmnd 2831). The task of the Committee was:

"to inquire into the treatment of young offenders and young people, who, owing to bad associations or surroundings, require protection or training". (Report (Moloney) 1927)

It had a secondary remit to include:

"young people who are the victims of cruelty or other offences committed by adults whose natural guardianship having proved insufficient or unworthy of trust must be replaced." (Report (Moloney) 1927, p.6)

The Committee decided that there was:

"little or no difference in character or needs between the neglected and the delinquent child. It is often a mere accident whether he is brought before the court because he has committed some offence." (ibid, p.71)

and examined the validity of applying criminal procedures to child offenders. Nevertheless, in legislation subsequently included in the 1933 Children and Young Persons Act, it argued for the retention of the juvenile court, with separate proceedings for offending and non-offending children, but where the court should have regard to the "welfare of the child" in both. On the criminal side there was continuing concern with the need to protect the public, but it was also felt that the child's right to justice demanded that s/he should have the fullest opportunity to meet the charge made against him/her through due process of a criminal trial. The continuing niggle about the relationship between deprivation and delinquency was

addressed in other ways. The introduction of the social enquiry report, prepared at this stage by the education department as the current welfare agency, was to provide the magistrates with information about the family and school background of those appearing before them, so that punishment could be made to fit the perceived needs of the child rather than following a strict tariff system. The distinction between reformatory schools and industrial schools was abolished, and both became schools "approved" by the Home Office, to which all categories of children could be sent.

A child was in need of care or protection if s/he was a child or young person, who, having no parent or guardian or a parent or guardian unfit to exercise care or guardianship, or not exercising proper care or guardianship, was either falling into bad associations, or exposed to moral danger, or beyond control, or was ill-treated in a manner likely to cause unnecessary suffering or injury to health. Cruelty or neglect on the part of the parent still had to be "wilful" so a successful criminal prosecution of the parent was still a necessary precedent for taking action on that ground. In other ways the provision for protecting children was strengthened, because the LEAs were now under a duty to inquire into such cases and bring them before the courts and the courts were empowered to commit the children to the care of the local authority.

"But these children had now become irredeemably entwined with a group of children with entirely different problems and who were regarded by society as virtually inseparable from delinquent children". (Eekelar, Dingwall and Murray 1982, p.75).

While welfare concerns had softened the approach to the young offender, the retention of a criminal trial mode meant that care proceedings, taking place in the same forum and with the same bench, followed a quasi-criminal mode as well. In criminal proceedings there is a trial stage aimed at the establishment of guilt which must be completed before sentence can be passed. In care proceedings, similarly, grounds must be proved, though on the lesser test of the "balance of probability" before the question of what order to make can be considered. The person bringing the proceedings is effectively the prosecutor, and the child, however young, the defendant. Parents lacked party status and any right of appeal.

The 1933 Children and Young Persons Act was amended in 1952 to reflect the growing concern for the need to prevent child neglect and ill-treatment. By this time, the welfare authority was no longer the LEA but the Children's Departments that had been set up under the Children Act 1948. The Children's Departments now had a duty to "cause enquiries to be made" into any case suggesting that a child was "in need of care or protection". The word "suggesting" meant that minor as well as grave complaints could be followed up. The most



significant part of the 1952 CYP Amendment Act, however, was that it removed the requirement for prosecution of parents as a condition precedent for finding a child to be in need of care and protection and the case could be decided on the civil test.

The nineteen fifties and sixties; delinquency linked with neglect and deprivation; the growing influence of social work and "welfare".

The nineteen fifties and sixties saw a growing preoccupation with delinquency, and particularly its causes which were seen to be linked with neglect and early deprivation; an idea which, as we have seen, was not particularly new.

"This association sprang from the premise that delinquent children were no different from deprived children who had not been in trouble with the law. They were seen as both victims of family and environmental circumstances, and suffered from neglectful, unhappy and often broken homes. As a consequence, it was quite arbitrary whether one committed an offence and the other did not. Their needs were the same and they should therefore be treated the same" (Parton 1985, p.44).

Parton also points out that because in the political and economic context of the time, poverty was assumed to have disappeared, the "deprived child" was seen as emotionally rather than materially deprived, and the problem must therefore lie with a dysfunctional family.

In 1956 the Home Office appointed a departmental enquiry under the chairmanship of Viscount Ingleby (Cmnd 1191) (Report (Ingleby) 1960). Its brief was to examine the workings of the law in England and Wales relating to

juveniles brought before the court as delinquent, or in need of care or protection, or beyond control. It also examined whether a general duty should be given to local authorities to undertake preventative work. Reporting in 1960, the committee recognised the contribution of deprivation to delinquency and advocated the establishment of family advice centres in deprived areas. The recommendations concerned with juvenile courts, however, upheld the justice principle that before any action to deal with a juvenile could be taken, the allegations against him should be specifically defined in a court of law, but that the age of criminal responsibility should be raised from eight to ten (Heywood 1978, p.189).

The Children and Young Persons Act 1963, which followed, extended the powers of local authorities to undertake preventative work. It raised the age of criminal responsibility to ten. The sections in the 1933 CYP ACT which dealt with care or protection were replaced with care, protection or control, to include the grounds that the child was falling into bad associations, exposed to moral danger, or lacked care protection or guidance which was likely to cause him/her unnecessary suffering or seriously affect his/her health or proper development, and that s/he was not receiving such care, protection and guidance as a good parent might be reasonably expected to give. It is important to note that a failure in the parenting function leading

to a specific condition in the child, was to be the ground for intervention.

By the 1960s, society had become overwhelmingly preoccupied with delinquency as a problem relating to the family as a whole. Because child abuse and neglect and child delinquency were seen as different manifestations of the same problem, that is a family under stress, the potential conflict between family autonomy and child protection was overlooked (Eekelar, Dingwall and Murray 1982, p.77). After retaining power in 1964, the Labour government issued in 1965 a White Paper, The Child, the Family and the Young Offender, (Home Office 1965) which recommended the abolition of the juvenile court and its replacement by "Family Councils" run by local authorities, where social workers and other experts would reach agreement with parents about an appropriate approach to the problems of their offspring. Should agreement not be reached, special magistrates' courts, to be known as "family courts", would deal with delinquency as well as other disputes concerning the family. The proposals were met with much criticism from practitioners, academics and magistrates, especially the latter, who felt that such an arrangement would undermine their own control of juvenile offenders and give an unacceptable amount of administrative discretion to social work agencies (Alcock and Harris 1982, p.97). The suggestions were therefore modified in

a second White Paper, Children in Trouble (Cmnd 3601) (Home Office 1968) issued in April of that year. The approach to delinquent children was to be essentially a welfare approach, but with the retention of the juvenile court to satisfy the justice lobby. The "treatment" as opposed to the punishment of offenders would be a matter of professional expertise with concentration on the deprivation rather than the delinquency (Heywood 1978, p.198). The main thrust of the Children and Young Persons Act, 1969, which followed, was that juvenile offenders should cease to be prosecuted and be made subject to care proceedings instead. Thus the grounds for care proceedings now included the commission of an offence.

A Conservative government was returned to power in 1970. Because criminal prosecutions were allowed to continue, civil care proceedings on the offence ground were rarely brought. Even if they had been, it is hard to see that it would have made a great deal of difference, because the formula in civil proceedings was in any case based on a criminal model which remained unaltered. In addition, because of concerns about justice, the balance of proof was to be on the criminal test of "beyond reasonable doubt".

The argument put forward by Eekelar et al (1982) and Parton (1985) is that under the Children and Young Persons Act 1969, children in trouble with the law were conceptualised in the same way as children who were

victims of abuse and neglect; that both were seen as manifestations of problems experienced by the whole family. The child victim was assimilated into proceedings that were designed to deal with the child who, whether s/he had committed an offence or not, was a threat to the community. In the legislation, there was no longer any reference to the parenting function in relation to any of the categories of children concerned.

"It was almost as if it were assumed that a conflict of interest between the child, the parents and the state had disappeared and the 19th Century problems of cruelty and neglect had been virtually abolished." (Parton 1985, p.45)

In practice, because juvenile offenders continued to be prosecuted, by far the largest number of children brought before the courts in care proceedings were the victims of parental neglect, abuse or mismanagement. These were the cases, along with a lesser number of children "beyond control", that guardians, from 1984, were being appointed to investigate.

The court system in England and Wales reflects a distinction between civil and criminal jurisdictions, each with its own hierarchical structure. In 1984 when the guardian ad litem provisions came into effect, civil cases relating to children that were concerned with parental separation or with adoption could be heard by the domestic panel of the magistrates' court, by the county court, or by the high court. Civil cases that related to the adequacy of parental care, that is those

that might necessitate the intervention of the state, could be heard either by the juvenile panel of the magistrates' court in care proceedings, or by the high court in wardship proceedings. Criminal cases relating to juvenile offenders were also heard by the juvenile panel of the magistrates' court.

#### Implications for Guardians of the CYP Act 1969

Although care cases were technically regarded as civil, the procedural format tended to follow a criminal mode, with a "proof" and "report" stage reflecting the "trial" and "disposal" stages in criminal proceedings, adversarial in nature and heard by a detached and inscrutable bench. Indeed the criminal bias was reflected in the appellate court with care proceedings, ostensibly civil, following the criminal route to the crown court. Since appeals to the crown court are by way of a complete re-hearing, rather than a re-appraisal of a decision, as is the case when civil appeals are held in the high court, this will have an important bearing on the range of evidence that is presented to the court, the focus being on the prevailing situation rather than on the situation at the time the decision was made. Unless guardians ad litem realise this, they may fail to report on all relevant matters.

As far as guardians were concerned, that the structure of care proceedings was not particularly appropriate for the matter in hand manifested itself in a number of ways. As people independent of both the

local authority and the parents, it was a matter of concern that parents were not full parties, although they were entitled to some legal representation from 1983 onwards, as will be discussed in the next chapter. The quasi-criminal forum meant that proceedings were adversarial, so that both parents and older children were made to feel on trial. This was reinforced by the sometimes punitive way they were treated in court, often being expected to wait for long periods, and with little attention being paid to helping them to understand what was happening, or who the various court personnel were. Care and criminal proceedings would be timetabled simultaneously, the same bench dealing with both, and magistrates did not always make the necessary adjustments in dealing with care cases.

The other problem for guardians was that the court was very limited in the orders it could make. A supervision order was scarcely appropriate as a protective measure if the problem lay with the parent. A care order gave the local authority almost unlimited powers, but it was not part of the guardian's role, as will be discussed in a later chapter, to try to influence the way that the care order would be used. Even if a guardian had opposed the discharge of the care order on Maria Colwell, the local authority would still have had the power to return her to her parents if they chose. The juvenile court could not award custody, for

example, to members of the extended family, nor could it make orders to address specific areas of concern, as in wardship.

As has been explained in this chapter, the preoccupation that led to the drafting of the 1969 CYP Act was the problem of delinquency. The impetus for a change of focus was the Maria Colwell scandal itself, which brought to public attention the problem of child abuse, the necessity, sometimes, to challenge family autonomy, and the recognition that children's and parents' rights might sometimes be in conflict.

The CYP Act 1969 continued to be the relevant statute, but the problem of potential child/parent conflict was addressed by the provision for separate representation for the child and the appointment of guardians ad litem, which was added retrospectively. These developments will be discussed in the next chapter.



## CHAPTER 3

### THE HISTORICAL AND LEGAL CONTEXT (2)

#### Introduction

As was discussed in the previous chapter, care proceedings under the CYP Act 1969 reflect concerns about children that had pre-occupied society at least since the Industrial Revolution and, although the Act did provide for the ill-treated or neglected child, it was rather more concerned with the control of the child that was troublesome. Ill-treatment in the Act was not specifically linked with any parental failing and, as was observed by Eekelar, Dingwall and Murray (1982), the Act did not recognise the potential conflict between child protection and parental autonomy.

In the following decade a new set of pre-occupations was to emerge which shaped the next piece of legislation, the Children Act 1975, and which will be examined in this chapter. These included the "discovery" of child abuse, the recognition of the precarious legal situation of children in care, a weakening of respect for the blood tie and the recognition that child abuse is sometimes perpetrated directly by parents. All these factors led to a challenging of parental autonomy, and provided the context for the disqualification of an allegedly abusing parent representing the child in court, and the substitution of a guardian ad litem to do the job instead. It is important to understand that the

Children Act 1975 itself is not about care proceedings - the 1969 CYP Act continued to be used - but about adoption and related issues. The parts about representation, which reflect the same philosophical considerations, arise from the coincidental occurrence of the Maria Colwell child abuse scandal, and were added retrospectively to the CYP Act 1969.

Because the guardian ad litem provisions were not implemented until 1984, the effect of the Act upon child care policies in the intervening years will also be discussed. Both the philosophy of the Act and the Maria Colwell affair had a radical influence on the management of child abuse cases and these had important implications for courts, for solicitors and eventually for guardians.

#### Factors that influenced the Children Act 1975

A Departmental Committee on the Adoption of Children was appointed on 21.7.69 under the chairmanship of Sir William Houghton, to consider the law, policy and procedure on the adoption of children and what changes were desirable. Owen (Owen et al 1986) points out that the committee itself was only appointed after considerable parliamentary pressure, particularly on the part of Leo Abse. From 1967 (Parton 1985, p.90), there had been a campaign in the press to support the claims of foster parents who were forced to return children to their natural parents after many years. It was argued

that both foster parents and children were unjustly treated by undue emphasis on the "blood tie" and increasingly suggested that to secure the situation for the child and improve the rights of foster parents, the law needed to be changed.

Houghton reported in 1972 (Report (Houghton) 1972) and committee members were unanimous in the assertion that in any new legislation the welfare of the child should be the first and paramount consideration. The main recommendations were that local authorities should be under a statutory obligation to provide an adoption service and, by co-operating with the voluntary sector, should be able to provide a whole range of alternative forms of care for children, of which adoption would be one. It also devised a new legal category of "guardianship" (to be known in the new legislation as "custodianship"), which would give the child's caretaker some legal rights but without extinguishing his relationship with his natural family. This was considered a more suitable alternative to adoption in cases where the mother had re-married or when relatives wished to provide permanent care for the child. Other recommendations were that parents should be required to give 28 days notice of their intention to withdraw the child from voluntary care, and that the local authority should be able to assume parental rights after the child had been in care for a continuous period of three years, regardless of the reasons for the original admission.

The Conservative government then in office did not, however, have plans to introduce any new legislation in the near future; the impetus for a change in the law sooner rather than later came about because of the scandal surrounding the death of Maria Colwell.

Maria Colwell, aged seven, died in January 1973 after being battered by her stepfather. East Sussex County Council had obtained a care order a few years earlier on grounds of neglect, and Maria had been fostered by an aunt. Her mother then re-married and, wishing for the family to be re-united, applied to the juvenile court for the care order to be revoked. Evidence given to the Inquiry later that year showed very clearly that Maria had become attached to her aunt and wanted to stay with her, but the Council did not oppose the mother's application because it could find no specific reason why the child should not return to her, and, as the closest blood relative, she was considered to have a valid claim. The case, which received unprecedented media attention, especially during the Public Inquiry, illustrated the conflicting claims of natural and foster parents that had already gained the interest of the public, and it also promoted concern about child abuse that had been barely established as a social problem at that date, though its existence had begun to be acknowledged by the medical profession from around the mid-1940s (Parton 1985, p.49).

Both Parton (1985) and Freeman (1983) attribute the "discovery" of child abuse to paediatric registrars in the United States of America. With improved techniques afforded by x-rays at their disposal, they were able to detect injuries that were thought to be traumatic in origin rather than attributable to any disease process. It was the paediatricians in the 1950s who defined the problem and attempted to explain it (Freeman 1983, p.107). The work of Henry Kempe, in particular, in coining the phrase "battered baby syndrome" drew public attention in America to the phenomenon of the child who had been abused by its parents.

The issue in Britain was first recognised by two orthopaedic surgeons, Griffiths and Moynihan, in an article entitled "The Battered Baby Syndrome" published in the British Medical Journal in December 1963, drawing attention to an often "misdiagnosed syndrome" and quoting Kempe and his colleagues (Parton 1985, p.54). It was taken up by paediatricians and forensic pathologists, with further articles in the BMJ. At that time, the debate and discussion was confined to the medical profession; it did not figure in the debate surrounding the Children and Young Persons Act 1963, which was currently proceeding through parliament.

In the post-war period (ibid, p.58), the NSPCC was finding that it was increasingly duplicating the work of the Children's Departments. In 1964, with the Society in financial difficulties and needing to find new

initiatives, its Director, the Revd. Morton, had read about the "syndrome" and had spent some time with Henry Kempe. In 1968, the decision was made to set up the Battered Child Research Unit, headed by a social worker, Joan Court, who had trained in America. (Joan Court was later to act as Independent Social Worker in the care proceedings relating to Jasmine Beckford.) The Unit published a number of articles in the professional journals, advocating a non-punitive, preventative "team" approach. The response from central government was quite low key at this stage, the DHSS publishing two circulars in 1970 and 1972, recommending an inter-professional team approach and suggesting a registry of injuries to children when these were not satisfactorily explained. Government thinking on the subject of child abuse had only progressed thus far when the Maria Colwell case occurred.

The actual death of Maria Colwell, and the subsequent trial of her stepfather, Mr. Kepple, received little publicity except in and around Brighton where she had lived (Parton 1985, p.72). However, Keith Joseph, Minister of State for Social Services in the Heath Government of 1970-74, announced in May that there would be a Public Inquiry.

One of the reasons that Sir Keith Joseph decided to call a Public Inquiry was that he had close links with the self-styled "Tunbridge Wells Study Group" (Parton

1985, p.76). This had been set up in the early 1970s as a "self-appointed ad hoc group", largely under the influence of the paediatrician, Dr. Franklin, who felt that British paediatricians, while being aware of the work of Dr. Kempe in America, were not applying his thinking sufficiently to their own cases. He liaised with Dr. Christine Cooper, a paediatrician with similar interests in Newcastle, and they agreed that it was important to link medical and legal concepts together. (As a northern guardian ad litem, I am aware that Christine Cooper greatly influenced the work of some northern paediatricians, of whom Dr. Marietta Higgs was one.) Following from this, a small working party was established, with representatives from medicine, the law, plus a director of one of the newly-formed social services departments (Leo Goodman). Their main concern was to see if it was possible under the present law to improve the management of families where child abuse occurred, or whether a change in the law was required.

In order to publicise the problem, the group organised a conference in Tunbridge Wells (hence the name) in mid-May 1973. This was attended by Sir Keith and several civil servants from the DHSS. The theoretical explanation of child abuse expounded by members of the group stressed the psychopathological and generational aspects of the problem, which accorded with Sir Keith's espoused theories of the "cycle of deprivation", which argued that deprived, inadequate

parents passed their inadequacies on to their children. In social policy terms, this led to the targeting of services on those in "real need" and, in terms of the "management" of abuse cases, the paediatric view was that "strong consideration should be given to the permanent removal of children from parental care". Sir Keith announced the Inquiry five days later, on 24th May.

The report and resolutions of the Tunbridge Wells Study Group on non-accidental injury is important, since it provided the groundwork for much of the policy formulation that followed (Parton 1985, p.102). It was circulated in October 1973 and January 1974 for the information of local authorities and NHS executive councils.

In 1973, after the death of Maria, but presumably before the Inquiry, which did not begin until October, Dr. David Owen had the good fortune to draw a high place in the ballot for private members. His original intention had been to implement the recommendations of the Houghton Committee in a private member's bill, but the pressure that built up after the Colwell case (it was from October that the event received intense media interest) came at "a critical moment in the drafting of the legislation" and had "an absolutely decisive influence in getting the weight of public opinion behind the need to legislate" (Owen et al 1986, p.2).



The Bill addressed two main issues. Implementation of Houghton would help to safeguard the position of children who, like Maria, had become established within and attached to alternative families. In addition, the Colwell case had illustrated a major anomaly in care proceedings. Where ill treatment by a parent was alleged to have occurred, there was an obvious conflict of interest between parent and child. The Owen Bill, therefore, sought to address the question of separate representation for the child.

The historical development of the legislation to protect children (enshrined at that time in the Children and Young Persons Act 1969) makes the child a party to the proceedings, the protagonists being the local authority and the child. Where it is alleged that the child has been ill-treated or neglected, the case is likely to be directed at the parent, so that the protagonists, in practice, become parent and local authority. The child, as a party, already has the right to be legally represented but if s/he does have a lawyer to act for him/her, then the lawyer may find that s/he is appointed and instructed by the parent. This is exactly what happened in the Maria Colwell case.

The Committee of Inquiry deliberated from October 1973 until December, but did not report until September 1974.

Meanwhile, David Owen presented his Bill to parliament in November 1973. The aim of the Bill was

to:

"amend the law relating to adoption, guardianship and fostering of children: to make further provision for the protection and care of children; and for purposes connected with those matters."  
(Children Bill (Bill 20) 1973, p.1)

The Bill incorporated all the recommendations of the Houghton Report that required legislation in Parts 1, 2, 3 and 5. The issues raised by the death of Maria Colwell were also addressed in the Bill, especially the need to strengthen the representation of children.

Part 4 made discretionary provision on the part of the court for the appointment in all proceedings involving children, of a solicitor or a solicitor and counsel to see that all the evidence was available to the court on which to base an informed decision relating to the interests of the child. There should be the option to make the child a party in any proceedings and to add as parties: parents, guardians, step-parents and foster parents. The Bill also made provision for the calling of expert witnesses.

The Bill ran out of parliamentary time, but following Labour's return to power in February 1974 and Dr. Owen's appointment as Minister of State for Health, the government introduced its own Bill in December of that year.

Meanwhile, further initiatives for the management of child abuse continued to take place administratively, by way of government circulars. The system of child

abuse management that was to endure until after the Cleveland crisis of 1987, was effectively established by the issue of DHSS circular LASSL (74)(13) on 22nd April 1974 (DHSS 1974). It calls upon the authorities to be alert to the first signs of non-accidental injury in children, as well as behavioural signs in parents; otherwise, the emphasis in the circular is on management, with a strong recommendation to establish case conferences and area review committees. If a child needed to be removed from home, this would be under a statutory order rather than as a voluntary arrangement, and any decision should be taken in the light of a careful assessment of the social, material and psychological aspects of the family. The setting up of a "Register" of information about child abuse cases in the area was also considered essential.

By the end of 1974, area review committees in England and Wales had been established, with representatives from social services departments, housing, education, health, the police, probation and the NSPCC. By the mid-1970s, case conferences were recognised as vital and by the end of 1975, nearly all area review committees had set up registers.

In September 1974, the Committee of Inquiry into the death of Maria Colwell reported. The central criticisms in the report are summarised by Packman (1981, p.175). First, there was a breakdown in communication between departments and individuals. Re-

organisation after Seebohm had attempted to integrate services but the new departments were large complex structures and, in any case, many other agencies, such as schools, had vital contact with the child. Second, professional judgement was called into question, such as failure to realise the gravity of risk and failure to heed Maria's own feelings. Third, a shortage of resources, plus a lack of specific child care specialism was blamed, with social workers carrying heavy caseloads of a generic kind. Also implicit in the report was criticism of child care policies, which had paid undue reverence to the blood tie and too much heed to theories of "maternal deprivation".

The Committee recognised that no-one had put the case for the child, and commented:

"Because there was no argument or evidence of any reasons why a care order should not be revoked, and it is clear from the notes taken by the clerk of the court that the revocation went through virtually 'on the nod' with brief evidence from Mrs Kepple [mother] and Miss Lee's report [Miss Lee was the social worker] - the case for the opposition went wholly by default." (Secretary of State 1974, p.81, para 226)

The Inquiry was also concerned at what it saw as Miss Lee's "plurality of roles"; that she had to represent the view of the authority, act as an officer of the court, and take on the role of ad hoc advocate (whether for the parent or the child is not clear) at the same time (ibid, p.81). Thus the view was expressed:

"Had the views of an independent social worker been available to the court, it would have had the assistance of a second opinion which might or might not have endorsed the conclusions and recommendations contained in Miss Lee's report. It seems to us that in the type of situation exemplified by Maria, where the local authority is seeking or consenting to a change in the status of a child under their care or supervision, it would be of the greatest value for such an independent report to be always available." (ibid, p.81, para 227)

The Inquiry thus highlighted two important issues relating to the position of the child: that her legal representative was instructed by the mother; and that an independent report undertaken by someone who was not handicapped by a "plurality of roles", as Miss Lee had been, would have been of great assistance to the child. The most important general issue, however, was how far child care policies had, through their growing commitment to the "family", ultimately failed the child (Packman 1981, p.177).

The final debates that were to lead to legislation in the Children Act 1975 were focussed upon the recommendations of the Houghton Committee, already contained in the Owen Bill; David Owen's own suggestions for improving the mechanisms for the representation of children, also contained in his Bill; and the report of the Inquiry into Maria Colwell's death.

John Tresiliotis (Owen et al 1986) ascribes the theoretical underpinning of the Act and the ensuing child care practices of the 1970s and 1980s to three sources: Kadushin's encouraging study, published in

1970, and showing that a high percentage of older/high risk children placed for adoption were doing well in adolescence; Rowe and Lambert's study, Children who Wait (1973); and Goldstein, Freud and Solnsit's book, Beyond the Best Interests of the Child (1973).

Children who Wait, commissioned by the Houghton Committee (Rowe and Lambert 1973), was a study which examined more than two thousand children in institutions and found that 60% were expected by their social workers to remain in care until the age of 18; 40% had no contact at all with their parents; and only 23% saw one or more of their parents at least once a month. It was estimated that there were about six thousand children in the country who could be released for adoption or "permanent" fostering, but decisions about alternative, permanent placements were being delayed for long periods while efforts were made to solve the problems of the natural family. The study thus argued that if a child could not be returned home within a time scale that would accommodate his needs, he should be placed in a permanent substitute family, with adoption given serious consideration.

Beyond the Best Interests of the Child (Goldstein, Freud and Solnsit 1973) was an American publication which expressed a philosophy that reinforced current thinking in Britain. The authors emphasised the importance of maintaining links between children and those who looked after them, whether parents or

substitute parents, thus avoiding the disruption of existing psychological ties. They also argued that any child who was the subject of court proceedings was disadvantaged by that very fact; they were much in favour of the child always being a party, with separate representation by an advocate who understood child development (probably a specially-trained lawyer) and that the case should be determined, not on the "best interests" principle, but on the "least detrimental alternative". A distinction was made between "biological" and "psychological" parenting, with less importance being attached to the "blood tie".

The main opposition to the changes proposed by the Children Bill came from BASW (Owen et al 1986; Packman 1981), which felt that the pendulum had swung too far against the rights of natural parents. Rowe (Owen et al 1986), herself a member of the Houghton Committee, stated that BASW welcomed many provisions of the Bill, particularly the introduction of a comprehensive adoption service, custodianship, and the appointment of guardians ad litem. The misgivings related to the situation of children in care, where it was felt that many families would be deterred from seeking help from the social services departments for fear of losing their children. BASW pointed out the link between deprivation and reception into care, the majority of children coming into care because of social and material difficulties.

This criticism that the Bill had nothing to say about prevention or rehabilitation is countered by Rowe (1986) with the reply that:

"criticism of the 1975 Act for not dealing with them is rather like those book reviews which chide the author for not having written a different kind of book." (Owen et al 1986, p.41)

The debate about the separate representation of children in court centred upon whether the child should be represented by a lawyer or a social worker; whether s/he should be represented in all proceedings, including custody, adoption, etc. or, if limited to care proceedings, if this should be the norm whether or not there was a discernible conflict of interest (Fogarty 1983). The Owen Bill had advocated the appointment of a lawyer with a clear responsibility to represent the child and ensure that his/her interests were brought to the fore. The suggestion was criticised by the social work lobby, especially by the Association of Directors of Social Services, who argued that lawyers were the wrong people, because they had neither the training nor the experience to deal with complex child care decisions. They argued instead for what became known in the course of the debate as "independent social workers" (as suggested in the Maria Colwell Inquiry). In criticism of the ADSS view, the point was made that, even so-called "independent" social workers might find it hard to be critical of another local authority social worker's view.



Another suggestion for improving the machinery was that parent and child could be separately represented in all care proceedings, not only when there was a discernible conflict of interest. According to Bevan and Parry (1978), David Owen's suggestion that the child should be separately represented in all proceedings was steadfastly rejected by the Government on the grounds of limited resources, both financial and personnel.

Once the Bill reached the committee stage, it was decided that if the interests of parent and child were in conflict, then the court would be given the power (not the duty) to decide that the parent should not represent the child. The court could then use its discretion to appoint a "guardian ad litem" to represent the interests of the child. The concept of a guardian ad litem was already established in other forms of civil proceedings, for example, a relative could, as guardian ad litem (sometimes known as "next friend") bring a civil action on behalf of a child in, for instance, a claim for damages. In wardship, the Official Solicitor acts as guardian ad litem in those cases where the child has been made a party. Ever since the passing of the first Adoption Act in 1926, the courts had been appointing a guardian ad litem to safeguard the interests of the child, the guardian ad litem in this event being neither a lay person nor the Official Solicitor but a salaried welfare worker. This will be discussed more fully in Chapter 5.

The general rule, then, was that in cases of discernible conflict, the court would have the power to disqualify the parent from representing the child. The exception to this rule was the case of an application to discharge a care or supervision order when the local authority was not objecting, that is, the Maria Colwell situation. In these cases, the court would be obliged to make a separate representation order, and obliged to appoint a guardian ad litem unless completely satisfied that it was unnecessary. The debates do not appear to have heeded the fact that, as a party to the proceedings, the child already had a right to legal representation (although this was to be the cause of much wrangling at a later date) and in an amendment reflecting, again, the Owen Bill, the suggestion was mooted that, if a court made a separate representation order, the child should be separately represented by a lawyer and that, if necessary, a "proper person", such as an independent social worker, could be called in to assist the solicitor, the solicitor taking the lead role. The amendment was defeated.

Children Act 1975, Sections 64 and 65. "Conflict of interest between parent and child"

The machinery for representation which was ultimately set up in the 1975 Children Act in Section 64 and 65 related to the appointment of a guardian ad litem in care and related proceedings under the 1969 CYP Act, and proceedings relating to parental rights

resolutions. It followed the general and exceptional rules as outlined above, and was, therefore, quite a modest development. According to Maggie Fogarty (1983), there had been no debate about who this guardian ad litem would be and what the job would entail. However, because the Committee in the Maria Colwell Inquiry had seen the role of independent investigator/ advocate for the child in care proceedings as a social work role, and the guardian ad litem in adoption was a social worker, it appears to have been an unspoken assumption that the guardian ad litem in care proceedings would also be a social worker. Because there was no debate in parliament about what the guardian would actually do, the role of the guardian in care proceedings was largely a product of DHSS and Home Office thinking (Goodman 1985).

The "job description" of the future guardian ad litem was written up in amended Magistrates Courts (Children and Young Persons) Rules 1970, Section 14A (Magistrates Courts 1970). Seven tasks were allocated. These were: to investigate the circumstances of the case, including interviewing and inspecting records (central to this part of the work would be interviewing the child in order to ascertain his wishes and feelings); to consider whether it was in the child's best interests that the case should succeed; to decide how the case should be conducted and, where appropriate,

to instruct a solicitor for the child; to conduct the case in court if the child was not legally represented, unless the child requested otherwise; to make a written report where this was considered to be of assistance; to perform other duties that the court might direct; and finally, to consider whether it would be in the best interests of the child to appeal against the court's decision.

The 1975 Act (s.103) empowered the Secretary of State to provide for the establishment of panels of persons from whom guardians ad litem could be drawn to act in adoption, care and related proceedings, and in proceedings relating to parental rights resolutions. The regulations under which such panels were to be established also made provision for the expenses incurred by panel members to be defrayed by local authorities.

With the exception of the appointment of a guardian ad litem in adoption, which was already well established but was to receive some modification in the Act, only those parts relating to unopposed applications for the discharge of care and supervision orders were implemented at once. Until panels were established, the guardian ad litem was to be a "suitable person", provided he was not a member, officer or servant of a local authority, nor of the NSPCC, when they were a party to the proceedings (Magistrates Courts 1970, r.14A(2)). Bevan and Parry make the comment:

"Ideally, no-one connected with a local authority should be eligible for appointment, even though it is not the authority involved in the proceedings. Local authorities are the lynch-pin in the operation of the law regulating children in care. To ask a local authority social worker to discharge this function of Guardian ad litem runs the risk of making unreasonable demands on professional loyalties. However, in the foreseeable future the limited number of suitable persons available prevents that ideal from being realised. Local authority social workers will, indeed, be the main source of appointments." (Bevan and Parry 1978, p.185)

For the time being, the matter was left to guidance by Departmental Circular LAC (76)20 (DHSS 1976). Courts were advised that in the interim period they might appoint persons recommended by the director of social services of a local authority (other than one involved in the proceedings) or a probation officer, unless s/he was involved with the family in some way. Other suggestions were retired social workers, or employees of voluntary organisations working in child care. In practice, the provision to appoint a guardian ad litem was considerably under-utilised; BASW (1986) suggests that about 25% of potential appointments were actually made, and Malos and MacLeod reported that they saw no cases at all where separate representation and a guardian ad litem had been ordered by the court in the period November 1983 to April 1984, the period covered by their research (Malos and MacLeod 1984).

#### Changes in policy and practice, 1975-1984

Because of the restricted scope of the guardian ad litem provision at that stage, and because it was, in

any case, so little used, there was little debate about what were to be the two major issues: the independence of panel members, and the respective roles of solicitor and guardian. Other parts of the Act were likewise slowly implemented; custodianship in 1985, "freeing for adoption" in 1988. Nevertheless, the Act, taken together with responses to the Maria Colwell case, produced major changes in policy and practice over the next decade.

First, from 1972-1982, there was an increase in the number of children taken into care on a court order, an increase in the numbers of parental rights resolutions and a corresponding decrease in the numbers of children admitted to voluntary care. This signified a major increase in "compulsion" (Owen et al 1986, p.12) and reflected the legacy of anxiety that the Colwell case had caused. Packman (1981, p.184) noted that this more anxious, alert and "tougher" stance spread beyond young children in physical danger to children of all ages, place of safety orders being used not only for infants in physical danger, but also for teenagers who were "beyond control".

The second reason for the increased use of court and local authority powers was the desire to avoid the "drift" in care that had been identified in Rowe and Lambert's study (1973). The new powers in the Act to assume parental rights more easily, control the

behaviour of parents in relation to their children in care, and give greater security to substitute family placements, were a direct response to these criticisms (Packman 1981, p.189).

A consequence of this shift in policy was that there were more cases in court. A consequence of not implementing sections 64 and 65 was that, because there was no guardian, the burden of representing children fell to solicitors but, because parents still had no rights to legal representation, the difficulties identified in the Maria Colwell case continued and solicitors (sometimes) took instructions from the parents. It was the recognition of the unsatisfactory aspects of these arrangements that provided the impetus for the government to announce in 1983 the setting-up of guardian ad litem panels. These developments and the ensuing debates will be discussed in the next chapter.

## CHAPTER 4

### THE QUESTION OF REPRESENTATION 1975-1984. TOWARDS THE ESTABLISHMENT OF THE SOLICITOR/GUARDIAN PARTNERSHIP IN CARE PROCEEDINGS

#### Introduction

This chapter will explore the difficulties for solicitors during the interregnum, referred to at the end of the previous chapter, in representing clients too young to give instructions. It will also examine the questions raised following the announcement of the panels, which focused upon the court rules. These had been amended in 1976, and suggested that, in some cases, a solicitor might not need to be involved at all, and that the guardian ad litem could carry out the advocacy role. The ensuing debate raised again the competing attractions of the independent social worker and was to lead to a further amendment of the rules in 1984. These established the solicitor/guardian partnership which was to become a central feature in representing children in care proceedings.

#### Hilgendorf's study: Social Workers and Solicitors in Child Care Cases

Hilgendorf (1981) in a study conducted between 1978 and 1980, identifies some of the problems encountered by solicitors representing children, and sometimes parents, in care proceedings during this interregnum. The study found that the central problem for the solicitor was the nature and extent of his/her decision-making function. How could s/he decide what was best for the child if



his/her body of knowledge did not include the care and development of children? About a third of the solicitors involved seemed to contribute very little to the proceedings, while others took on too much, becoming too dependent on the social services department and even becoming emotionally involved. Some solicitors took instructions from parents, to compensate for their lack of representational rights, taking the view that the local authority acted in the interests of the child. Both solicitors and social workers in the study felt that pressure on the solicitor representing the child could only be eased by parents being made parties to the proceedings.

#### Independent social workers

Children's solicitors, faced with the choice of either being briefed by parents whose interests might clearly be in conflict with those of the child, or obtaining their information from the local authority bringing the case, began to seek independent evidence and to instruct independent social workers. This practice was encouraged by a Law Society Memorandum, circulated in November 1980, which drew attention to the difficulty of the solicitor's position and reminded them that they could instruct an independent social worker in cases where they were in doubt. In response to the increasing demand for independent reports, a number of organisations, including MIND; the Family Rights Group and the National Council of One Parent Families,

established panels of independent social workers, mainly in the London area. A similar panel was established on Merseyside by IRCHIN (Independent Representation for Children in Need). This panel only provided a service for solicitors representing children and not for those representing natural parents.

In May 1983, the situation for parents was eased by the introduction of "Assistance by way of Representation" (ABWOR). This extended the help available to parents, hitherto limited to advice, under the Legal Advice and Assistance Scheme, to cover legal representation in court. The provision, however, was limited to a certain sum and fell short of full legal aid.

#### The proposed guardian ad litem panels

In the summer of 1983, the Government announced that Sections 64 and 65 of the Children Act 1975 would be implemented. It was in response to the DHSS consultation document on the proposed establishment of panels of guardians ad litem and reporting officers in the summer of 1983, that BASW set up a Project Group and identified some initial concerns: the increased workload entailed; the lack of clarity as to how the panels were to be funded and trained; the lack of an independent administrative base from which to operate; and the somewhat basic qualifications for panel membership (BASW

1986). In November 1983, Alison Macleod and Ellen Malos at Bristol University, initiated a piece of research:

"designed as a reconnaissance to investigate opinion on, and what was happening about, children and parents' representation in care proceedings during the period immediately before the implementation of Sections 64 and 65 and to explore ways of monitoring the subsequent working of the sections." (Malos and Macleod 1984, p.23)

It was not intended to be a representative or statistical study, but to "feel the water". By this time, a date for implementation had been set for 1st April 1984.

The researchers' observations belonged to the period following ABWOR, but they found that even then parents often did not know they could be represented. Solicitors for children were usually appointed by agencies, e.g. the social services departments, rather than by parents, and possessed varying degrees of experience. To a greater or lesser degree, they carried out private and personal research into the case, but were at the mercy of the often suspicious social worker as to how much information was actually divulged. Some saw their task as making sure all relevant material was brought to the attention of the court, leaving the question of "best interests" to the court itself. Others brought a layman's "common sense" approach to assessing the children's interests. Where children were very young, they would tend to "brief" independent social workers, or to obtain independent medical or psychiatric reports.

At the beginning of the research period, it was proposed that the duties of guardians ad litem should be those described in amendments to Rule 14A of the Magistrates Courts (Children and Young Persons) Rules in 1976. With regard to representation, the guardian should:

"decide how the case should be conducted on behalf of the child, and where appropriate, instruct a solicitor to represent the child; where the child is not legally represented, conduct the case on behalf of the child, unless he otherwise requests."  
(Magistrates Courts 1970)

The main concern seemed to be that the child would lose his right to legal representation, and that the guardian ad litem would be a cheap alternative to the solicitor. The Rules as they stood, provided for the guardian to function as the child's advocate and conduct the case without the aid of a legal advisor.

The combination of investigator, expert witness and advocate was felt to be against natural justice. Several of Macleod and Malos' interviewees, who were themselves social workers, perceived a contradiction in the duty of the guardian ad litem to form a view on the best interests of the child, and the duty to ensure all the available evidence would be laid before the court (Malos and Macleod 1984, p.158). They also expressed doubts that they would possess the necessary advocacy skills.

House of Commons Select Committee on Children in Care

These misgivings were echoed in evidence given to the House of Commons Select Committee, chaired by Mrs. Renee Short, which was considering many aspects of children in care. It reported in 1984 (Social Services Committee 1984). The vested interests of the various pressure groups involved were quite apparent and essentially the same arguments arose as when the Children Act 1975 was going through parliament: on the one hand, that solicitors could do the job alone; and on the other that the independent social workers, as expert witnesses, be called upon to assist the solicitor when necessary.

In giving evidence to the Committee, the Law Society, concerned that solicitors would no longer be needed, argued that guardians were not necessary and that the provisions should not be brought into force. The Society was particularly concerned about potential conflict between a guardian ad litem and a young person regarding "best interests", where it was likely that the case put to the court would be the guardian's. It was concerned, too, about cases where the guardian ad litem might decide to offer no evidence on behalf of the child, and not to cross-examine the witnesses for the local authority; that is, they feared that the guardian would not probe and test the case thoroughly enough.

It was also argued that, now that parents had ABWOR, parents and children were already separately

represented; each could now have their own representative to act and bring the evidence they considered necessary. This would prevent the interests of the child becoming subordinate, thus reflecting the intentions of David Owen's Bill.

An alternative course of action, advocated by the Family Rights Group, MIND, the National Council for One Parent Families and the Register of Independent Advisors Ltd (all of whom provided panels of independent social workers) and submitted as a paper to the Committee, was the setting up of a national panel of experts in social work, with a central organisation in London and a locally administered regional organisation. Most social work experts would be provided through this scheme, but the solicitor acting for any party would retain the right to instruct "whomsoever he thinks most appropriate". This would have been along the lines of the 1974 amendment to the Children Bill, which would have made solicitors more central. It was emphasised that the network would have to be completely independent, and paid for by the legal aid scheme, or the client, as appropriate.

The independent social workers thought that local authority social workers acting as guardians ad litem would have professional sympathy and the same social work ideology as the officers in the case, thereby compromising their independence. Leo Goodman LL.B, then

Director of Social Services for Wandsworth, in a paper to an IRCHIN conference in November 1983, strongly disagreed with this, saying "Ideology is not confined to social workers in local authority employment", and expressed the view that as "just witnesses", i.e. as expert witnesses without responsibility for determining how the case would be conducted, their role would be a limited one (Goodman 1985).

In December 1983, the Secretary of State, presumably in response to the unsatisfactory situation that prevailed, exercised his powers under Section 103 of the Children Act 1975 for the setting up by local authorities of panels of persons to act as guardians ad litem, not only in care proceedings and adoptions, but also in extended provisions to cover parental rights resolutions and access proceedings as well. In January 1984, a circular, LAC 83(21) (DHSS 1983) was issued for the purpose of directing local authorities to seek nominations for these panels and to set them up in their area. The panel was to be of sufficient size for its area and the court was to be responsible for the appointment of a guardian ad litem/reporting officer to act in a particular case. The accompanying court rules were designed to ensure that the appointed person was independent of any party to the proceedings and had no previous involvement with the case.

1984 Amendments to the Magistrates Court Rules 1970

Because of the criticisms of the old Rule 14A of the Magistrates Court Rules, described in the previous chapter, the parts relating to the appointment of a solicitor were changed. When the court was exercising its power to order separate representation and to appoint a guardian ad litem, it should:

"On the same occasion consider whether the infant should be legally represented and may direct that the Guardian ad litem so appointed is to instruct a solicitor to represent the infant."  
(Magistrates Courts 1970)

The rules also provided that the guardian should ask the court whether there should be legal representation if a solicitor for the child had not already been appointed, and then:

"unless the court otherwise directs, appoint a solicitor to represent the infant". (ibid)

The guardian ad litem should then work alongside the solicitor:

"and shall, in such a case, instruct a solicitor to the extent that the solicitor considers the infant, having regard to his age and understanding, to be unable to give instructions on his own behalf".  
(ibid)

It was for the solicitor to decide if the child was capable of giving instructions and in that event would take instructions from the child. The guardian could, however, give contrary opinion or evidence at the proof stage, even if not called by the solicitor.

Thus the model for representation that finally emerged was that of solicitor instructed by guardian ad



litem. If the lawyers had had their way, as the Law Society would have wished and as had been envisaged by the Owen Bill, provided parents were represented, the lawyer would have been able to test the case, on behalf of the child, for both parents and the local authority. He would still, however, have been lacking instructions, might have found it difficult to obtain all the relevant information and, with only a layman's knowledge about children, families and the care system, could still, in many instances, have found it hard to decide the child's "interests". If, as suggested by the independent social work lobby, the guardian ad litem scheme had been replaced by a national scheme of independent social workers, as expert witnesses for parents, their standing in relation to the interests of the child would have been questionable. As expert witnesses for the child, they would have been limited to this role, rather than the wider role that was defined in the court rules, of "deciding how the case should be conducted".

The argument for a guardian ad litem rather than an independent social worker is put forward in the report of the Committee of Inquiry into the death of Jasmine Beckford. On 5th July 1984, Jasmine Beckford, a child in the care of Brent Council but living at home with her mother and stepfather, died after being subjected to "parental battering over a prolonged period" (London Borough of Brent 1985, p.2). The care order had been

made on 9th September 1981, before the guardian ad litem provisions were enacted.

In their report, the Committee compared the position of the independent social worker with that of the emerging guardian ad litem. In the 1981 care proceedings, the solicitor for Jasmine and her sister Louise, engaged the services of Miss Joan Court, Independent Social Worker, to report on the family situation. At the beginning of the 1980s, the independent social worker was a new phenomenon, and the Council was unsure as to how much access to confidential information it should give to such people. Brent Council's policy was that access should be denied (London Borough of Brent 1985, p.93). Nor was Miss Court permitted to talk to the social worker on her own, nor to the foster parents. Her report was, therefore, prepared without a complete picture of the children's situation. The Committee sought to highlight the value of the guardian ad litem thus:

"The essential feature of the role is that for the first time there is someone, other than a legal representative, whose concern is exclusively the welfare of the child, independent of both the child's parents and the local authority which has the duty to protect the child. The guardian ad litem - who is a qualified social worker drawn from a local authority panel by the court - is definitionally possessed of the power and expertise to investigate and comment objectively on all the circumstances surrounding the case". (London Borough of Brent 1985, p.253)

The advantages were also seen in terms of the guardian being in control of the case, instructing the solicitor

(not the other way around) and having a duty to examine local authority and other records (ibid, pp.253/4).

What is curious is that nowhere in the controversy surrounding the role of the guardian ad litem in care proceedings at this early stage is any reference made to the already-established roles of guardians ad litem in adoption and wardship, or the arrangements for protecting children's interests in matrimonial cases. While a recognition of the unsatisfactory aspects of these separate legal developments was to lead to new legislation in the Children Act 1989, which marries the "private" and "public" aspects of the law relating to children, the representational anomalies have persisted and a comparison between them can serve to illustrate the particular features of each. This will be the subject of the next chapter.

## CHAPTER 5

### REPRESENTATION OF THE CHILD IN OTHER CIVIL PROCEEDINGS

#### Introduction

This chapter will look at the significance of party status for the child, and the representational anomalies that arise from the separate historical developments of other legislation involving children, in wardship, adoption and proceedings arising from parental separation.

#### Party Status

Party status implies a right to legal representation and, as we have seen, the child in care proceedings, after 1984, retained his/her right to be represented by both a guardian ad litem and a solicitor. As a general rule, the child in adoption proceedings is not a party, and therefore has no right to legal representation, but his or her interests are safeguarded, in contested adoptions, by a guardian ad litem who, like the guardian ad litem in care proceedings, is a social worker. The child in wardship is not automatically a party, but can be made one; and if so, the Official Solicitor must be given first refusal in acting as guardian ad litem, and because he is a solicitor, he acts as solicitor as well. The child in matrimonial and guardianship proceedings is not, generally speaking, a party, but where there is a dispute, a court welfare officer, who will be a qualified probation officer with social work training,

can provide the court with information about each parent, bearing in mind the child's own views, upon which to base a decision. When such cases are heard in the High Court, the child can be made a party, and the Official Solicitor invited to act. The same applies to adoption. There seems to be no particular logic about this; it is probable that each jurisdiction has developed in its own ad hoc way. The situation is further confused by the multiplicity of courts involved: magistrates, county and high; by different kinds of adjudicator: magistrates, circuit judges, High Court judges; and different advocates: barristers and solicitors. The representational arrangements for each of these: wardship, adoption and matrimonial proceedings, will be examined in turn, to discover if there are any links between them, and how they relate to and compare with the representational arrangements in care proceedings.

Wardship will be discussed first, since it provides the earliest example in legal history of recognition that "minors" (and those under other forms of disability) require to have their interests protected in an impartial way.

#### The history of wardship

Lowe writes:

"Wardship is exclusively a High Court jurisdiction delegated by the Crown *parens patriae* to protect children. The general basis of this inherent jurisdiction lies in the concept that it is the

sovereign's duty to protect his subjects, particularly those, such as children, who are unable to protect themselves." (Lowe 1978, p.299)

Although the jurisdiction is now primarily concerned with the ward's welfare, wardship began in feudal times as a means of protecting his/her person, but more particularly, his/her property. The Crown's responsibility was delegated to the Lord Chancellor (Slomninka 1982, p.281), but in 1540 was taken over by the Court of Wards and Liveries. In 1660 this court was abolished, when its powers and duties were assumed by the Court of Chancery. In 1875 the court's jurisdiction in wardship passed to the Chancery Division of the High Court where it remained until the Administration of Justice Act 1970 transferred it to the Family Division of the High Court.

In the Court of Chancery it began to develop into its more modern form as a protective guardianship. Although it was no longer dependent on the existence of property, the jurisdiction remained largely property based throughout the nineteenth century, and well into the twentieth. (White and Lowe 1986, p.4). Citing the report of the Latey Committee 1967 (Cmnd 3342, para 193), White and Lowe write:

"to understand wardship...it is essential to realise that its original function was to protect property of a minor whose parents were either dead or unavailable. Inevitably it was originally called in only when the property was substantial, and had to handle only a small number of cases. With this small number, however, it dealt exhaustively and tried to offer all the protection of a parent." (White and Lowe 1986, pp.4-5)

Despite this emphasis that wardship was to be regarded as a parental jurisdiction, with decisions based on the welfare of the child, there were so many procedural restraints that in practice it continued only to be invoked in respect of wealthy wards. In 1949, the Law Reform (Miscellaneous Provisions) Act simplified the procedure for wardship, opening the way for much wider use and enabled the child to be made a ward solely for the purpose of protecting him/her.

#### Use of wardship by local authorities

From the 1970s, local authorities began to use wardship as an alternative to care proceedings in order to obtain care orders. White and Lowe (1979) give several reasons for the "dramatic increase" in wardship. First was the change in social attitudes (as illustrated by the public reaction to the Maria Colwell tragedy) that challenged the notion that parental autonomy was unassailable. Second, local authorities began to see that some of the restrictions in the child care legislation, such as having to prove the case to a specific standard, could be avoided. They were actually encouraged by High Court judges to use wardship when faced with particularly onerous or difficult decisions (White and Lowe 1986, p.296). Third parties, not at that stage accommodated in other proceedings, could be heard. Third, the court seemed at that time to be willing to act in a supervisory capacity and to review the decisions of other courts and local authorities. It

was also the best jurisdiction for dealing with "kidnapping" cases, where one parent takes the child without consent from one jurisdiction to another. Other reasons given by Hoggett (1987, p.155) were that the High Court had more flexible rules of evidence and procedure, wider powers, and the local authority might prefer to have the guidance of the High Court in particularly complex matters.

Until an important decision was made in the House of Lords in 1982, parents or anyone else with a legitimate interest in the child could use wardship to challenge local authority plans. In this case, (*A. v Liverpool City Council* (1982) A.C.363) a mother could not use wardship to seek access to a child removed under a care order. Four years later, in *Re W a minor* (1986) A.C.791, an uncle and aunt could not use wardship to review a local authority decision to place a child for adoption, when they themselves wished to care for the child. Lord Scarman commented that the profoundly important rule underlying these decisions was:

"that where parliament has by statute entrusted to a public authority an administrative power subject to safeguards, which, however, contain no provision that the High Court is to be required to review the merits of the decision pursuant to the power, the High Court has no right to intervene." (White and Lowe 1986, p.290).

This aspect of case law was to have an important significance for panel guardians in the years to come.



### Representation of the child in wardship

In wardship, unlike in care proceedings, the child is not automatically a party. Whether the child should be represented is a matter within the discretion of the court - and if so, s/he must be made a party first.

Provision for the separate representation of minors in wardship proceedings has, like wardship itself, a long history, described by White and Lowe (1986, Chapter 9). In 1739 an administrative office was created to provide for centralised control of suitors' money paid into the old Court of Chancery. The holder of this office was originally known as "the Solicitor to the Suitors of the High Court of Chancery" which was later changed to the "Solicitor to the Suitors' Fund". One of the other offices associated with the court was the Office of the Six Clerks, which was responsible for the provision of assistance to parties in Chancery who were without means and for the representation of infants and lunatics who might be necessary parties but were otherwise unrepresented. Another of its duties was to visit contempt prisoners. When the Court of Chancery was reformed in the mid nineteenth century, this office was abolished and its duties were passed to the Solicitor of the Suitors' Fund. In 1869 the Suitors' Fund was abolished but the office survived and was renamed "The Official Solicitor to the High Court of Chancery."

In 1875 "The Official Solicitor to the High Court of Chancery" was re-created by Lord Cairns in its modern form as "The Official Solicitor to the Supreme Court of Judicature". At this point he became available to all the High Court Divisions and the Court of Appeal. The working constitution of the office is unwritten (i.e. is not bound by any Court Rules) which allows for considerable flexibility.

#### The modern Official Solicitor

The post became a full-time appointment in 1919, and the office was given a quasi corporate status by which the duties of the Official Solicitor and property vested in the holder of the office pass to his successor automatically on his death or retirement. A solicitor of at least ten years' standing, he is appointed by the Lord Chancellor. The office is a sub-office of the Lord Chancellor's Department and the staff are civil servants of the Court Service, administered by the South Eastern Circuit Office. The only office is in London.

There is only one Official Solicitor and enquiries are usually undertaken on his behalf by junior officers. In a paper (unpublished) given to The National Forum of Guardians ad litem and Reporting Officers early in 1988, Jim Baker, Deputy Official Solicitor, stated that the staff are not selected on the basis of any specific qualification, but on "enthusiasm and a willingness to work long hours and travel extensively". Twelve of the staff are, however, qualified lawyers who advise the

non-legal staff. These range in Civil Service grades from Principal down to Administrative Officer. He described the role as being similar to that of Legal Executives in private solicitors' litigation departments; indeed, the general philosophy of the office and the approach to its duties were essentially those of a practising solicitor's office.

Staff engaged exclusively in children's cases are organised in five divisions and in each of these an experienced Senior Executive Officer supervises three Higher Executive Officers and three Executive Officers who work in pairs. There will therefore normally be three people who are familiar with a particular case, which facilitates discussion and provides continuity. All work is under the ultimate supervision of the Official Solicitor and the Deputy Official Solicitor by whom all reports are read and signed. Mr. Baker stated that policy with regard to training, was to engraft upon the Court Service experience that officers would already possess, the knowledge and skills, which he did not specify, required in children's work (Baker 1988).

Although the major areas of the Official Solicitor's work in relation to children are wardships and High Court Adoptions, he may also represent children whose welfare is of concern in the Family Division of the High Court or divorce county courts, in paternity issues, legitimacy petitions and disputes in custody and access arising from divorce, nullity or judicial

separation proceedings. In some wardships, he may represent, not the ward but another party who is under a legal disability such as a mental disorder; and his ancient duty towards persons in prison for contempt still exists (Slomninka 1982, p.369).

According to a Practice Direction (1982) 1 WLR 118, (1982) 1 All ER 319, it was stated that the joinder of the child and his/her representation by the Official Solicitor was only likely to be of assistance to the court in exceptional circumstances. Jim Baker, in his paper to the National Forum set out the "exceptional circumstances" that the Official Solicitor had identified:

1. where the ward was old enough to express an independent view;
2. teenage wardships (e.g wardship instituted by parents in efforts to avoid undesirable associations);
3. to carry out a specific task or independent enquiry - such as examination by a psychiatrist, especially where the parties disagreed on the need for this;
4. cases with international elements;
5. difficult or novel point of law/unusual legal or public interest.

Baker suggests a sixth reason could be sexual abuse (Baker 1988). Sexual abuse was not much recognised until the early 1980s but suspected sexual abuse became

a common reason for local authorities to look for wardship, because they were bound by much stricter rules of evidence in the lower courts.

In his submission to the Cleveland Inquiry the Official Solicitor quoted Goff J. in re R (PM) (an infant) (1968). When appointed to act as guardian ad litem the Official Solicitor is:

"not only an officer of the court and the Ward's guardian, but he is a solicitor and the ward is his client." (Official Solicitor 1988 citing 1 All ER at page 692)

Since he is a practising solicitor, the Official Solicitor usually acts not only as guardian ad litem but also as his own solicitor. (He will, however, instruct counsel for the actual hearing, as most other solicitors do.)

He went on to say that the Official Solicitor sees his primary role as being to give the child a voice in the proceedings. He sees his duty as being to make such submissions to the court, having given due regard to the expressed views and wishes of the child concerned, as he considers to be consistent with the child's welfare and best interest. Where these coincide, he will advocate that view. Where they do not, the Official Solicitor would feel obliged to make an alternative submission to the court.

Over the years, the Official Solicitor acting as guardian ad litem of children in wardship cases, has accepted responsibilities beyond the mere conduct of

proceedings as an officer of the Court and has become closely involved with the welfare of wards. In re G (Minors) C.A. (1982), Ormorod, L.J. said:

"in custody cases the Official Solicitor is much more than a mere guardian ad litem. He is at once an amicus curiae, an independent solicitor acting for the children, an investigator, an adviser, and sometimes a supervisor." (Official Solicitor 1988, p.106, citing 1 WLR 438 at p.442)

Once he has been appointed, and it is necessary for him to consent to the appointment, the Official Solicitor receives the court file which may already contain affidavit evidence. The principal task (Baker 1988) is to place before the court the evidence the Official Solicitor considers material on the ward's behalf, usually in the form of a report. The officer to whom the case is assigned, (who will be supervised), will make the "fullest possible enquiries", that is, he will interview all parties, including the ward, friends, relatives, schoolteachers, doctors, etc., and will arrange, if necessary, any medical or psychiatric examinations. The aim is to give the judge the fullest picture of the ward's circumstances and needs (Baker 1988). An estimation of the time taken in preparation for a two day hearing, as given to the Cleveland Inquiry, is around twenty hours. (One must assume this does not include travelling time or time actually spent in court).

Although the task of obtaining the information in the report is normally delegated to one of the Official

Solicitor's officers, who will be responsible for drafting the report, it will need to be approved by a senior officer and sent to the Official Solicitor or his deputy for final consideration and signature (White and Lowe 1986, p.210). The report represents the Official Solicitor's views, based on the evidence of the officer's enquiries and is to be regarded as his report, in his quasi-corporate capacity. The officer responsible for the case will also prepare instruction and briefs to counsel (subject to approval by senior staff).

The report will usually contain an account of the enquiries made, and an analysis of the relevant issues and the options available to the court. It usually contains specific recommendations (ibid).

At the hearing, the ward is represented by counsel who may examine witnesses, lead evidence and address the court on the ward's behalf. The officer who made the enquiries can be asked questions on matters of fact, but is not likely to be cross-examined on them. Although White and Lowe are of the opinion that there should be a power to do so, in view of the guardian ad litem's additional role as an investigator, there is a general rule that a party's representative may not be cross-examined.

The Official Solicitor's duties may not end with the court hearing; his staff may be called upon to advise on the details of the order, such as contact with

relatives etc. He can also take the initiative in bringing the case back before the court. In his submission to the Cleveland Inquiry, the Official Solicitor said:

"The Official Solicitor believes that continuity of representation is one of the most significant of advantages that his office possesses in children's cases". (Official Solicitor 1988, p.110)

White and Lowe point out that great reliance is placed by the courts on the experience of the Official Solicitor's department which possesses considerable prestige.

"Little complaint is made of his conduct of cases in court, where he has access to the most experienced counsel at the family bar. His officers' investigations are usually most thorough." (White and Lowe 1986, p.215)

Disadvantages are that he is expensive, there may be delays in the production of the report caused by the relatively small size of the department and the fact that it is situated in London; and it is questionable whether civil servants with no necessary experience of delicate child care matters are the best people to undertake these enquiries (ibid, p.215).

#### A comparison with the panel guardian

In summary then, in common with the panel guardian, the Official Solicitor investigates, reports and recommends. Like the panel guardian, his focus will be upon determining the child's "best interests" and ensuring that the child "has a voice" in the proceedings through appropriate advocacy. In other ways, however,



in organisation, professional training, and the arrangements for legal representation of the child, there are significant differences.

Organisationally, although there is only one Official Solicitor, he is the figurehead of a government department, staffed by civil servants whose decisions and recommendations in a case reflect the department as a corporate entity rather than their own autonomous views. That they do not possess any relevant professional training has a bearing on this; they are not regarded as "expert witnesses", are not, therefore, required to be cross-examined in court; and rely upon other expert witnesses, such as child psychiatrists, to help them to decide the child's interests.

Unlike in care proceedings, the child is not represented by an individual solicitor, legal advice being available "in house" to the officer in charge of the case. Because the case will be heard in the High Court, counsel will be briefed to represent the child at the hearing. Although he will give due regard to the expressed views and wishes of the child concerned, it must not be forgotten that this essentially paternalistic jurisdiction will only allow him to do this as far as he considers to be consistent with the child's welfare and best interests. There is no parallel facility to that available in the juvenile court, for the solicitor and guardian to part company, so that an older child can give his own instructions,

thus enabling him/her to participate more directly in decisions about him/herself. In care proceedings the appointment of a panel guardian comes to an end as soon as the case is finished. However, in wardship, which may go on for several years, the Official Solicitor continues to represent the ward. It is perhaps curious that no reference was made to the role of the Official Solicitor or to his organisation when the role and organisation of the guardian ad litem in care proceedings was being determined. As will be shown in the next section, he did not figure in the deliberations about a role for a possible guardian ad litem in the creation of the first Adoption Act. A possible reason for this is that wardship, deriving from the common law, has developed in quite a separate way from the other source of English law, legislation, of which both care proceedings and adoption are examples.

### Adoption

Perhaps one reason why there was so little debate during the passing of the Children Act 1975 about the concept of the guardian ad litem as a welfare professional, was that the appointment of a guardian ad litem, latterly a social worker, was already well established in adoption proceedings. The Act was largely about adoption and the appointment of a guardian ad litem in care proceedings could be seen as an extension of that system.

## History

Adoption was not legalised until 1926. Prior to this, children could be placed informally, but permanently, in adoptive homes and they frequently used the name of the people adopting them which could be legalised by deed poll. Voluntary societies had been acting as adoption agencies from the 1890's. The real impetus for legalised adoption came from the need for homes for the many children orphaned or born illegitimately during the First World War (McWhinnie 1973).

Although the early adoption workers believed it was better for orphaned or abandoned children to be brought up in an adoptive home rather than an institution, there remained a body of opinion which saw the preservation of the blood tie with the biological parent as of paramount importance to the child (ibid). Another factor working against the legalisation of adoption was the prevailing attitude towards illegitimacy; to care for such children might condone the immorality of the mother and because it was thought that moral qualities were inherited, "bad blood" would out and the sins of the mother be visited on the child (Tizard 1977, p.4). Adoption in those days was much more a phenomenon of lower socio-economic groups than the middle class (McWhinnie 1973, p.55).

The earliest departmental committee to look at the possibility of legalising adoption was the Hopkinson Committee which in 1921 came out in favour of such a

move. Its recommendations proved so controversial, however, that a second committee was appointed, under the chairmanship of Mr. Justice Tomlin which reported in 1925 (Hoggett and Pearl 1987, p.599). This committee was not especially enthusiastic and expressed doubts as to whether the demand for legalised adoption, as opposed to de facto adoption, could justify a change in the law. On the other hand, the committee members could see there were inherent insecurities in the current situation from possible interference by the natural parent, and they argued that the relationship between the adopter and the adopted should be given some recognition by the community.

"The transaction is one which may affect the status of the child and have far reaching consequences and from its nature is not one in which, without judicial investigation, there is likely to be any competent consideration of the matter from the point of view of the welfare of the child." (Report (Tomlin) 1925, cited in Hoggett and Pearl 1987).

The report goes on to say that there should be a safeguard against the use of adoption as a means of taking advantage of the mother and compelling her to surrender the child forever, if all she needed was a temporary respite. The committee also expressed its views on the blood tie: that separation of mother from child may of itself be an evil and, if introduced, should be operated with caution.

"Whichever tribunal is selected it is important that the judicial sanction, which will necessarily carry great weight, should be a real adjudication

and should not become a mere method of registering the will of the parties respectively seeking to part with and take over the child. To avoid this result we think that in every case there should be appointed...some body or person to act as guardian ad litem of the child with the duty to protect the interests of the child before the tribunal." (Report (Tomlin) 1925, cited in Hoggett and Pearl 1987, p.599).

Thus the Tomlin Committee gave a very cautious blessing to legalised adoption in what became the Adoption of Children Act 1926. Despite the activities of the early adoption societies, adoption at that stage was still largely a private transaction: there was no regulation of adoption placements and the adoption order did little more than give legal sanction to the de facto transfer that had already been agreed. The court's role was limited to checking whether the natural parents had really agreed and that the child's welfare did not suffer. Because of their fears that adoption condoned immorality and that homeless children would far outnumber altruistic families, the committee was certain that the adopted child should not become a full member of the adoptive family for purposes such as succession.

It has been difficult to discover what kind of person was appointed as guardian ad litem at this stage. The Hurst Report (Report (Hurst) 1954) suggests that it was envisaged that the task would be undertaken by an officer of the local authority, usually an officer of the Education Department or a Probation Officer or private individuals who were "fitted" and "willing". Certainly, from the 1933 Children and Young Persons Act

onwards, the education authorities had welfare responsibilities and were charged with the duty of bringing children in need of care or protection before the courts and of preparing social enquiry reports about them. The education authorities could also place children in care (Dennis O'Neal had been in the care of Newport County Borough Council), and could also discharge children from their care by means of adoption (Packman 1975).

Contrary to the expectations of the Tomlin Committee, adoption became very popular after the passing of the Act in 1926. Placements could be made by placing children direct: individuals, such as doctors or clergymen could act as intermediaries; the voluntary societies or adoption societies could also make arrangements (ibid). Concern about the fact that adoption work was entirely unsupervised and uncontrolled led to the Adoption of Children (Regulations) Act 1939, which empowered the Secretary of State to make regulations about how adoption societies conducted their work.

According to Packman (1975), after the setting up of the Children's Committees in 1948, child care officers took over the supervision of all children placed for adoption, no matter who had placed them. When the date of the adoption hearing was fixed, the child care officer would undergo a change of role from

supervisor to guardian ad litem. If the Children's Department had itself placed the child, in order to ensure an objective view, the guardian ad litem would be a Probation Officer or a member of a neighbouring Children's Department (an early example of a "reciprocal arrangement").

In 1953, the Hurst Committee (Report (Hurst) 1954) was appointed to consider the law in relation to the adoption of children, and recommended that the person appointed as guardian ad litem should always be a suitably qualified and experienced children's officer, probation officer or social worker, as long as his/her agency had not taken part in placing the child. The committee was also opposed to the appointment of the Official Solicitor in High Court adoptions, believing that a child care officer was more suitable. (The Official Solicitor has continued to act in the High Court up to the present day.) The 1957 Adoption Act which followed repealed all earlier legislation and introduced provisions that eased the situation for prospective adopters: the rights of putative fathers were removed so that they were no longer "parents"; and the grounds for dispensing with parental consent were widened. The Children's Committees were also given powers to make and participate in arrangements for adoption, not only for children in care.

Reforms leading to the current role of guardian ad litem in adoption

When the Houghton Committee (Report (Houghton) 1972) began its investigation into adoption practice in 1969, it noted that its predecessor, the Hurst committee, had expressed concern that more than one third of non-relative adoptions resulted from placements by third parties or by the natural parents. A 1966 survey showed that the figure was not quite so high as that; nevertheless, the Houghton Committee continued to be worried that the welfare of the child was compromised if prospective adopters were able to bypass the "skilled work of the adoptive services", which included preparation for adoptive parenthood. They accepted that there was no recent research to compare one kind of placement with another, but plenty of evidence that independent placements were unsatisfactory. Worried that the imbalance of supply and demand (more prospective adopters than children available for adoption) might lead to financial transactions, the committee expressed the view that adoption was of such vital importance that society had a duty to see that satisfactory placements were made. Consequently, direct and third party placements should be outlawed, and local authorities were given the duty (not just the power) to create their own adoption agencies.

The committee also noted that there was a considerable duplication and overlap of duties in the



current arrangements, and that the adoptive family might be visited by three different social workers: one from the agency which made the placement, one from the local authority responsible for "welfare supervision" as well as the guardian chosen by the court (Hoggett 1987). Packman (1975, p.94) comments that where the local authority carried out the welfare supervision and then went on to become guardian ad litem, the family often felt "on trial" and therefore inhibited from discussing any problems they might have. The role of the guardian ad litem was threefold: first to check that consent to adoption had been given; second to ensure that the order, if made, would be in the interests of the child; and third to check that the applicants were suitable. This would involve an investigation of their material assets, personality, motivation, and the effect of the adoption on the wider family. To avoid this duplication, it was proposed that the welfare supervision would be undertaken by the placement agency, which meant that prospective adopters would get a better continuity of service. These recommendations were incorporated into the Children Act 1975, but, together with many other parts of the Act, were not actually implemented at once, in this case not until May 1984, at the same time that the guardian ad litem provisions in care proceedings were implemented. It was at this stage that the earlier court rules were amended; the agency itself would report to the court, on matters that had

been the province of the guardian ad litem, giving extensive particulars about the child, his parents, the prospective adopters, the actions of the agency or local authority involved. The report should conclude with the agency's views on whether adoption would be in the child's best interests, or some other measure such as custody was to be preferred, and make some evaluation of the likely effect on both child and adopters, should the order be granted (Schedule 2 of the Adoption Rules 1984.)

The other part of the guardian's role had been to witness and verify parental agreement to the adoption. The Children Act 1975 created the "Reporting Officer", whose role was limited to this one task, and with a duty to safeguard the interests of the natural parent. The Reporting Officer was to be drawn from the panels set up under section 103, and had to be independent of any care or adoption arrangements for the child.

Houghton was of the opinion that once the involvement of professional people in adoption arrangements was secured, the appointment of a guardian ad litem in every case was unnecessary. It was only if a parent was unwilling to agree, that the court must appoint a guardian ad litem for the child, again drawn from the panel and independent of all the agencies involved. Houghton argued that the court could use its discretion to appoint a guardian ad litem where there

were "special circumstances" and the welfare of the child required it, usually relating to step-parent adoptions, or adoptions by other family members, about which the Houghton Committee had been unenthusiastic because it felt this distorted family relationships and might deprive the child of his/her right to access to a natural parent. (This is why the concept of "custodianship" was introduced.) Whatever the reason for her appointment, the guardian ad litem must investigate the agency and local authority records and reports, the statement of facts relied upon to dispense with parental agreement, and any other matter the court required her to investigate.

As in care proceedings, then, the guardian investigates, reports and recommends, and, as a welfare professional, is regarded as an expert child care witness. Because much of the background information will have already been covered in the adoption agency's Schedule 2 report, the report is usually shorter, and focused on specific issues, such as the parents' views, the advisability or otherwise of continuing contact with natural family members, and, if the child is in care, the decision-making process of the local authority.

The major difference is that the majority of adoptions take place in the magistrates' or county courts where the child is not a party and therefore not entitled to legal representation. In practice, this may not matter very much, because while natural parents may

refuse, formally, to agree to the making of an adoption order, so that the hearing is technically "contested", they often accept the reality of the situation and abandon the fight. The greatest scope for contention is where children have been taken into care against their parents' wishes; and it must be remembered that the application for an adoption order or a freeing order will be at the end of a line of a series of potentially contentious hearings, care proceedings, refusal of contact and any appeals arising from these, in which the natural parents will have already been involved.

Hoggett (1987), in relation to the "special circumstances" in which a guardian ad litem may be appointed, makes a comment that this is where the most likely in cases raising complex legal problems...

"If so, it is strange that the guardian will still be a social worker or probation officer (from specialist panels) rather than a lawyer. A social work guardian may be particularly useful where the child is old enough to have "wishes and feelings" of his own, so that these can be properly explored. Cases of both sorts are increasing in number. Nevertheless, the young child may be in just as much need of someone whose only duty is to serve his interests, rather than those of the adults and agencies involved. It (ie separate representation) is still the best, even the only way yet devised by our adversarial legal process for ensuring that even uncontested cases receive some adjudication." (Hoggett 1987, p.135)

It seems strange, also, that while the Colwell Inquiry (Secretary of State 1974) felt it was the child's right to have his/her interests considered separately from those of his/her parents, the

recommendation of the Houghton Committee to limit the appointment of a guardian in adoption proceedings was accepted in the same legislation without argument. Adoption is perhaps the most far-reaching and radical legal process a child can undergo. The Colwell Inquiry felt that some safeguard against the actions of local authorities in care proceedings was necessary, yet the local authority acting as an adoption agency is seemingly beyond reproach.

Misgivings about limiting the appointment of a guardian ad litem to specific circumstances are also expressed by Bromley (1978):

"First, the fact that an adoption agency has made a poor placement may be more apparent to an outsider than to a caseworker concerned who will probably, if only subconsciously, be anxious to justify her initial decision. Secondly, the guardian ad litem's function in most cases is to ensure that the mandatory requirements of the Adoption Act have been complied with. He can also give a second opinion in a really difficult case." (Bromley 1978, p.379)

#### The role of the court welfare officer

In most guardianship of minors and matrimonial proceedings in the county court the child's interests will be safeguarded, not by a guardian ad litem, but by a court welfare officer. (High court proceedings may be an exception, when the child may be represented by the Official Solicitor.) In those cases in wardship where "special circumstances" do not apply, a court welfare officer may be involved instead of the Official Solicitor, but if need for representation emerges at a

later date, the child can be made a party and the Official Solicitor appointed as well.

The welfare officers of the court welfare service are qualified probation officers. In London, there is a permanent staff of welfare officers attached to the Supreme Court. Although specialist teams exist in some areas, it is common in the provinces for the probation officer to combine his/her duties, both in divorce work and wardship, with other work.

Once s/he has been directed to report, the welfare officer may inspect the court files, and visit and interview the parties, including the child, at their respective homes. The wider family, school, doctor, etc. may also provide useful observations. Under the old (pre-1989 Act) rules, court welfare officers do not attend the hearing as a matter of course. Although it is possible for the officer to be cross-examined on his/her report, the more normal practice is for the judge to ask questions in the presence of both parties in order to have the report explained and expanded on. Although the court is not bound by the report, reports are held in high regard and are of extreme importance and influence (White and Lowe 1986, p.223). It has been held that in custody cases where the court differs from the welfare officer's views, it is essential to give the reasons (Clark v Clark (1970) 114 Sol Jo 318.) (The judgement came to have significance for panel guardians because at a later stage it was held that similar

considerations should apply to their reports as well.) The welfare officer's duties will not necessarily end at the conclusion of a case; s/he may be asked to supervise the transfer of care and control or prepare a report at some later stage.

The child in proceedings arising out of parental separation does not have party status; s/he is not entitled to legal representation and the role of the court welfare officer is not a representational one. It could, however, be argued to be a "safeguarding" role inasmuch as the court welfare officer considers which parent is the better able to meet the child's needs. It is important, also, to report on the child's own wishes and views. The role is not specifically child-centred, however, but more concerned with helping parents to reach agreements with one another.

The Official Solicitor, the court welfare officer, the guardian ad litem in adoption, and indeed in care proceedings, have much in common; each could be said to provide a court-based welfare service for children founded on an independent investigation of a child's "best interests". Yet it is only with the implementation of the Children Act 1989, with its attempts to unify the court system, and with the simplification and amalgamation of the public and private aspects of the laws relating to children, that this common ground is beginning to be recognised. So far, for historical

reasons, each of these arrangements has evolved quite separately within its own organisation. The organisation of a service to provide the courts with a guardian ad litem to act in care proceedings has also followed its own separate evolution; this will be the subject of the next two chapters.



## CHAPTER 6

### THE DEVELOPMENT OF A GUARDIAN AD LITEM SERVICE

#### PART 1 : THE FIRST YEARS; 1984 TO 1987/8

##### Introduction

The model for the prospective role of the guardian ad litem in care proceedings, as defined in the court rules, was discussed in Chapters 3 and 4, and will be further explored in Chapter 8. This chapter and the next will examine the administrative arrangements for the provision of panels of guardians ad litem, and will trace the development of a guardian service from its beginnings in 1984 to the end of the period preceding implementation of the Children Act 1989 in October 1991. Although the service included the provision of guardians to act in adoption cases as well as care proceedings, this study will focus upon the latter. The process created problems not hitherto experienced in social services management.

##### Professional or organisational independence?

In the summer of 1983, the Junior Minister at the DHSS, Tony Newton, announced that sections 64 and 65 of the Children Act 1975 would be implemented in full in the course of 1984. These sections dealt with separate representation and the appointment of a guardian from a panel set up under Section 103.

The essential feature of the guardian role, as envisaged by the Maria Colwell Inquiry, was the investigation and presentation to the court of a child's

case in care proceedings by an "independent social worker". Although the inquiry did not spell out what was meant by "independent" in any great detail, what was implied was that such a person would be free to present his/her own views rather than those of the local authority, and to focus on the child specifically, rather than the child in the context of the family. If the person acting "independently" for the child, however, is to have any real credibility with the court personnel, and especially with parents, there is a need to be seen to be organisationally independent of the authority that is party to the case.

The court rules ensured the "professional" independence of the guardian by excluding certain categories of people from acting; if, for example, they knew the child or family already, or if their agency had played a part in the child's life. This meant that the guardian could not actually be employed by the authority that was a party to the case. However, giving the local authorities the responsibility for providing the courts with panels of people - even if they were not actually employing them - to investigate and possibly criticise their own cases, immediately raises potential conflicts of interest. The local authority, for example, might like to make sure that only certain kinds of people became panel members; and panel members might feel constrained from expressing a conflicting view if they

felt beholden to the authority for their place on the panel.

The reasons why the government chose to give this responsibility to the social services departments, despite the inherent difficulties, were first, that it was hoped that this safeguard for children could be provided without any additional expense and second, that the social services departments with their existing statutory responsibility for child care matters, were bureaucratically convenient. A third reason, not much discussed, was the difficulty in anticipating demand; at the same time as the introduction of a provision to appoint a guardian in care proceedings, guardians could also be appointed for the first time in parental challenges to the assumption of parental rights, and in parental challenges to the termination of access, which was itself a new piece of legislation. In all of these cases, the appointment of a guardian was at the discretion of the court, and it was, therefore, impossible to give a very accurate forecast of how many guardians would be needed.

In the very limited use that had been made of guardians from 1976-1984 (in unopposed applications for discharge of care orders), the most likely person to undertake the task was a probation officer. However, the 1984 amendments to the Magistrates' Court Rules 1970 made probation officers an excluded category except in adoption work, in which they were already well

established. This was explained in LAC (84)11 (DHSS 1984) as stemming "partly from resource considerations and partly from the need to protect the primary work of the Probation Service", i.e. its duties in the criminal justice field. A precedent had already been set in adoption cases for using a social worker from a neighbouring authority in order to avoid conflict of interest where the authority, rather than an agency, had placed the child. It appeared to be generally assumed that if the scheme were to be provided at zero cost, then the most likely organisational model would be a reciprocal arrangement with a neighbouring authority. If a reciprocating arrangement was in prospect, perhaps this explains why there was not much debate about the lack of an independent administrative base. The problems of selecting, appointing and training panel members could safely be left to the reciprocating authority; and if removal of a member from a panel were to be required (if, indeed, anyone had thought that far ahead), one assumes that discreet words between members of the management hierarchy were supposed to suffice. An additional factor was that appointments to the panel were to be for a three year period only, implying that this was not the sort of work with career prospects in its own right, but rather something that guardians were expected to do as a kind of sideline, in addition to normal duties.

Some doubts, however, were expressed regarding both professional and organisational independence. In September 1983, BASW set up a Project Group to examine the implications of the prospective panels and, while the provisions were welcomed in principle, doubts were expressed about the way in which they were to be implemented. In its response to the DHSS Consultation Document (undated) in October 1983, anxieties were registered about the increased workload envisaged, the lack of clarity as to how panels were to be funded and trained, the lack of an independent administrative base from which to operate and the somewhat basic qualifications for panel membership (BASW 1986, p.1).

Echoing these fears, the Second Report of the House of Commons Social Services Committee stated:

"Confidence in Guardians will [also] crucially depend on the extent to which the panels at the court's disposal include social workers who are truly independent." (Social Services Committee 1984, para 108; quoting a submission from The National Council for One Parent Families)

"It is essential that the guardian is, and is seen to be, completely independent of the local authority bringing the proceedings and is not merely drawn from a panel consisting of social workers from neighbouring authorities." (ibid, para 108)

In view of these anxieties, the Committee recommended:

"that the Department ensure that they have sufficient information on the operation of guardians ad litem in care proceedings to enable them to assess the impact of the new provisions." (ibid, para 108)

Accordingly, taking heed of the Committee's recommendation, the DHSS commissioned Mervyn Murch,



Senior Research Fellow at the Family Law Research Unit, Bristol University, to undertake a short study into how the panels were working, in the first few months following their inception in May 1984. The research, entitled Separate Representation for Parents and Children : an examination of the initial phase, was published in December 1984 and covered the months from July to December (Murch and Bader 1984). Its findings will be discussed later in the chapter.

LAC (83) 21 - Children Act 1975:Section 103  
Panels of Guardians ad Litem and Reporting Officers

The guidelines to be followed in the setting up and administration of the panels were set out in LAC (83)21, (DHSS 1983) published at the end of December 1983. These provided the basic framework; its translation into practice was to be the subject of Murch's research. With regard to structure the circular said little, merely stating that each local authority in England and Wales would have a duty to administer a panel of persons, according to the relevant regulations, and that local authorities would have discretion to act jointly in their administration and to nominate one authority as the "administering authority" (DHSS 1983, paras 1/2). In determining the size of the panel, the local authority would need information about the numbers and types of cases dealt with by each court in its area, bearing in mind that the members of the panel must be independent of authorities or voluntary bodies concerned

with the child's care. The circular suggested that people to serve on the panels should be sought in a number of ways: by nominations from magistrates' clerks, from the Probation Committee, from adjoining local authorities, from voluntary agencies. Alternatively, people who were not nominated could be invited to serve, or advertisements could be placed. It was, however, the responsibility of the administering local authority to make the final decision. The term of office would not exceed three years, the administering authority being empowered to withdraw a member from the panel at any time, but only after a full enquiry which would be open to challenge by the member concerned (DHSS 1983 paras 5/6).

Likewise, determining the suitability for membership would rest with the administering authority. The circular suggested that the people concerned should have qualifications in social work plus sufficient relevant experience, especially of work with families and children, and with children needing to live apart from their parents. Experience of court work in adoption and care proceedings was especially important, and knowledge of adoption agency organisation and practice desirable. Because panel members would need to appraise the work of other social workers, they would need to be people in whom social workers could have confidence (DHSS 1983 para 10).

The circular recognised that some training might be needed, and suggested joint training with local solicitors might be useful (DHSS 1983, para 12).

Members who were social work or probation employees would be paid by the authority that employed them. In the case of persons not so employed, the sessional fee and "reasonable expenses" would be borne by the administering authority (DHSS 1983 paras 19/20).

On the question of independence, the circular stated:

"No person should be appointed as GAL or RO if he has taken part in arrangements for the adoption or care of the child; or is a member, officer, or servant of the LA, adoption society or other body which has parental rights and duties in respect of the child or which has taken part in the arrangements or proceedings concerning the child." (DHSS 1983, para 17)

Murch's research The first months of the scheme : May 1984 - December 1984

Murch's study (Murch and Bader 1984) looked at the following areas: first, the pattern of use (i.e. possible and actual appointments); second, the administrative arrangements for the panels, including selection and training of members and levels of pay; and third, the part played by the courts. Data was collected from fifteen magistrates courts, chosen to give a reasonably representative cross-section, seven of them situated in large cities, four in county towns, two in industrial towns in rural counties, and two in small rural towns.



First, as regards the pattern of use, it has already been explained (Chapter 4) that after the making of a separate representation order it is at the court's discretion whether a guardian will be appointed. The study showed that in eight out of thirteen courts the making of such an order automatically signalled the appointment of a guardian. However, in the other courts, appointment rates following the making of a separate representation order varied from 67% to 13%.

There were also major variations in the numbers of guardians appointed. Murch identified two important elements to account for this variation: individual child care policies, and the policy of individual courts. In other words, child care policies based on a belief in the efficacy of taking large numbers of cases to court, and/or a court policy that believed in appointing guardians ad litem, which would generate a higher level of demand for guardians to be available.

On the second matter, the administrative arrangements, Murch interviewed fourteen panel administrators. The resulting information indicated that local authorities set up their panels in one of three ways:

1. those employing free-lance or non-statutory agency staff only; these he calls "solos";
2. those relying upon reciprocal arrangements with local authorities; called "reciprocators";

3. those using a mixture of free-lance staff and staff from non-statutory agencies, as well as neighbouring local authority personnel; these he calls "hybrids".

The factors identified in the research that influenced the local authority's choice are interesting. Reasons given for choosing the "solo" option included: avoidance of disruption of the department and imposing an intolerable burden on those left behind; provision of a faster service; free-lancers would acquire experience more quickly; they would be more independent; they would avoid role confusion.

Reasons for choosing the reciprocating option were largely financial; GALs would be paid to do panel work in the normal course of their duties. That it was assumed that they had the necessary spare capacity reflects how little it was understood at that stage what the work would involve. It was hoped that a balance would be struck, to make compensation payments unnecessary. Some authorities planned to utilise previous partnerships, for example, where they had shared one another's child care facilities. Sometimes this arrangement was chosen because the two authorities had compatible child care philosophies (to reduce the chance of disagreement?), or with the hope of increasing staffing levels, and to avoid the disadvantages of the solo option, which were seen as difficulties in fixing fees, lack of control (!), and worries about free-lance

staff not understanding the local authority perspective.

Where local authorities had been able to secure funds and to negotiate arrangements with neighbouring authorities, they set up the "hybrid" model, seeing its advantages in terms of wider choices for courts, spreading the load and easing the strain on local authority staff. Because the research did not cover all the panels, it is not possible to tell exactly in what sort of proportion these three types were distributed, but my own knowledge suggests that reciprocating arrangements tended to be favoured in the North, and "solos" in the South. In London, twenty-four inner and north London Boroughs combined into one large consortium, subdivided into four area panels. This consortium is administered by a panel administrator employed by the London Boroughs Children's Regional Planning Committee. All four area panels are hybrids.

All panels were required to appoint a Panel Administrator. Children's Regional Planning Committees, however, were special to the London Boroughs, and elsewhere the panel administrator was an employee of the (usually single) administering authority. The panel administrators in Murch's study (Murch and Bader 1984) were either professional administrators or qualified and experienced social workers. His major concern was with their position in the hierarchy and whether they were sufficiently senior to negotiate the necessary staff

resources. He saw the ambiguity in the role as most evident when they themselves, as was sometimes the case, were responsible for allocating cases, and not (as was to become an even more contentious issue) arising from their role within the local authority as makers of that authority's child care policy, which it might be the guardian's task to criticise.

Murch was interested to discover not only what kind of social workers had been appointed to panels, but how they had been selected. In reciprocating authorities it was invariably left to partners to come up with a list of suitably qualified people, it having already been decided that they were looking for Level 3 staff with a minimum of three years post-qualifying experience. Sometimes, people were told to do the job; sometimes they were asked to volunteer. The vast majority of local authority employees were appointed; they were rarely interviewed and, when they were, it was left to panel administrators (Murch and Bader 1984, p.60). In my own authority, Durham, Level 3 workers with child care responsibilities automatically became panel members; court officers likewise, though this entailed being upgraded to Level 3; and in addition a post of Guardian ad litem (Child Care) was created in each district. Applicants for these posts were interviewed by the employing (not the administering) authority, as for any other appointment.

Where panels were of the "solo" or "hybrid" variety, the selection process tended to be more rigorous. Advertising often produced mixed results, and the more successful approach was to write to voluntary organisations, university social work departments, etc. for suggestions. The message was also passed through the professional grapevine to former local authority staff; this proved the most popular source of recruitment, and the people most often recruited were either women who had given up full-time social work to raise families, or older people who had recently retired from social services departments or probation (Murch and Bader 1984, p.61). In most of the smaller authorities, free-lancers were interviewed, the panel administrator invariably being present, usually accompanied by one or two social services department colleagues and a court liaison officer and/or area manager (ibid, p.62). Generally speaking, people were sought who had enough knowledge and confidence to deal with both the court and the local authority, were able to work without supervision, and were open-minded rather than doctrinaire in their approach.

With regard to training, Murch discovered that most authorities arranged an initial briefing meeting for panel members a few weeks before, or at about the same time that, the provisions came into force. At these meetings, the nature of the provisions and the arrangements to be followed were explained and practice

issues sometimes discussed (Murch and Bader 1984, p.74). Most administering authorities had tried to include a legal element (Murch and Bader 1984 p.76). In addition, several authorities had established small support groups for panel members, the request for such groups often coming from the panel members themselves, especially when they were free-lance (ibid p.75). The role of the panel administrator and the issue of independence become relevant here. One panel administrator made it very clear that he would not discuss cases, and in another situation, where the panel administrator was involved in bringing care proceedings, members actively sought her exclusion from at least part of their own meetings. Members, for example, of some of the London panels:

"seemed determined that GALs should become and remain independent of the LA and were consequently setting up their own groups." (ibid, p.76)

The regulations made provision for the fees and reasonable expenses of non-agency, free-lance staff to be defrayed by the administering authority. Because local authority staff were recruited at Level 3, it could be expected that levels of payment would be based on this, but in practice they were calculated in widely differing ways, producing widely differing figures. The top hourly rate in Murch's study, paid by a predominantly reciprocating county council (where free-lancers would be used, one assumes, exceptionally) was

£12.50, said to be a compromise between Level 3 and the current BAAF rate for independent social workers, reported to be £15.00 per hour. The London consortium hybrid panel paid £10.50 an hour, plus £7.00 for travel and waiting time. This was based on the Law Society rate for independent social workers, believed to be related to Level 3. However, a rural county council hybrid panel paid its members only £6.38 per hour, even though this too was supposed to be based on the top point of Level 3, with 10% added to reflect the exigencies of the job. The lowest rate, of £4.70, was paid by a county council solo panel, related to the bottom three points of the basic grade social work scale (Murch and Bader 1984, pp.78/80).

Related to the question of payment was the matter of support services for GALs. Where local authority staff were concerned, it was expected that their own area offices would provide clerical support and storage for working case papers. Free-lance members were expected to make their own arrangements, both for clerical services and secure storage. The question of specially headed notepaper arose at this early stage, it being recognised that to write to parents on local authority notepaper "would imply a degree of control by the local authority". This point was accepted completely by all those administering solo and hybrid authorities, and most reciprocating authorities as well, although some had made no arrangements and two thought

it quite unnecessary (Murch and Bader 1984, p.81). We had no such arrangements in my (reciprocating) authority, and insisted on using completely plain paper.

The third part of Murch's study looked at the role of the courts. Both LAC (83)21 (DHSS 1983) and the circular that followed shortly after, LAC (84)11 (DHSS 1984), envisaged that the courts would play an important role in the implementation of the new provisions. The earlier part of the study had established that the appointment of a guardian did not necessarily follow the making of a separate representation order, and when the court clerks in the study were asked about their policies in regard to making these orders in the first place, it emerged that practice varied greatly. Because there was no statutory or judicial guidance suggesting any criteria, some courts assumed there would always be a conflict of interest, while others seemed inclined to limit potential conflict of interest between parent and child to certain categories, such as likely ill treatment of young children, or cases where children were beyond control or in moral danger. Another court clerk thought separate representation should be allowed when there was a conflict between the parent and the local authority, especially where the local authority had been involved with the family for some time, so that the guardian could take an independent look at the local authority's conduct. An important part of the problem was that at the application stage the court had very



little information about the case upon which to form any sort of judgement. Circular LAC (84)11 stated:

"It is suggested that Justices' Clerks and the Administering Authority liaise over matters of common concern in relation to the panels...it is suggested that courts and the administering authority agree arrangements for the exchange of information and any other arrangements needed to enable the panel to meet the court's requirements most effectively." (DHSS 1984, paras 19-20)

and the earlier circular had suggested involvement from the clerks in nominating potential panel members (DHSS 1983, p.2, para 6).

Only eight out of the fourteen clerks reported that they had been contacted with regard to establishing the panel (Murch and Bader 1984, p.90), and only two had been closely involved. Murch's impression was that most of the clerks were content to leave the local authority to get on with it and would perhaps get involved later, when the scheme had developed.

LAC (83)21 (DHSS 1983) had advocated court involvement in devising clearly understood procedures for appointing guardians to cases, with the court making the actual selection based on information from the administering authority about the availability of members (ibid, p.3, para 16). LAC (84)11 (DHSS 1984) had suggested that the administering authority should provide the courts with lists of panel members with details of their qualifications and experience. Murch found that the amount of information the courts held varied a good deal (often limited to names, addresses

and telephone numbers) and that the selection process most often occurred in one of two ways: selection directly by the court, and selection by the panel administrator. Courts making their own selection did so in order to prevent the independence of the guardian being compromised; those who left it to the panel administrator did so because they found the administrative burden too great and there was some advantage in using a "clearing house" system to ensure a more even distribution of work (Murch and Bader 1984, pp.70/71). It must be said that five of the courts were following the DHSS guidelines in LAC (84)11, and on the whole this was reasonably successful (Murch and Bader 1984, p.102).

When asked for their general impressions about guardians in the early months of the scheme, where cases had reached a final hearing there was "a remarkable consensus" from the clerks: "that both reports and the first appearance of GALs in court had been impressive" (ibid, p.107). With regard to the effect of the new provisions on the general conduct of care and related proceedings, all clerks felt that theoretically the new provisions were helping to safeguard children's interest. On the practical side, however, cases where guardians had been appointed took longer to complete. Some courts felt that the extra information available had confused the issue, while others thought that the

introduction of guardians might help to defuse the adversarial element so that agreements might more readily be reached. In at least one court, the introduction of the system had put pressure on the local authority to be more careful in bringing cases to court.

At the end of the study, Murch concluded that it had been quite an achievement to set up a scheme that was operational in all courts in some form, in so short a space of time and when public expenditure had been tightly controlled. Many courts had been greatly impressed by the initial quality of the work of guardians ad litem.

What Murch saw as the problem areas were diversity of local policy and practice; and an ambiguity that manifested itself in various ways.

The diversity reflected itself in local authority practice in taking cases to court, rather than dealing with them in other ways; and in court practice in making separate representation orders and in appointing guardians thereafter. There was diversity in the type of panels that had emerged, and even more complexity in the development of financial resources, with local authorities struggling to avoid extra staff appointments by stretching existing capacity and by entering into reciprocal arrangements with neighbours which they hoped would balance out (if not, they would have to make compensatory payments at the end of the financial year).

There was even greater diversity in the rates of payment to free-lance panel members.

Although Murch does not comment directly on the obvious ambiguity in an arrangement whereby a local authority, who is a party to proceedings, also has the responsibility for hiring, firing and paying a panel of persons part of whose task may be to criticise the authority, the issue of "independence" is raised in the study in a number of ways. An awareness of the need to be seen as independent is raised in the question of appropriately headed notepaper. Perhaps even more obviously compromising is the role of the panel administrator, especial if s/he were to discuss cases with guardians or even be responsible for selecting them for a case. There appeared to be ambiguity also that was reflected in the various models that had emerged, with "solo" and "hybrid" panels seeming to be regarded as more independent by justices' clerks (Murch and Bader 1984, p.115).

At the conclusion of the study, Murch made two observations. First, he observed that the new panels seemed to have been sited on the boundary between the court structure and local authority practice. As such, he predicted that they would play an increasingly important liaison role. Second, he and his team were aware that what they were studying was the beginnings of a new form of court social work service at a time when

there was renewed official interest in the idea of Family Courts (the Lord Chancellor's Department and the Home Office had recently established a Family Court Review). Clearly, the establishment of new machinery for guardians ad litem was pertinent to such an idea, and the new types of panel would have to be considered along with the role of the Divorce Court Welfare Service, reporting officers in adoption, and in-court conciliation services. The problem was that the diversity and ambiguity he had identified would make the task of rationalising a court welfare service more difficult. The question would be better considered when more information concerning the most appropriate and effective type of panel had emerged through time.

Following on from this initial piece of research into the workings of the new system, Murch was to undertake a much broader piece of research covering the period 1985-1989, to look at the representation of children, not only in care and related proceedings, but in disputed custody and access cases as well, with a view to rationalising a court welfare service which would cover children in all civil proceedings. The findings were reported in a series of unpublished papers prepared for the Department of Health, though a summary of this work, and the conclusions reached, was published in January 1990 (Murch et al 1990). These will be discussed in the next chapter (Part 2).

### The next two years - 1985-1987

Information about the next stage of development of the guardian ad litem system is provided by three reports: firstly, Panels of Guardians ad litem and Reporting Officers, which was produced in February 1986 by a joint ADSS/ACC/AMA Working Party (ADSS 1986); secondly, Guardians/Curators ad litem and Reporting Officers, published in June 1986 by BASW (BASW 1986); and thirdly, although the focus is slightly different, The Practitioner's View of the Role and Tasks of the Guardian ad litem and Reporting Officer, which was the publication in the spring of 1987 of a research project undertaken by George Coyle (Coyle 1987).

#### **The ADSS/ACC/AMA Officers' Working Party Report**

In November 1985, a group of officers representing the Association of Directors of Social Services, the Association of County Councils and the Association of Metropolitan Authorities was set up under the chairmanship of Mr. Andrew Foster, Director of Social Services for North Yorkshire:

"To consider the arrangements adopted by local authorities in appointing Reporting Officers and Guardians ad litem, identifying issues of professional concern, making recommendations, and forming a judgement of the total costs of the service provided, and proposed, in national terms." (ADSS 1986, p.2)

The ADSS report was published before that of the BASW Project Group in February 1986. While the situation had been viewed, naturally enough, from the

point of view of the local authorities (i.e. costs and the burden to the local authority), it also charts some administrative developments, examines growing concerns about independence and raises questions about monitoring performance and dealing with complaints. The report does not describe any methodology, so the exact sources of information are unclear.

The Working Party reported that "the impact of the new arrangements has been profound". Guardian ad litem/reporting officer work was taking up to three times longer than expected; there was an increasing reluctance by local authority staff to accept this work because of the heavy burden involved. Some managers were refusing to allow staff to do it, because adequate replacement arrangements were not available. This had led to a high withdrawal of local authority staff from panel work, or the appointment of full-time staff specifically for guardian/reporting officer work, or "replacement" field staff (ADSS 1986, p.8). The types of panel were still as Murch had described, "solo, hybrid or reciprocating", but were now joined by a fourth type, the "consortium", a group of local authorities making specific appointments of full-time staff to undertake guardian/reporting officer work (ADSS 1986, pp.9/10). In view of the pressures on staff in reciprocal arrangements, one assumes that these were on the decline.

Although not specifically mentioned as a new type of panel, the report also mentions the Children's Society Guardian ad Litem Project on Humberside, which was by that time in existence as part of an otherwise hybrid panel. The local authority in Humberside had entered into an arrangement with the Children's Society to provide a guardian ad litem service, supplemented by free-lance workers.

It was found that although most authorities had contained the costs of setting up panels within original estimates, the actual running costs were far higher than expected. An increasing readiness by the courts to appoint guardians was observed; cases took longer than anticipated; the costs for administration of the scheme, especially where training and consultation was provided, were higher than expected; the shift from local authority to free-lance staff had cost implications; as had the need to replace local authority staff when panel members were engaged on guardian/ reporting officer work (ADSS 1986, p.8).

With regard to recruitment and selection, the stipulation in the original circular that members should be persons of "suitable experience" had led to differing definitions and panels which did not always contain a sufficient range of skills (such as knowledge of ethnic minorities). Some panel members had been appointed without a proper interview and, although some selection procedures had been undertaken by a panel, in others the



matter had been left largely in the hands of the local authority (ADSS 1986, p.11).

The Working Party felt that existing training did not cover the full range of skills needed, and that arrangements for providing essential professional advice and support (in the form of consultation and access to relevant literature) varied from the comprehensive to the virtually non-existent. Both members and panels were often isolated from one another, and lacked a corporate identity (ADSS 1986, p.11).

Payment rates varied from £4.00 to £16.00 per hour. Although, as in Murch's research, the rate was supposed to have been based on Level 3, the calculations had been made in widely differing ways and did not always reflect the fact that free-lance panel members did not have pension, sick pay and holiday cover, nor that the work was unpredictable and casual.

Three aspects of the system that Murch did not address, but which were considered by the ADSS group, were monitoring of guardians' work, how to deal with complaints and grievances, and how to remove people from the panel. Some form of professional monitoring, oversight and quality control was felt by the working party to be essential "in the interests of public and professional accountability" (ADSS 1986, p.13). Since guardians/reporting officers provided a direct and confidential service to the courts, however, it was

difficult to see how the local authority could monitor their work without devising special procedures for doing so. A written procedure was also needed for dealing with complaints and with removal from the panel, that would involve an independent element.

The working party made various observations about court practice, noting continuing diversity both in the rates of separate representation orders and in the appointment of guardians. Some courts took responsibility for choosing and appointing members to cases, while many relied on the local authority to produce a name (ADSS 1986, p.15). Some courts had not been sufficiently consulted; some courts had been reluctant to become involved.

Like Murch, the working party felt that independence was compromised by the position of the panel co-ordinator, especially if s/he was attached to mainstream child care activities within the authority; and if administrative arrangements, such as the use of appropriately headed notepaper, were not adopted. Perhaps more fundamentally, the recurrent theme throughout the report is that the independence of panel members is incompatible with the local authorities' responsibility to hire, fire, pay, train and monitor them.

Despite recognising that radical alternatives to the present scheme lay outside its terms of reference,

the working party put forward several ideas (ADSS 1986, p.18):

1. panel membership to be supplied by a voluntary organisation, with local authority finance;
2. establish specially recruited, independent panel administration paid by, but separate from, mainstream local authority structure;
3. a regional partnership arrangement between local authorities and a voluntary agency, involving the full-time secondment of staff.

However, its main recommendation was linked with a solution that was possible within the existing legal framework; namely, that the panel's independence would be best served by the local authority delegating as many functions as possible: hiring, firing, training, monitoring, investigating complaints, to an advisory group. The suggested membership would include representatives from higher education, the courts, solicitors, probation, the administering authority and the guardian ad litem panel. Possible disadvantages were that such a group might be expensive, cumbersome, with a mix of advisory and executive functions and not guaranteed to secure independence since its powers could be withdrawn by the administering authority (ADSS 1986, p.17).

Other recommendations were that payment levels to fee-attracting guardians/reporting officers must reflect

the special nature of the work and the high professional standards demanded; that panel members must be given access to professional counsel, support and administrative arrangements that did not compromise their independence; that induction and subsequent training was vital; that a clear written scheme dealing with complaints, removal from the panel and appeals was necessary for every panel; that courts were to be encouraged and enabled to play their full role in appointing members both to the panel and to individual cases.

Neither Murch's study nor the ADSS report give actual figures as to how many local authorities in England and Wales began with reciprocal agreements and changed to other types of panel as time went on. The ADSS speaks of a "trend" towards using free-lance staff, caused by the time-consuming nature of the work and reluctance on the part of management to deploy staff in this way. North Yorkshire disengaged itself from reciprocal arrangements with Durham and Cleveland within a few months because of management conflicts, and adopted the "solo" model, with some probation officers doing adoption work. In Durham, area managers made firm stipulations that panel members were to take only one case at a time.

Despite the absence of actual figures, the preoccupations of the ADSS report reflect the trend towards free-lance members, because the creation of

systems for the appointing, training and monitoring of panel members who are supposed to be independent of the administration only becomes pertinent once the administration begins to have direct responsibility. In reciprocal arrangements, appointment to the panel and training, at least, could be safely left to the employing authority (it was in Durham) and where the performance of an individual member was in question, it could be assumed that the administering authority had some redress by virtue of access to the hierarchy of the employing authority, though this itself does not exactly enhance the professional autonomy of the person concerned. The need for a fair procedure for complaints and removal from the panel also becomes more crucial when people are dependent on panel work for their livelihood, and no longer have the security of a salaried post.

The system suggested by the ADSS group, whereby the local authority could distance itself from the panel was an advisory group, the shortcomings of which were acknowledged. Although the group described them as "radical alternatives", the suggestions put forward for an alternative panel structure actually kept responsibility within the local authority, which made true independence somewhat questionable. Even in a partnership arrangement between a voluntary agency and the local authority, the authority would still hold the

purse strings; and it is difficult to see how "specially recruited independent panel administration" that is still paid for by the local authority could be, and be seen to be, independent.

**The BASW Project Group Report "Guardians, Curators and Reporting Officers"**

(Note: "Curators" are appointed in Scotland to perform a guardian ad litem role in adoption.)

BASW's report was published in June 1986. It was based on a short questionnaire sent out to all 70 panel administrators in England and Wales; the response rate was 83%. BASW's working party reported:

"Shortage of resources has undoubtedly influenced the composition of the panels, as administering authorities have been placed under considerable pressure to fulfill their statutory obligations as cheaply as possible". (BASW 1986, p.12)

The report speaks of the breakdown of reciprocal arrangements, originally popular in the North and Midlands because of their apparent cheapness. One reason was the difficulty of achieving parity of work load from one area to another, with different child care policies and rates of reception into care. Another was the strain put on area teams, left for periods of time by their more senior staff without any effective cover, and resentment from the staff themselves who were taking on this burden without any additional reward. There was also concern that scarce resources were being diverted away from work with children and families to subsidise the panels (BASW 1986, p.12).

By mid-1986, my own authority, Durham, which still had a reciprocal arrangement with Cleveland, was experiencing difficulties in balancing the demand. Although the panel, composed of Durham social workers, was quite large (about thirty), restrictions placed on them by management, coupled with Cleveland's more court-oriented child care policies, had led to an ever increasing waiting list in Cleveland. To address this difficulty, three panel members, of whom I was one, from different area teams, were seconded to full-time guardian ad litem duties, initially for one year, and three additional "peripatetic" posts were created to provide cover in our absence. It was part of the reciprocal arrangement that if there was a greater demand on one side than the other, the additional expense would be met by the authority making greater use of the service, so these posts were indirectly paid for by Cleveland.

The BASW survey provided the fullest information to date on the composition of panels and clearly illustrated the lack of an overall plan, inasmuch as there appeared to be little relationship between panel size, the population served, and actual/potential workload (BASW 1986, p.16). While it could be argued that it had been difficult to forecast the demand at first because of the discretionary nature of the provisions, it could be hoped that by this time a pattern of use of guardians in particular court areas

could be discerned. The information suggested that there were approximately 3,500 panel members in total, but that only 1,206 were acting in care and related proceedings, 1,415 were acting in adoption only, and 179 were unspecific as to what they were doing. Of the sixty panels that replied, just over half (31) were "hybrid", 15 were "reciprocal" (these were mainly in the North), and 14 were "solo".

The BASW project group made reference to the original circular (DHSS 1983), which had advised on the need to have balanced membership of panels (the "range of skills" referred to in the ADSS report), that is, social workers drawn from local authorities, probation officers, voluntary child care agencies and fee-attracting members. The BASW group advocated this mix as being the one that offered the greatest choice to the courts and, therefore, the best service to safeguard the individual child (BASW 1986, p.24). It was noted that many panel members had not been interviewed or adequately briefed about what the job would entail, and the group felt that prospective panel members should be formally interviewed, notified of the outcome and, if appointed, sent an official letter stating the terms of their membership.

The BASW study states that "training cannot turn a person into a Guardian ad litem or Reporting Officer" (BASW 1986, p.41), implying that relevant experience was



a pre-requisite for the job, and has more to say about the knowledge and skills necessary to carry out the role of guardian ad litem (which will be discussed in Chapter 7) than about the responsibilities of administering authorities to provide training. It recognised the isolation of panel members, and noted that support groups were beginning to form. It was recommended that in addition to these, members should have access to independent legal advice and to independent professional consultants.

The single most worrying issue for panel members was delay. There are many causes of delay in court procedure, but those directly relating to guardians were delay in being appointed in the first place (some courts by now had waiting lists) and delay caused by the time taken to prepare the report. Except where delay was being used constructively for the benefit of the child, for example, by undertaking a proper assessment or by trying out some new course of action, a delay that caused the case to be decided on the passage of time rather than the facts would be both unjust and psychologically damaging. This problem of delay was also identified by Murch in a working paper The length of care proceedings (Murch and Mills 1987), which he describes as a "spin off" from his wider investigation of children's representation in civil proceedings. He found that delay in the appointment of a guardian, which could be as much as five months, was generally

associated with those areas (the North East was chosen specifically as part of the study) which still had reciprocal arrangements.

The findings of the BASW group relating to diversity in levels of pay to fee-attracting members, in court practice in the making of orders both for separate representation and the appointment of guardians, in the degree of involvement by the courts, echoed the findings of both Murch and the ADSS. In common with the ADSS study, the BASW group advocated that the training, appointment and removal of panel members should be dealt with by an advisory group, that the panel administrator should not have conflicting child care responsibilities within the administering authority, and that the guardian ad litem functions of the local authority should be reflected in the provision of identity cards, separate storage of documents, appropriately headed notepaper, etc. It recognised the difficulties of the administering authority in monitoring the work and controlling "quality", but rather than have the advisory group take on this task as well, favoured accreditation via:

"the establishment of an approved social worker (child care) and the provision of the specialist training necessary. This is in recognition of the fact that a social work qualification is a necessary but not sufficient qualification for the panel member's task." (BASW 1986, p.58)

Its core recommendation, however, was: "the establishment of an independent administrative structure

for panels". Possible models were: the independent prosecution service; the children's regional planning committees; independently funded regional specialist units, dealing with panel work; contracting out to reputable voluntary agencies; divorce court welfare (suitably amended in title and brief); but preferably:

"The establishment of independent, separately funded regional specialist units which could hopefully be developed alongside family courts if and when they are established." (BASW 1986)

### **The Research Project of George Coyle**

In March 1987, George Coyle, an independent social worker and guardian ad litem, published his research project under the auspices of Barnardo's Research and Development Section. The concerns highlighted in Murch's study relating to the diversity of local practice and the ambiguity of the guardian ad litem role led Coyle to design his own research project to examine the role, tasks and practice of guardians ad litem/reporting officers. The data was to be collected using a computerised questionnaire from guardians all over the country. The response rate was only 32%, which is low, but was explained by the author on the grounds that the questionnaire had been exceptionally long! He had also interviewed individuals from interested and related agencies, such as BASW, BAAF, the Children's Legal Centre and IRCHIN. While most of the study is

concentrated upon the professional aspects of the role, it makes some suggestions for an alternative panel structure.

Published only nine months after the BASW survey, it is not surprising that the picture had changed little, with most panels (75%) of the "hybrid" variety, now containing a mixture of local authority social workers, probation officers, voluntary agency staff and self-employed people. The majority had been practising as qualified social workers for at least six years, with 16% having at least 16 years' experience. Fifty-four per cent of the sample were employed full-time in either a statutory or voluntary agency, 14% part-time, and of which a quarter combined guardian ad litem duties with other commitments. Twenty-nine per cent were self employed (Coyle 1987, p.16).

The study revealed that some of the recommendations of the previous studies were beginning to be put into effect, such as the establishment of complaint and dismissal procedures, though these were not widespread (fewer than half the respondents said they had one) (Coyle 1987, p.20), and there was some vagueness about who had actually set it up (ibid, p.21). Only the second group, the interested agencies, responded to the question on monitoring; they all agreed it was desirable but difficult to achieve. One suggestion, somewhat overworked by this time, was that:

"an advisory group or committee could be set up to try to encourage and monitor feed-back from courts, clients and other agencies" (ibid, p.57)

and indeed this group could address all aspects of the panel and the guardian ad litem's work.

Both the individual guardians and the interested agencies felt that the major constraints that influenced the effectiveness of the guardian ad litem/reporting officer system were the lack of resources and of an independent administrative base. Coyle's recommendation was the establishment of a national and/or regional system of guardian/reporting officer units, funded by and accountable to the Lord Chancellor's Department, overseen, monitored and supported by Standing Advisory Committees. Coyle envisaged that these units would cover several social services departments and courts, accommodating upwards of 40-150 contract guardians/reporting officers of various kinds, including some on secondment for limited periods from social services departments and voluntary agencies. The standing advisory committee would be responsible, along with the unit director, for selection, complaints, discipline, dismissal, etc. They would also have a training and research role and could develop a specialist social work consultancy service to social services departments, etc. Apart from a core group of senior/consultant guardians, all appointments were to be for three years only. He does not say whether these would be physical or representational units; the scheme implies quite a

hierarchical bureaucracy and considerable government expenditure.

By 1987, what had begun as a rudimentary scheme for providing courts with guardians should they choose to appoint one, had developed considerably. Perhaps the most important point to emerge was that, despite the fact that the involvement of a guardian might make the proceedings much longer, on the whole, courts appeared to like them, enough, at any rate, to make considerable impact on the available supply in some parts of the country. The conflicting demands of guardian and mainstream work had led very quickly to a decline in reciprocal arrangements, an increased use of non-agency or free-lance guardians and a trend towards hybrid or solo panels. Now that they had to manage this new service themselves, rather than being able to leave much of the task to their reciprocating colleagues, the administering authorities were faced with a novel management problem; how could they ensure an efficient system, using people of the right professional calibre, who were supposed to be "independent" of them at the same time?

The need for an independent structure began to be recognised, not only by guardians, but by the local authorities as well. Not only did the present scheme place them in an impossible position ethically, but the provision of a guardian ad litem service, which had been

impossible to provide at "zero cost", had to compete for resources with all their other responsibilities as well. The problem was that, although it was very easy to identify the guiding principles, such as in the BASW report's core recommendation, it was very difficult in practice to identify a more appropriate agency to take it on. With some form of family court system in prospect at that stage, it was also important to consider ways of integrating the guardian ad litem service with the court welfare service and, indeed, the Official Solicitor's Department. This department is not mentioned in the reports, perhaps because of its separate historical evolution, perhaps because of doubts about the professional qualifications of its members. That it might have some part to play, however, was recognised by White and Lowe, who write:

"It seems difficult to avoid the conclusion that ideally a body having both legal and social work skills, combining the independence of the Official Solicitor and the Court Welfare Service, should exist for the representation of children in all courts and throughout the country. This department should provide a consistent standard of representation for children in the courts, with support and supervision for individual guardians, quite different from the isolation of the panel guardians in the national network. Regional offices of the Official Solicitor, working closely with the court welfare service, perhaps expanded by those on the panels of guardians, might provide an appropriate structure." (White and Lowe 1986, p.216)

The authors admit the practical difficulties of such a proposal, however, since responsibility is divided

between the Lord Chancellor's Department, the Home Office and the DHSS.

New government guidelines for panel administrators

Although the government was unwilling to consider any radical alternatives to the existing arrangements, it did address some aspects of the management conundrum in a guide for panel administrators, Panel Administration : a Guide to the Administration of Panels of Guardians ad litem and Reporting Officers, which was published in July 1988 (DHSS 1988). The aim of the Guide, which was not mandatory, was to give advice on panel management, to encourage good practice and to complement the existing guidance in circulars LAC (83)21 (DHSS 1983) and LAC (86)2 (DHSS 1986). In particular, the potential for guardians being compromised by their links with the local authority was recognised:

"There is considerable concern among panel coordinators and guardians ad litem and reporting officers to ensure that their independence is not prejudiced by their links with the administering authorities, which, wearing another hat, are parties to the large majority of cases reported on." (DHSS 1988, para 1.7)

The Guide acknowledged that there were conflicting principles inherent in providing a service to the child and court as one independent of the local authority, when the local authority was responsible for managing that service itself. To a large extent, the authority would need to rely on the integrity of the panel coordinator and of panel members (ibid, para 1.12), but other safeguards were necessary. Three major



suggestions were made: first, the guide acknowledges the ambiguous position of the panel administrator (called "co-ordinator" in the guide), who needs to take particular care to carry out his or her functions independently of the child care activities of the social services department, and to express views that can on occasion differ from the policy of the social services department and the legal department in particular matters (DHSS 1988, para 2.7). It is not part of his/her role to allocate a guardian to a case, and procedure for making the availability of guardians known to the court should recognise this; it is for the court to decide which person should serve in that capacity (DHSS 1988, para 4.1).

Secondly, because it would clearly place the panel co-ordinator in an invidious position were s/he to be consulted by guardians about individual cases, the guide suggested that the administering authority should appoint a social work consultant or a senior guardian ad litem for this purpose, as well as to provide professional advice to the panel co-ordinator (DHSS 1988, (para 2.11). In this event, the guardian would become an employee of the administering authority when taking on these duties, and would therefore be precluded from taking on guardian ad litem cases in that authority. It is hard to see, then, how such an arrangement would work outside a consortium or an arrangement with a voluntary agency.

Thirdly, adopting the suggestion originally put forward in the ADSS report, the local authority should consider setting up an advisory group, involving senior representatives of the local authority and "others", but especially representatives of the courts, whose vested interest in the service the guide is anxious to reinforce. Its primary function would be to provide a link between administering authorities, the courts, and others, and to give advice and guidance about selection, re-appointment, complaints and training, with individual members participating in such activities as selection and review of performance (DHSS 1988, paras 2.14, 2.15).

Although the guide did aim to enhance the independence of panel members by making suggestions that would distance the management of the panel from the administering authority, its other major concern was with improving and monitoring the service, the administering authorities themselves being in the somewhat difficult position of having statutory responsibility for a service over which they could have no direct control. The guide suggested that, when appointed, guardians should already have considerable experience in child care and social work and that induction training should focus upon the particular knowledge and skills required by guardians, such as legal matters, investigative work and the representation of the child's interests. It also recognised the need

for ongoing or refresher training, and encouraged the formation of support groups. As part of a process to monitor the service, the guide suggested that the administering authorities should undertake periodic reviews of panel members' work, though it was important that the review process should be "independent, fair and clearly understood" (DHSS 1988, para 5.8). Likewise, there should be clear procedures to deal with complaints about panel members and their removal from the panel that would allow for a fair hearing following the rules of natural justice (DHSS 1988, para 29).

Because the guide was only advisory, many local authorities did not set up advisory groups at all. Where such groups were established, their first tasks were to devise disciplinary procedures and schemes for reviewing guardians' work, usually linked with the question of re-appointment to the panel. From the point of view of guardians the groups are only advisory, rather than holding any executive powers, so that in practice there is scope for the administering authority to insist upon procedures, especially in disciplinary matters, which pay too little regard to the independent element and, in review of performance, to devise procedures where reassurance from the administering authority appears to take precedence over constructive criticism for the guardian. If advisory groups are in place to "advise the panel", does this include guardians, who may be in dispute with the local

authority, in which case advisory group members may themselves experience a conflict of interest?

### Conclusion

In summary, the research cited in this chapter showed a trend from reciprocating to hybrid and solo panels, making the management issue much more crucial; how could local authority control be reconciled with independence? How could independence be reconciled with accountability and quality safeguards? While the government remained opposed to an independent panel structure, the guide for panel managers made some effort to address these problems.

The research also showed widely divergent rates of appointment of guardians ad litem by the courts, so that in some parts of the country children were unlikely to experience the involvement of this new "safeguarding" person at all. In other parts of the country, a new difficulty was beginning to emerge; the imbalance of supply and demand, which was leading to waiting lists for guardians and, in consequence, long delays in court proceedings. Although given somewhat less publicity than other parts of the "Cleveland crisis", this was a problem which received some attention during the Inquiry and in the subsequent Report.

The Report of the Inquiry into Child Abuse in Cleveland 1987 (Secretary of State 1988) was published only a month after the DHSS guide for panel

administrators. The importance of the Inquiry in providing the impetus for changes in child care law, with implementation, not at some vague future date, but as quickly as Parliament and the relevant government departments would allow, cannot be over-estimated. Because it signalled imminent changes in the law, opportunities were provided for a new appraisal both of the role of guardians ad litem and of the administrative structure within which they operate. This will be the subject of the next chapter.

## CHAPTER 7

### THE DEVELOPMENT OF A GUARDIAN AD LITEM SERVICE

#### PART 2 - 1987/8 TO 1991

##### Introduction

This chapter will examine the developments in the guardian ad litem system from 1987 until the passing of the Children Act 1989. It starts with the child abuse crisis in Cleveland and the Report of the subsequent Inquiry, so far as they are relevant to guardians ad litem. The Inquiry recommended the setting up of an Office of Child Protection, one of whose functions would be to administer the guardian ad litem panels. The proposals for the establishment of this new bureaucracy were published by the Lord Chancellor's Department as a consultation paper but met with such wide resistance that they were abandoned.

The Cleveland affair, however, was a catalyst in putting into action a major reform of child care law, and in the autumn of 1988 a Children Bill began its progression through parliament. This gave guardians and other interested agencies the opportunity to lobby for changes in the system, in particular the removal of the panels from local authority control. The government, however, favoured retention of the status quo, at least for the time being, as it argued that the guardian ad litem service could not be seen in isolation from other court welfare services. The Representation of the Child in Civil Proceedings, a research project by Murch, Hunt

and Macleod (Murch et al 1990) suggests a possible amalgamation of the guardian ad litem service and the civil work of the Probation Service, outside local authority control, at some stage in the future.

In the meantime, the Children Act leaves the responsibility with local authorities; and the Report of the SSI's Inspection of Panels (SSI 1990) makes recommendations for the organisation of the service in the shorter term, arguing that the way to enhance its credibility lies through better "management".

#### The "Cleveland Crisis"

Over the months of May and June 1987, in the County of Cleveland, there was an unprecedented rise in the diagnosis of possible child sexual abuse, principally around Middlesbrough General Hospital, where Dr. Marietta Higgs was the newly appointed Consultant Paediatrician. In accordance with Cleveland's child abuse procedures current at that time, most of these children were removed from home on "Place of Safety" orders and, in most cases, on expiry of the order, care proceedings were started in the juvenile court by way of an application for an interim care order. Such an application would normally have signalled the appointment of a guardian ad litem, but the extraordinary number of applications, for example, forty-five on a single day in June (Secretary of State 1988, p.20, para 52) would have stretched any system and

the system in Cleveland was already under strain. In the interests of fairness, the waiting list was tackled chronologically, and because Cleveland County Council decided to restart most of the "crisis" cases in the High Court in wardship, where the children were rarely made parties to the proceedings, most of the children in the crisis did not have either a panel guardian or the Official Solicitor to represent them. There were, however, exceptions: some guardians, appointed in the juvenile court, went on to act for children in the High Court; and the local District Registrar sometimes made children parties to the proceedings and appointed panel guardians (rather than the Official Solicitor) because it seemed an obvious and practical course of action. The appointment of panel guardians in the High Court proved quite controversial, and raised some practical problems, which will be discussed in the next chapter.

#### The Cleveland Inquiry

On 9th July 1987, the Secretary of State for Social Services ordered that a statutory inquiry should be established to look at the arrangements for dealing with cases of suspected child abuse in Cleveland from 1st January 1987. The Cleveland Inquiry was not concerned with how many children had actually been abused, which was left to the courts to decide, but with the practices of the individual agencies involved, principally the Health Authority, the Police, the Social Services Department and the Courts. Its first recommendation was



that there is a need to recognise and describe the problem of child sexual abuse (Secretary of State 1988, p.245). Its conclusions stressed the importance of inter-agency co-operation (ibid, p.248), and made specific recommendations for police and medical practice (ibid, p.247). With regard to social services departments, there needed to be efficient systems for monitoring the service, and supporting staff engaged in the field of child sexual abuse (ibid, p.247).

The Report also emphasised the importance of treating parents with courtesy (ibid, p.246), and of recognising children as people, not "objects of concern". Of particular relevance to guardians was the need for children to have court proceedings explained and their wishes and views presented to the court (ibid, p.245).

Also of particular relevance to guardians was the way in which courts and legal services, including the guardian ad litem service, came under scrutiny. The particular experiences of Cleveland, given in evidence to the Inquiry, raised yet again the now familiar themes of the availability of guardians and the independence of the system.

In the summer of 1987, when the actual "crisis" occurred, the system of panel administration that prevailed was a reciprocal arrangement between Cleveland and Durham, which had been in existence since 1984.

Because Cleveland had a much larger population, Durham was unable to meet the demand, despite the secondment in 1986 of three panel members to work full-time and the beginnings of a move to recruit some free-lance guardians as well. An additional factor, that was not referred to by the Inquiry, was that Cleveland tended to adopt a more court-centred approach to child care work (to operate the more vigorous child care policy referred to by Murch) which, if anything, had been intensified following Blom Cooper's Report concerning the death of Jasmine Beckford (London Borough of Brent 1985). By 1986 there was already a backlog of children awaiting the appointment of a guardian ad litem. Early in 1987 there were sixty children waiting; by June the delay between making an order for separate representation and the nomination of a guardian was two to three months; and by July, the waiting list had grown to 82 (Secretary of State 1988, para 10.34). Once a guardian had been appointed, it was reported by the clerk that the case might take a further six months to reach a conclusion, partly, it seems, because guardians were unable to begin their enquiries at once (ibid, para 10.44) or because of restrictions by management on the number of enquiries their staff could undertake (Murch and Mills 1987, p.31).

The Cleveland panel administrator also held the post of Child Care Adviser to the Cleveland County Council. In his evidence to the Inquiry, he indicated that the administration of the panel presented

difficulties of a conflict of loyalties; he could not advise the guardian, as he might also have advised the local authority about the same case. The actual day to day running of the panel and nomination of guardians was delegated to an administrative officer in the department, though the panel administrator did have, if he chose to use it, influence over the appointment of guardians; he could recall on one occasion appointing as guardian someone recommended by a case conference.

The Inquiry received evidence from Cleveland guardians and others:

"and they spoke with one voice in expressing their dissatisfaction with the existing arrangements for managing the panel and the impression of lack of independence from the Social Services Department which in almost every case was the applicant for a care order in the case where the GAL is representing the child" (Secretary of State 1988, para 10.45)

The difficulties in achieving both real and perceived independence were acknowledged, especially the fundamental contradiction whereby guardians ad litem were appointed, administered and paid by the local authority, thus making the system very hard for parents to accept. As one guardian put it, parents "regarded the GAL as another arm of the SSD". Regrettably, it seems that the local authority sometimes took the same view, nominating specific guardians at case conferences (Secretary of State 1988, p.179, para 10.48).

The Inquiry Report also included a sub-chapter entitled "The Official Solicitor".

"In looking at the position of the guardian ad litem that of the Official Solicitor is of great importance" (Secretary of State 1988, p.237, para 16.74)

Quoting Mrs. Justice Heilbron (reported in re J.D. (1984):

"As to the position of the Official Solicitor, one finds that the implication of almost every reported case and Practice Direction is that the Official Solicitor is the preferred guardian ad litem and the first one to be considered....It is beyond doubt that the position of the Official Solicitor is unique. Historically, he has been closely involved with wards of court. He provides the expertise and authority of his office and his department and he is accepted as the person who will form an objective and independent assessment of the ward's interests. As the child's representative in a case where a fresh, unbiassed view is required, he can provide invaluable assistance to the court." (Secretary of State 1988, citing FLR 359, pp.360-361)

It was also considered by Heilbron J. that it was of advantage to the ward to be able to have the continuing assistance of the Official Solicitor, for example, in the oversight of possible orders, after the case was over, "in marked contrast to the guardian from the panel" (Secretary of State 1988, p.237, para 16.74).

Any comparison in the report between panel guardians ad litem and the Official Solicitor tended to be implicit rather than explicit, though the Official Solicitor seemed to be regarded rather more favourably. It was certainly an explicit recommendation that the Official Solicitor should continue act as guardian ad litem in wardship.

With regard to any other suggestions for improving the system, the Inquiry panel felt that guardians should be appointed directly by the court. Its main suggestions regarding future panel administration were contained in an idea put forward for consideration at the very end of the report. The suggestion was the creation of an Office of Child Protection. Because the Inquiry believed that a fundamental part of the problem in Cleveland had been the initiation of court proceedings without due consideration, the main function of an Office of Child Protection would be:

"to provide an independent assessment as to whether the proposed proceedings are well-founded [which] would provide an impartial check and balance on ensuring the grounds for proceedings are properly established." (Secretary of State 1988, p.240)

From the point of view of parents, this intervening step would provide them with greater protection as well. Its second main function would be to act as administrator of the guardian ad litem panel:

"to relieve the local authority of a duty and create the independence sought by guardians." (ibid, p.240, para 16.91)

#### The Office of Child Protection

The idea of an Office of Child Protection was very quickly taken up by the Lord Chancellor's Department, which published in the same month a consultation document, Improvements in the Arrangements for Care Proceedings (Lord Chancellor's Office 1988). In addition to a need for independent scrutiny of the local authority's case, the Inquiry had also noted that the

only alternative to care proceedings was wardship, and suggested that:

"the setting up of a Family Court (or, more accurately, a Family Court system) with the ability to move cases from one tier of court to another in a flexible way would significantly assist in the distribution of the individual case to the court best fitted to deal with it." (Secretary of State 1988, para 16.66)

Comments were, therefore, sought on the ways that present arrangements could be improved, so as to achieve a more appropriate match of cases to court, the avoidance of delay, the independent scrutiny of care cases, and better management of "the arrangements for protecting the child's interests".

In putting forward the establishment of an Office of Child Protection as a possible way of addressing some of these issues, the Lord Chancellor saw its functions as being two-fold: the management of the allocation and control of cases; and the management of "arrangements for the protection of the child's interests" (i.e. the guardian ad litem panels).

With regard to the former, the Office would scrutinise the local authority's application; recommend who should be parties to the proceedings; commission additional reports; resolve problems of access to information and arrange distribution of statements; advise on the appropriate level of court; establish a timetable; co-ordinate transfer of cases. It would work with all the courts with jurisdiction, both the

magistrates' courts, which are administered by the Home Office, and the higher courts, which are administered by the Lord Chancellor's Department.

With regard to the latter, the paper acknowledged that: .

"there is a need to demonstrate the independence of panels of guardians ad litem from the local authority bringing care proceedings"  
(Lord Chancellor's Office 1988, para 10)

It went on to say:

"There is also room for better links between guardians and the courts and for improved arrangements for their professional management and training. In reporting on individual cases, guardians are answerable neither to their employing authority nor to the authority bringing the proceedings; nor do magistrates' courts in practice exercise very much guidance over their activities."

The model put forward in the paper for managing the panels owed much to the Official Solicitor's Department. The Office would appoint the guardian ad litem. Instead of working in partnership with a solicitor, the guardian would obtain legal assistance from the Office. The Office (not the guardian) would report to the court on the issues and evidence, and recommend as to the disposal of the case. The Office, through the guardian ad litem, also saw itself as having a kind of conciliation role "to eliminate unnecessary disputes and court hearings through clarification or resolution of issues".

One important part of the proposal, which received little attention at the time, was that this new bureaucracy would hold information about the state of

court lists and the availability of judges and magistrates.

It was envisaged that the line of accountability would be to the Lord Chancellor and open to parliamentary scrutiny, operating regionally under the central direction of a family lawyer of standing. From a functional point of view, it was suggested that this new organisation might stand in the same relation to the courts as the Official Solicitor's office does at present.

These proposals were met with little enthusiasm, it being argued that structures already existed for carrying out the functions the office sought to perform, for example: the justices' clerks would be able to allocate cases to courts; local authority solicitors would be able to vet the local authority's case, as, indeed, would the guardian, if appointed. Guardians were concerned that the child would lose his/her right to automatic party status and that the solicitor/guardian partnership would disappear.

That the government jettisoned, or at any rate set aside these proposals, appears to have had more to do with its unpopular reception than with reluctance to spend public money. Some of the tasks that the Office sought to perform were to be allocated eventually to the guardian ad litem when the role was re-drafted under the Children Act 1989. No answer has as yet been found as to



the best way to provide an independent guardian ad litem service, and the urgent need for information systems required by the new system of concurrent jurisdiction (i.e. the availability of court dates, judges, etc) is only now beginning to emerge as a significant problem. These two aspects of the situation, together with the need to rationalise other court welfare services, including the Official Solicitor's Department, remains a live issue and has been addressed by Murch and Hooper in The Family Justice System and its Support Services, (Hooper and Murch 1990).

#### A reform of child care law

The Cleveland affair highlighted the need for legislative reform to be implemented as a matter of urgency (Secretary of State 1988, p.252).

The groundwork for reforming both "private" and "public" law with respect to children had already been done. In March 1984, the report of the House of Commons Social Services Committee on Children in Care (Social Services Committee 1984) had noted the plethora of often contradictory and unrelated laws relating to children, and had established a Working Party to undertake a thorough review of the body of statute law, regulations and judicial decisions, to produce a coherent and simplified body of law comprehensible to both practitioners and families. The Review of Child Care Law (DHSS 1985), provided the basis for a subsequent

White Paper, The Law on Child Care and Family Services  
(Cm 62) (DHSS 1987).

Its main suggestions for the improvement of the law and procedure in care cases were: the introduction of broad forward-looking grounds for making care orders, to replace the specific grounds in the CYP Act 1969; new emergency protection orders to replace Place of Safety orders; guardians ad litem to be appointed in all cases, except where it appeared unnecessary to do so; parents, as well as the child, to have full party status and greater rights of participation for other interested people; greater openness through advance disclosures; a wider range of remedies, to include custody orders in care proceedings; and a right of appeal to the High Court.

The Cleveland Inquiry Report recommended the urgent implementation of the proposals in the White Paper, and by the autumn of that year, a new Children Bill was beginning its progress through parliament. Considering that there had been two major child abuse inquiries in the period since an overhaul of child care law had first been mooted (Jasmine Beckford and Kimberley Carlisle), it is hard to resist the observation that the government found the prospect of children being forcibly removed from "innocent" parents altogether more compelling.

#### The Children Bill

The Children Bill began its passage through Parliament in the House of Lords. Clause 36 related to

guardians ad litem in care proceedings. Following the recommendations of the White Paper, the court would be under a duty to appoint a guardian unless satisfied that it was unnecessary; the Bill went on to specify the relevant proceedings in which such an appointment would be made. It also set out the circumstances in which a solicitor would be appointed for the child, somewhat ambiguously, leaving room for the interpretation that the child might be represented by a guardian or a solicitor but not necessarily both. Since nowhere did the Bill make specific mention of the child as an automatic party, this part of the Bill began to intensify doubts, already raised by the Lord Chancellor's consultation document, about the child's right to legal representation.

With regard to the administration of the panels (Clause 36 for care proceedings; Clause 74 for adoption), the Bill (Children Bill 1988) stated that this would be determined by regulations, which might, in particular, make provision for two or more specified local authorities to make arrangements for the joint management of a panel; for the defrayment by local authorities of expenses incurred by panel members, and for their fees and allowances. This appeared to leave responsibility for the panels unequivocally in the hands of the local authorities.

Much of the briefing of members of both the Lords and the Commons was undertaken by The British

Association of Social Workers (BASW) and supported by Independent Representation for Children in Need (IRCHIN), the National Children's Bureau, The Children's Society, the Children's Legal Centre, The Family Rights Group, the Law Society, and British Agencies for Adoption and Fostering (BAAF). Lobbying was focused upon three major concerns: the importance of the representation of the child by both a guardian and a solicitor; the establishment of guardians as independent of the local authorities; and the need to keep accurate statistics, in order to avoid not only an insufficiency of guardians to meet the demand, but also to find out whether the provision of this service was more evenly spread than the current statistics suggested (BASW's briefing paper cited an appointment rate of 100% in some areas, and 1% in others).

On the matter of representation, the Lord Chancellor, speaking to the House of Lords, made it clear that he wished to leave the matter as drafted, to allow a flexible response to a variety of circumstances. However, he gave the assurance that the child would continue to be a party to the proceedings and that the Bill already made sufficient provision to safeguard this (Hansard 19.1.89, column 411).

Lord Mishcon, supported by Lord Campbell of Alloway, raised the matter of the independence of guardians and of panels, and moved an amendment (which

was defeated) that would have established the setting up of a nationally-administered court welfare service (Hansard 19.1.89, column 413). The same issue was raised in the Commons by Mr. Rowe, MP for Mid-Kent. Both the Lord Chancellor in the Lords and Mr. David Mellor in the Commons gave essentially the same response: that, rather than throwing over the existing machinery precipitately, it was intended that the matter should be approached in ordered stages, to include the Probation Service and the Official Solicitor. Meanwhile, the issue of independence would be safeguarded to some extent if groups of local authorities (consortia), where conflicts of interest had been less apparent, were to take on the administration of panels (Hansard 19.1.89, column 419; House of Commons Official Report, 23.5.89, column 256).

The problem of supply and demand, linked specifically to the problem of delays in the appointment of a guardian ad litem, was raised in the House of Commons by Mrs. Elizabeth Peacock, MP for Batley and Spens in West Yorkshire, where there was a waiting list for guardians. This opened the way for some lively debate about what guardians actually were, how their task differed from that of a solicitor, and whether consideration should be given to extending the range of people from whom guardians might be drawn; a debate that seemed to reflect, not only a pragmatic response to the problem of supply and demand, but also revealed some

scepticism about social workers and their "ideology", as opposed to lay people with "life experience" or people from other professions. This debate, which relates more to the role of the guardian ad litem than to administrative matters, together with the government's response, will be discussed in the next chapter.

Despite attempts to introduce amendments in both the Lords and the Commons which would have removed local authority responsibility for the panels, the relevant part of the Act, when it appeared, remained essentially unaltered. An explanation for government thinking on the subject can perhaps be found in Mr. David Mellor's remarks to Standing Committee B, when he said:

"It is important to distinguish between the professional independence of the guardian ad litem and the organisational independence of the service. For the guardian to be professionally independent, I am not sure that it is necessary for him to be organisationally independent of the local authority system, but I believe our new system will encourage professionally objective judgements." (House of Commons Official Report 23.5.89)

The reason why this was the "only practical step we can take at this stage" was hinted at when Mr. Mellor reminded the Committee that the whole issue was being examined by the Lord Chancellor as part of the programme of reforms extending to all matters of family law and business, to include a review of the welfare functions, including guardians ad litem. The management of panels should not be considered in isolation from the

administration and role of other court welfare services (House of Commons Official Report, 23.5.89, column 272).

The specific requirements of local authorities in providing a guardian ad litem service would be left to regulations, as would the necessary qualifications for panel membership. The Court Rules would deal with party status and rights to representation. David Mellor's remarks to the Committee indicated that both the short and the longer term arrangements for the provision of a guardian ad litem service were being considered.

From late 1987, the SSI had been inspecting a number of panels; its report (SSI 1990), published in May of that year, can be assumed to apply to the shorter term, as it assumes the continuation of local authority involvement. From early 1985 onwards, and referred to at the beginning of the last chapter, Murch had followed up his four month examination of the initial phase of the guardian ad litem service with a comparative study of representation in disputed custody and access hearings. The summary and conclusions of this part of the project, entitled The Representation of the Child in Civil Proceedings, Research Project 1985-89 (Murch et al 1990), was published in January 1990. Some issues are common to both papers, for example, the problem of supply and demand, but the suggestions in each report for future panel structure differ quite radically. Both papers were published in the period between the passing

of the Act in November 1989 and its implementation in October 1991. Each will be considered in turn.

Social Services Inspectorate - Inspection of selected panels and subsequent report: "In the Interests of Children" (May 1990)

During the latter part of 1987, before the publication of the Cleveland Report and its proposals for an Office of Child Protection, the Social Services Inspectorate decided that an inspection of panels should be carried out to see how this new service had developed and to contribute to policy debates. In its report, it acknowledged that although the proposal for the Office of Child Protection had not been carried forward, "the need for change in the organisation of the service was recognised", and that new regulations under the Children Act 1989 allowed the possibility of organisational change. The focus, therefore, in examining existing organisational and management arrangements would be lessened, in order to learn more about supply, demand and workload.

"The revised objectives prescribed an exercise which would inform discussions about the organisational model to be adopted following the enactment of the Children Act 1989". (SSI, 1990, para 2.4)

Four panels out of the existing total of sixty-one were chosen for detailed inspection. (There were sixty-one rather than the seventy identified in the BASW survey (BASW 1986) because Wales was not included.) The other fifty-seven panels were sent a brief postal questionnaire, seeking information on size and



composition of panel membership, the number of appointments requested during the survey year, and the average time taken to complete cases. The response rate was 93%.

The inspection showed that nationally forty-seven of the sixty-one panels were run by single local authorities. Fourteen panels were consortia of local authorities. Except in London, where one panel covered twenty-three boroughs, and another covered four boroughs, all consortia consisted of two or three authorities. Only two Shire counties were members of consortia, and in each case they were twinned with a neighbouring metropolitan district. Information gathered for the 1988 regional meetings for panel co-ordinators confirmed the trend already identified in the BASW and ADSS reports away from the reciprocal arrangements with neighbouring authorities that the DHSS had originally assumed would make a major contribution to the service. The reasons, as the earlier reports had already suggested, were in managing the conflicting priorities of panel and other child care work, and the inequality of demands made by different panels often leading to complex cross-charging arrangements. Where joint arrangements between panels still existed, they had become more centrally organised consortium arrangements (SSI 1990, para 4.1). The report mentioned that a single authority panel relying on a small group

of fee-attracting guardians (Murch's "solo" panel) was one viable option, but did not refer to the "hybrid" model.

The four panels selected for detailed inspection represented different organisational models and included the range of agency and non-agency guardians/reporting officers in their membership. Panel A was a single authority panel in a north-western rural shire county. Panel B was similar and located in the south-west. They were similar to each other, both having originally set out with reciprocal arrangements. Most work was carried out by a small number of fee-attracting guardians. A middle or senior manager took responsibility for the general working of the panels as part of much wider management duties for their social services departments, but with limited involvement in order to preserve the independence of the guardian ad litem. Panel members were appointed directly by the courts. In both panels, the provision of financial resources to enable the panel members to operate was considered important; Panel A had a recently-identified consultant to provide training and support.

Panels C and D were both consortia, which demonstrated different, and in one case complex, patterns of organisation. One consortium (D) was a loose federation of three social services departments, in which most of the work was completed by the social workers of the three departments acting reciprocally. In

allocating cases, courts contacted a senior administrative assistant, who passed them on for allocation to a manager in one of the constituent social services departments. The other consortium (C) had a central, staffed panel (this presumably means full-time guardians/reporting officers) for the three social services departments' care and related cases, and three separate panels dealing with adoption cases. The central panel had a full-time senior guardian ad litem employed by one of the authorities, and responsible for the day-to-day operation. Courts made requests for appointments to identified co-ordinators (SSI 1990, chapter 4).

Six kinds of guardian/reporting officer were identified: social services department employees engaged only for panel duties; social services department employees undertaking guardian ad litem/reporting officer duties as well as other social work duties; voluntary agency employees engaged only for panel duties; voluntary agency employees doing guardian/reporting officer work as part of their other duties; probation officers doing guardian/reporting officer work (adoption only) as part of their employed duties; fee-attracting (including probation officers and social services department employees acting in their own time as individuals).

The survey indicated that there were about 2,550

guardians ad litem/reporting officers altogether. Over a thousand of these were social services department employees who carried out panel duties in addition to their mainstream social work duties, which was consistent with expectations at the setting up of the panels in 1984. The number of fee-attracting guardians, however (about 700) had not been anticipated. The contribution of the voluntary agencies (less than 100 altogether) was surprisingly small (SSI 1990, para 10.2).

The type of panel membership did not, however, reflect the contribution made to the actual work. Some panels had a large membership with most doing a little work. Others had very few members who completed most of the cases.

"Analysis of the hours worked by different types of panel member in the four selected panels showed both the concentration of work of free-lance and specialist panel members in three panels and the limited contribution of others - e.g. in one panel 46% of the members contributed less than 2% of the hours worked. Probation officers also contributed less than 2% of the hours worked" (ibid, para 1.5)

Approximately 2,550 panel members had been available to complete the estimated 300,000 hours worked during the survey year.

"Without allowing for the unevenness of demand and the need for flexibility in responding, this amounted to the equivalent of only 180 full time panel members." (ibid, para 1.5).

There was, therefore: "a diffuse work force which was very large in relation to the work undertaken". It was inefficient because it made the task of managing it

unnecessarily complex, and those who made little contribution were also limiting their opportunities to build up their expertise. It was also wasteful to prepare and train them. The SSI, therefore, advocated "a smaller, more dedicated workforce" that would provide a better basis for a skilled and managed service. Current practitioners in mainstream social work did have strengths, however, which could be used by seconding them to full-time work in the guardian ad litem/reporting officer service. The flexibility provided by free-lance guardians also needed to be maintained.

With regard to management, the SSI noted that only Panel C had appointed a senior guardian ad litem. The report does not explain how the duties of the senior guardian differ from those normally associated with panel managers. This panel had also established an advisory group in line with DoH advice, which represented the constituent agencies of the consortia and the courts. Systems for quality control and complaints and dismissal procedures were found only on this panel. The other panels had been caught in the management dilemma, i.e. that on the one hand too much management impairs the independence of the individual guardian, while too little impairs the independence of the system. So far the development of management systems had been avoided for the sake of the guardians'

independence, although Panels A and B were about to set up advisory groups, and in Panel D discussions were taking place. Those responsible for running the four panels in the survey usually carried responsibilities for the social services departments' child care services as well, but despite this "there was no evidence that the ability of GALROs to make independent decisions on cases had been compromised". However, this had been at the expense of proper management, which needed to be separate from the child care hierarchy of social services departments so that work could be monitored without detracting from the independence of the guardians' advice to the courts; the use of advisory groups would also lessen the tension between the local authorities' interests and the independence of panel members.

In trying to assess the supply/demand balance, the survey found that approximately 10,500 appointments of guardians/reporting officers to cases had been made in the survey year, but these included reporting officer and guardian ad litem appointments in adoption cases as well as care proceedings. Adoption cases usually take less time than care cases, and reporting officer cases only a fraction of the time taken by either. Even within similar types, however, the time taken on average for a care case, for example, varied between 39 and 98 hours (SSI 1990, para 6.2). The reasons for this required further study (ibid, para 1.13(7)). Another

factor was the uneven pattern of requests for appointment, a variation of between 20% and 30% from one month to the next. Home Office statistics on court proceedings and the numbers of appointments in the survey year (nationwide) give an appointment rate of 65% in care and related cases. In the four panels inspected by the SSI, there were local variations of between 4% and 88%, thus confirming the point about a "patchy service" that had been made by the BASW to Parliament in its briefing papers (see earlier section of this chapter, under the heading Children Bill). Another problem was that courts recorded cases by child, and panels by family (this problem had also been encountered by Murch in his first research project). These were all factors that needed to be taken into account when assessing future demand (SSI 1990, para 1.3).

Delays imply a supply/demand imbalance. The survey noted that by 1988 there was some evidence of improvement in the eleven panels that were known by the DoH to have experienced serious delays in appointing guardians to cases in 1986 and 1987. The two "solo" panels in the inspection were able to appoint to cases within days. One of the consortia was experiencing an average delay of 39 days; the other of 58 days for all types of case, and an "extremely worrying" delay of 81 days for care cases. In view of the fact that the "area panel" (i.e. a consortium model) was the one the

government had indicated it favoured the most, this information must have been most disturbing.

The essential ingredients of the new system, then, should be a "smaller, more dedicated workforce" (SSI 1990, para 1.13). The report indicated that a small group of sessional guardians ad litem was one viable model, presumably as long as they had the capacity to make significant contributions to the workload, and full-time employed guardians, some of whom might be seconded to guardian/reporting officer work. In order to ensure greater "efficiency", they should all be "managed", and to avoid too much conflict of interest between the child care functions of the authority and the panel, the panel manager should be someone outside the child care hierarchy. Advisory groups would also help to distance the panel from the local authority. With regard to independence, there were few advances on the suggestions contained in the guide to panel administration (DHSS 1988) that had been issued two years previously, and guardians had been extremely sceptical then that either removal from the child care hierarchy or advisory groups would give them the independence that they sought. The emphasis now, however, was on a "managed service". Exactly what is meant by this is not clear, but would seem to encompass administrative matters, such as keeping more efficient, preferably computerised, records and making better estimates of supply and demand, but also implied is the



more rigorous monitoring of guardians ad litem, both in terms of the standards of their professional work and the time spent in doing it.

The Representation of the Child in Civil Proceedings,  
Research Project 1985-9. Murch, Hunt and MacLeod

The problem of supply and demand was also examined by Murch, Hunt and Macleod (1990). While acknowledging that in general the initial shortages of guardians appeared to have been reduced, mostly by the greater use of free-lance and voluntary agency guardians, it was known that in practice there was often little choice available to the courts and that in some places the problem was so acute that courts were eventually proceeding without guardians. Moreover, the provisions of the Children Act, which would extend the use of guardians, would control the duration of proceedings to avoid delay, and would appoint guardians at an earlier stage, would place acute pressure on services in some areas (Murch et al, 1990, p.31). These developments will be discussed in Chapter 10.

The authors began by looking at the question of recruitment in the context of the provision of social work services generally. Given that there was a general shortage of qualified and experienced child care specialists, there was a danger that the guardian provisions might "siphon off" child care expertise from local authorities, leaving them denuded or staffed by people less knowledgeable and skilled than the guardian

(Murch et al 1990, p.34). (This, of course, assumes that it is more attractive to be a guardian than a local authority social worker.) Rupert Hughes, addressing the inaugural meeting of the National Association of Guardians ad litem and Reporting Officers, made a similar point when he said:

"Neither will it help these children if a few of them receive a Rolls Royce service at the expense of other children receiving a lesser service than they deserve." (Hughes 1990)

One option would be to improve the supply. Murch and his colleagues noted that there had not, in their knowledge, been any difficulty in recruiting free-lance workers, which in the SSI survey had been among the most experienced groups of child care workers (SSI 1990, para 14.1). If, as indicated in Murch's earlier research and also in the SSI report, these were recently retired people or women with families, who would not otherwise be available for social services department child care work, "an otherwise untapped scarce resource was being tapped" (Murch et al 1990). If, however, they were choosing to work outside the local authority because being a free-lance guardian was more attractive, they were obviously contributing to the drain of talent from the social services departments.

Another option, as suggested indeed in the parliamentary debates, would be to use other professionals or even specially selected and trained lay personnel. Staff in the Official Solicitor's

Department, for example, do not have social work qualifications, though they do have access to expert advice; some American states use volunteers; in Scotland, safeguarders (the nearest guardian ad litem equivalent) are drawn from a range of professions, often lawyers. Murch felt that parents might share the view about the "collective philosophy" of social work that was expressed in the parliamentary debates, and prefer a non-social worker (Murch et al, 1990, p.36).

The role as currently constructed is a professional social work one, however, and Murch concluded that (in his view) it had been so successful that it would be risky to re-cast it (ibid, p.37). Another option, therefore, would be to reduce demand, perhaps by restricting the number of hours spent on each case. There is every possibility that the "management" of guardians ad litem will encompass this issue, though Murch felt that the thoroughness of the guardians' enquiries was one of the major features that commended them to the court and offered protection to the child. New procedures under the Children Act (advance disclosure for instance) should help to cut down on the amount of investigative work to be undertaken.

A third, much more radical suggestion, was the regulation of the use of the provisions for separate representation; in other words, is it always necessary for the child to be separately represented and, if so,

are both a guardian ad litem and a solicitor always necessary?

"In a substantial number of cases the legal outcome is predictable from the outset. In approximately 87% of the cases studied, the guardian and the local authority made the same recommendation." (Murch et al 1990, p.41)

Despite the attempts to make the child's party status specific in the Children Act 1989, and the appointment of a guardian mandatory, the court retains a certain amount of discretion. The court has the power not to appoint a guardian "if this appears unnecessary", and may appoint a solicitor for the child in certain circumstances. In addition, the court will have the power under section 7 to call for "welfare reports"; it seems that these could be provided by guardians ad litem (ibid, p.43). It is possible, therefore, to devise a number of options according to the requirements of the case. Although those responding to an earlier draft had been highly critical of such a selective approach, Murch urged, nonetheless, that different approaches be explored on an experimental basis and carefully monitored. The time to comment on this will be when the actual demands for guardians under the Children Act are known.

Murch's research project was published in January 1990, while the SSI report was not published until the following May. The only model that appeared to be favoured by the government at the time was the area panel or "consortium", which would still be run by

social services departments. Murch and his fellow authors made it quite clear that their preferred option would be for the administration of the panels to be entirely removed from social services departments and moved to a separate agency, regionally based and separately funded. Possible structures are considered in conjunction with the court welfare service, though not with the Official Solicitor's Department, because the research did not cover any proceedings in the High Court, and guardians were thought in any case to have more in common with their probation officer colleagues, sharing a common professional background and overlapping experience with regard to children and families (Murch et al 1990, p.72).

The existing organisational arrangements, which required the administering authorities to distance themselves from the guardians' professional practice, obviously made it difficult for them to appraise practice and set standards using its established systems of control (ibid, p.60). This will always remain a problem as long as the local authorities are involved. Murch did not, however, encounter any demand from courts and solicitors that guardians should be more accountable to a management structure than they already were; in many respects, a guardian's work is under constant scrutiny from social workers, solicitors and the courts. This slim-line panel management structure has indeed,

placed the professional responsibility upon guardians themselves to maintain high standards; which Murch believed they had done. What was rather more relevant was the efficient use of public funds. What was needed, therefore, was a management structure that preserved autonomy of decision-making and practitioner control over management of individual cases, but was able to monitor professional standards and evaluate both effectiveness and efficiency. It was suggested that this could be provided by careful initial selection, time-limited renewable contracts combined with periodic appraisal, a complaints mechanism and close liaison with user groups (Murch et al 1990, p.62). The researchers saw no need for hierarchical control, nor the imposition of a hierarchic bureaucratic model with, for example, senior guardians. Rather, the adoption of a Code of Practice could protect the guardians' autonomy and ensure consistent standards.

This "slim-line" panel structure appears to be radically different from the hierarchically organised probation service. Nevertheless, Murch put forward two options: first, the absorption of the panels into a separately constituted and organised division of the probation service; or the formation of a new specialist service by combining and administering on a regional basis the current civil work of the probation service and panels of guardians/reporting officers. Murch favoured the absorption of this branch of the probation

service into the guardian ad litem system, rather than vice versa, bringing the civil work of the probation service into line with the model outlined above. This would essentially provide a new specialist service, independent of both the probation service and the social services departments, built on the foundations of the existing panels but organised on a regional basis and centrally funded from government as part of the developing infrastructure of the Family Jurisdictions. Staff would be professionally trained and enjoy a high level of autonomy. Management would be kept to a minimum.

With regard to staffing the service, Murch noted that the most interesting developments:

"have been the burgeoning use of sessional guardians and in a few areas the establishment of guardian ad litem projects by voluntary agencies."  
(Murch et al 1990)

Although it was felt vital to retain this source of recruitment (i.e. the sessional workers) as people who might otherwise be lost to social work altogether, a service based entirely on sessional guardians ad litem would not be feasible. What was suggested was some form of core staffing, working from an independent office base, as provided by the guardian ad litem projects operated by the voluntary agencies. The system could absorb seconded officers from social services departments and voluntary agencies, together with

sessional guardians to provide the necessary flexibility.

The most striking difference between the reports is that the SSI accepts the continued involvement of the local authority while Murch and his associates do not. Since local authority responsibility for panels is enshrined in the Children Act, one assumes that the SSI's recommendations will prevail, at least in the short term. Little mention is made in either report of the guardian ad litem project provided by a voluntary agency, though the Children's Society Humberside Project was the subject of a separate piece of research by Joan Hunt and Mervyn Murch from 1985-88. The report, Speaking out for children (Hunt and Murch 1990) was published towards the end of 1990.

#### The Humberside Research

Humberside had initially joined a consortium of local authorities acting on a reciprocal basis, which collapsed for much the same reasons that similar arrangements collapsed in other parts of the country. Humberside, however, found it difficult to recruit enough sessional guardians ad litem to meet the needs of the courts. The solution was that of partnership with a voluntary agency. Negotiations with the Children's Society began in 1985, a project leader was appointed at the end of the year, and the project was fully established by April 1986, with two full-time guardians and a project leader. It was initially funded by the



local authority on an annual grant and housed in local authority property, but throughout has been managed by the Children's Society. The project workers are employees of the Society but also, as panel members, accountable to the local authority, which retains overall responsibility for the service. A senior member of Humberside's social services department's professional staff co-ordinates the work of the whole panel; the allocation of cases is dealt with by an administrator.

Over the ensuing three years, the project became joint-funded, the Children's Society having agreed to fund an independent office base and a car, and to fund the equivalent of one full-time post to carry out developmental work (Hunt and Murch 1990, p.10).

The Humberside panel actually consists of project staff and a number of sessional guardians ad litem. Despite increased staffing, the project has never been able to meet the demand on its own, and sessional guardians have played a crucial role in maintaining the service (ibid, p.11).

Hunt and Murch found that what they described as a "core-satellite" model, (a core of full-time workers reinforced by sessional workers to meet the peaks and troughs in demand) was one of its major strengths. Fundamentally, however, they had to question the whole

concept of a partnership with a local authority in the provision of a guardian ad litem service.

"Successful partnership requires collaboration and good working relationships: GAL work requires separation and is inherently conflictual....The system is inherently complex and lacking in clarity; some duplication of function between agency and administering authority seems unavoidable." (Hunt and Murch 1990, p.65)

They concluded that there was an "urgent" need to re-organise the guardian ad litem service on a properly independent basis, as described in their report to the Department of Health.

### Conclusion

The "Cleveland crisis" gave urgency to the need to implement already identified legislative reform. It also raised questions about adequate safeguards to ensure that state intervention into family life was properly justified and suggested that an Office of Child Protection could perform this function, whilst taking on the administration of guardian ad litem panels at the same time. General resistance to the idea, however, led to its withdrawal, leaving the problem of an independent administrative base for guardians unresolved. Despite energetic lobbying by guardians and other interested organisations during the passage of the Children Bill through Parliament for the establishment of an independent administration in some other form, the Act left responsibility for the service with the local authorities, with some suggestion that the independence

issue could be dealt with by the creation of area panels or "consortia".

The Social Services Inspectorate, which had conducted a detailed inspection of four sample panels from 1987 to 1990, made the assumption that panels would remain a local authority responsibility, though recognising the tensions between those interests and the independence of panel members. It found that the work force was large in relation to the work undertaken, which was inefficient, and recommended that efforts should be made to encourage a "smaller, dedicated workforce", with the most viable models being groups of sessional guardians or full-time employed guardians. The independence of the service could be enhanced by better management, situated outside the child care hierarchy, with the assistance of representative advisory groups. Many of these recommendations have been incorporated into the Regulations that accompany the Act; they will be discussed in Chapter 10.

Perhaps the most important clues as to what may lie ahead at some stage can be found in remarks made to the Lords and Commons by the Lord Chancellor and the Minister of State respectively: that the guardian ad litem service was being considered in the context of other court welfare services. This is in line with the Murch, Hunt and MacLeod research, and suggests a possible amalgamation of the civil work of the probation

service with guardian ad litem panels, perhaps to include the Official Solicitor's Department as well, to produce a combined court welfare service for the Family Jurisdiction.

Perhaps the most important conclusion that arises out of this examination of the administrative arrangements for guardians ad litem in care proceedings, is that a system that began as a relatively minor sideline, vying for attention with other child care functions of the local authority, is now regarded as a "service". Although this service does not, as yet, exist entirely in its own right, as it still has to compete for resources within the local authority, the fact that it is now accorded separate recognition, with its own management organisation and budget, is a reflection of a recognition of the importance of the guardian ad litem role itself. The professional role of the guardian ad litem as the independent safeguarder of children's interests before the court will be the subject of the next chapter.

## CHAPTER 8

### THE ROLE OF THE GUARDIAN AD LITEM IN CARE PROCEEDINGS

#### Introduction

This chapter will examine the role of the guardian ad litem in care proceedings. It will address the issue of why this was conceived as a social work role, the guardian being accorded the status of "expert witness" and professionally independent of the proceedings. It will examine the original "job description" as defined in the amended Magistrates' Courts Rules (Magistrates Courts 1970), and explore the ways in which the ambiguity of the rules gave scope for the guardians to give different interpretations to the role. Finally, the "success" of the role will be evaluated.

As was mentioned in the Chapter 1, the concept of a guardian ad litem - a guardian for the legal proceedings - is a familiar one to the courts and can be undertaken by a lay person such as a relative. The role, in this context, is to act as "next friend" and is simply that of initiator of civil proceedings on the child's behalf. As was described in Chapter 5, the role of a guardian ad litem as a representative and safeguarder of children's interests can be carried out by the Official Solicitor in proceedings in the High Court; and in adoption, a similar safeguarding role has been carried out by an officer of the local authority, latterly a social worker, ever since the first Adoption Act in 1926.

The Magistrates' Courts Rules and the DHSS Guide for Guardians ad litem

The idea of a guardian ad litem in care proceedings, examined in Chapter 3, arose out of the Maria Colwell tragedy; the Inquiry called for a social worker to carry out an independent investigation on the child's behalf in future cases of that kind and it was therefore accepted without debate that this would be a social work role and the court rules which were amended in 1984 were constructed accordingly. Guidance on the interpretation of these in practice was given in the DHSS Guide for Guardians ad litem in the Juvenile Court (DHSS Guide 1984). Together, they established the philosophy that supported the role; emphasised the guardian's professional independence; underlined the guardian's professional autonomy, and specified the tasks that needed to be done. As a professionally-qualified, experienced social worker, the guardian ad litem was also to be regarded as an "expert witness" in social work matters.

The philosophical underpinning of the role was to:

"Regard as the first and paramount consideration the need to safeguard and promote the infant's best interests until he reaches adulthood".  
(Magistrates Courts 1970, Rule 14A 6 (b))

Rule 14A(2) established the professional independence of the guardian ad litem. No one could act as a guardian ad litem if she was a member, officer or servant of a local authority or authorised person (within the meaning

of Section 1 of the Act of 1969) which is a party to the proceedings; or if she was at any time a member, officer or servant of a local authority or voluntary organisation directly involved in arrangements relating to the care, accommodation or welfare of the child. This is important to note, as it has been substantially altered in the Court rules relating to the Children Act 1989 (Magistrates Courts 1991) and will be discussed further in Chapter 10.

The new role gave social workers, used to working in a hierarchical institution and responsible for carrying out the Department's policy rather than making their own personal decisions, an unprecedented professional autonomy. The DHSS guide (1984) suggested that in order to reach an independent view about the child's interests, the:

"Guardian ad litem will be expected to appraise - and may find he must criticise - the work of local authorities and agencies with whom he has dealings in the course of his normal employment". (DHSS Guide 1984, paragraphs 6 and 7)

Second:

"A Guardian ad litem is accountable to the court for the evidence which he gives and the recommendations that he makes. Members of a panel who are employed by local authorities or other social work agencies act as independent practitioners whilst appointed as guardians ad litem and their work in that capacity is not subject to the scrutiny and direction of their seniors and managers".

The Rules then set out the tasks that needed to be done in order to achieve this: to investigate the circumstances relevant to the proceedings, by

interviewing people, inspecting records and obtaining professional assistance (such as paediatric assessment, for example) if appropriate. In response to the opposition levelled against the first set of court rules (see Chapter 4), if the court had not already done so, the guardian ad litem would appoint a solicitor for the child, act jointly with him/her in considering how the case should be presented, and instruct him/her, unless the child was old enough to give his/her own instructions. Should these instructions conflict with those of the guardian ad litem, the solicitor would take instructions directly from the child. The guardian must take into account the child's wishes and feelings, (having regard to his/her age and understanding) and make these known to the court. Should difficulties arise, the views of the court must be sought. Having completed her investigation, the guardian ad litem was to prepare a written report for the court. In court, as an expert witness, the guardian ad litem would be subject to cross examination. The final task was to decide, with the solicitor, whether to launch an appeal if the case, from the child's point of view, had had an unsatisfactory outcome.

The specific, and new, features of the role could be summed up thus: working in partnership with a solicitor in the presentation of the child's case; assuming professional responsibility for the case



without recourse to, or intervention from the management hierarchy; appraising or possibly criticising the work of the agencies involved with the child; taking special care to ascertain the wishes and feelings of the child and to communicate these to the court; and performing in court as an "expert witness" and thereby subject to cross-examination by the legal representatives of both the local authority and the parents.

The government recognised that "some preparation and training may be needed" (DHSS 1983, para 12) by guardians ad litem for this new role. Murch (Murch and Bader 1984, p.74) found that most local authorities had run an initial briefing meeting around the end of May 1984, that the London Boroughs' Training Committee had organised a rather more substantial series of three day meetings, but that two or three authorities visited in August and September, had yet to run their first "training day". My own authority set up an initial briefing day and followed this up with a further meeting. The prevailing management view, however, was that as "Level 3" workers we already possessed the necessary knowledge and skills for the job. It was probably reasonable to assume that panel members would be adequately knowledgeable about child abuse and about local authority practice, especially the range of substitute care available, and one hopes they had had some practice in talking to children. However, given the paucity of law teaching on most social work courses

(Ball et al 1988), knowledge of the law relating to children and expertise in the witness box, would depend very much on individual experience. "Support groups" quickly became established, both in order to address gaps in knowledge and to provide some informal consultation.

One area that was expected to be controversial was the solicitor/guardian partnership. An area that proved far more controversial was the extent to which a role conceived as investigative rather than interventionalist could be justifiably extended "in the interests of the child", especially when the guardian ad litem was charged with the duty to safeguard the interests of the child "until he achieves adulthood". Safeguarding the child in the longer term implied a role in influencing the local authority's long term plans. However, there was no mechanism for the guardian ad litem to initiate any proceedings and the law as it stood suggested that it was the local authority alone who had the power to determine the child's future once an order had been made. The third aspect that was to give rise to some controversy during the passage of the Children Bill through Parliament was the question of whether it was essential for the guardian to be a social worker. These issues will be considered in turn.

#### The solicitor/guardian ad litem partnership

The court rules allowed the guardian to appoint a solicitor for the child "except where a solicitor has

been instructed". This begged the question of who had instructed the solicitor; if it was the local authority, this might put his/her independence in doubt (Murch and Bader 1984, para 4.42). Some courts adopted the practice of appointing solicitors for children on a rota basis in order to ensure a fair distribution of the work, though a government circular issued in January 1986 (DHSS 1986) stated "that where a guardian is appointed it is for the guardian to appoint the child's solicitor", and "it is inappropriate for the local authority who is party to the case to either select or appoint the child's solicitor" (ibid, para 7). Although guardians ad litem prefer to appoint their own solicitors, it is generally accepted that it is in the child's interest for a solicitor to be appointed by the court when there is a waiting list for guardians. This practice is confirmed in the SSI Report (SSI 1990, para 16.4).

An early problem for guardians was that it was difficult to know how to choose a solicitor with the appropriate expertise. Murch (Murch and Bader 1984, para 4.41) found that some court clerks were willing to advise guardians ad litem, though not to give specific names. Otherwise they were advised to consult the Law Society Directory. "Good" and "bad" solicitors quickly became a subject for discussion at Support Group meetings, as people passed on their experiences. By

1985/6 the Law Society had established local panels of lawyers who had an interest in this work and at least some expertise; their names were published in a list that was regularly updated and sent to guardians ad litem and to panel administrators.

Despite reservations expressed on the part of lawyers about being instructed by, rather than instructing, the guardian (Chapter 4) and regret that they were about to lose the investigative part of their own role, the two roles proved quite complementary, with the guardian ad litem taking on most of the investigative work which would ultimately inform a view of the child's best interests, and the solicitor, in collaboration with the guardian, planning how best to present the child's case in court (see para 16.5, SSI 1990). This might include deciding on relevant witnesses, and if the help of a particular expert, such as a child psychologist, was required, the solicitor would make the necessary arrangements with the legal aid board. A point made in an article by Parry (1990) is that, because many guardians ad litem work in relative isolation, solicitors can perform an invaluable task in helping the guardian ad litem to distinguish the wood from the trees by acting as "devil's advocate" and thus assist her in coming to a conclusion about a case. Murch (Murch et al 1990, p.9) comments that the guardian ad litem/solicitor partnership "is one of the distinctive and most successful features of the system".

Once in court, the advocacy skills of the solicitor come into their own, though it is important that the guardian ad litem should be seated nearby, so that further instructions can be given as the case unfolds. In the early days, this could be a problem, because courts were unaccustomed to the guardian's role and tended to want to tuck them away at the back!

The Rules made it quite clear that it is the guardian who instructs the solicitor, unless the solicitor considers (and it is his/her ultimate responsibility, having taken into account the views of the guardian ad litem) that the child is old enough and sensible enough to give his/her own instructions. The situation can arise in which a solicitor refuses to accept instructions from the guardian ad litem, even though the child is very young, or even a baby, in which case the rules direct that the guardian ad litem should seek the advice of the court, and it is likely that permission will be given for a change of solicitor.

The more legitimate conflict arises when the child, who is considered old enough and wise enough to give his/her own instructions, has a different view from that of the guardian ad litem. The situation for the solicitor is quite straightforward because solicitors are always under a duty to do their best for their clients; though Murch (Murch et al 1990, p.12) had encountered some situations where solicitors were reluctant to diverge from the guardian even though the

child was "competent". Under the 1970 Magistrates' Court Rules the guardian ad litem was in a more difficult position because s/he was left effectively without representation, though the rules did allow him/her to make "oral representations" to the court. Some courts, because they have a degree of discretion about how they conduct their proceedings, would allow guardians ad litem to cross-examine witnesses, but the DHSS Guide (1984, para 32) did not approve this practice. Changes brought about by the Children Act 1989 in this regard will be discussed in Chapter 10.

The role - is it investigative or interventionalist?

A far more controversial matter for debate has been how far the guardian's role can be legitimately extended beyond the essentially investigative one prescribed in the court rules, in the interests of the child. This dilemma has manifested itself broadly in two ways: first, in the carrying out of additional activities more akin to casework, such as "disclosure work" or mediation; and second, in the intervention by the guardian into the court process itself, in order to challenge the local authority's plans for the child. Where guardians did this by invoking the wardship jurisdiction, and appointed themselves as guardians ad litem in place of the Official Solicitor, further controversies arose.

Despite the fact that the rules indicated that this was an investigative, forensic role, by 1987 there is evidence to suggest that guardians ad litem might be taking on other roles as well. In respect of the extent to which the guardian ad litem should take on case-work tasks, the Official Solicitor, in his submission to the Cleveland Inquiry, expressed the view that "the limits of the role of the guardian ad litem are not well understood", and that:

"in short it must be emphasised that it is not a casework role and it is not a role in which a positive social work contribution is likely to be appropriate". (Official Solicitor 1988, p.178)

By way of example, based upon what he had encountered in Cleveland, he reported that guardians ad litem were carrying out "disclosure work", which in his view went beyond ascertaining the wishes and feelings of the child, with the risk that the guardian ad litem would jeopardise her objectivity. ("Disclosure work" is the name given to a specific kind of interviewing relating to children who are suspected of having been sexually abused.) He also took issue with the need to "visit the child four or five times", or even once a week over a prolonged period, which was at odds with the time-limited nature of the task, and could lead to the child, who was already in a vulnerable position, becoming over-attached. His final, related criticism was that the guardian ad litem spent too much time on the investigation, 50-60 hours as opposed to the 20 or so

spent by the Official Solicitor. (The 20 hours did not include travelling time.) The Official Solicitor did not, in fact, interview any guardians ad litem in Cleveland where, because of an insufficiency of guardians, they were appointed to very few cases. In the few cases where the juvenile court had appointed a guardian ad litem, complexities in the evidence led, in many instances, to a change of venue to the High Court in wardship. This was an arena which was unfamiliar, where the length of time before the hearing was indeterminate, and where the guardian ad litem was probably anxious to ensure that the "wishes and feelings of the child" were particularly well canvassed. Coyle quotes two guardians ad litem who had been involved in a High Court case where the Official Solicitor had been appointed:

"We were unhappy with the limited scope of the Official Solicitor's investigation, which meant that in our opinion the child's view was not sympathetically investigated." (Coyle 1987, p.45)

The guide to panel administration (DHSS 1988, para. 4.17) also drew attention to the need for guardians ad litem to resist the temptation to "find themselves drawn into active social work", this being the task of the local authority caseworker. It advised that it was not appropriate for the guardian ad litem to carry out rehabilitative work, participate in access arrangements, or even to attend case conferences, unless strictly as



an observer; disclosure work was definitely off bounds (DHSS 1988, para 4.18).

A further example of the guardian ad litem's growing reputation for over-involvement is provided by the case of Re B. Mr. Justice Bush, sitting in the High Court on 19th August 1988, refused to appoint a panel guardian, Mrs. P., as guardian ad litem in the wardship proceedings, even though she had already been involved in the juvenile court and even though the Official Solicitor had no objection to her appointment. The argument put forward in favour of Mrs. P.'s appointment was that she was "skilled in conciliation". Mr. Justice Bush replied that no doubt such skills were very valuable in their place, but that a guardian ad litem

"who is too close to the action may be at risk of losing that objectivity...in which the Official Solicitor is so skilled". (Re B. a Minor. Bush J., 19.8.88 (unreported))

The Official Solicitor (1988, pp.184/5) put forward as possible explanations for misunderstanding the limits of the role: lack of training, especially in the legal aspect; inexperience caused perhaps by taking on only a limited number of cases; but most particularly that part of the job description, laid down in the Court Rules, which was the duty to:

"regard as the first and paramount consideration the need to safeguard and promote the infant's best interests until he achieves adulthood".

Another dilemma for guardians that this rule generated was that on the one hand the appointment was

"for the purpose of the proceedings", but on the other hand, the rule seemed to imply that the long-term effects of the order that the guardian ad litem was recommending to the court should also fall within the guardian's influence; in other words, the local authority's plans for the child once the order had been made. The DHSS guide had stated that the

"guardian ad litem will be expected to appraise - and may find that he must criticise - the work of local authorities and other agencies with whom he has dealing in the course of his normal employment". (DHSS Guide 1984, para 6)

Smith (1989:119) noted that Atherton (1987) suggested an expansive and critical role for guardians in relation to their assessment of social work practice and procedural matters; for example: had the local authority observed the Code of Practice on Access? had statutory Reviews been held, and had parents been allowed to participate? how much preventative work had been undertaken? Atherton was clearly of the view that guardians could and should seek to influence local authority practice beyond their limited duties to the court, even if this might include negotiating with the local authority about its particular approach to a case.

The BASW Report (1986) makes the point that, because the guardian ad litem comes to the situation from a broad perspective (an overview of the situation rather than one that is seen in terms of the functions and responsibilities of a particular agency), it is possible, firstly, to come to a different conclusion,

and secondly, the examination of the situation across a broad front may have the effect of changing the facts, or the way the facts are perceived.

"The effect of the participant observer in research as an agent of change has long been established in social science experiments and the situation of a panel member in the court situation may not be very different from this" (BASW 1986, p.44)

The report recognises that by the very fact of their involvement, guardians ad litem may act as catalysts in the situation, and suggests that, without recourse to plea bargaining, the sharing of information or of hitherto unexamined alternatives may be the outcome.

Coyle (1987, p.25) gives a number of examples where the guardian ad litem has, in effect, acted as a mediator where: the guardian ad litem and solicitor for the child felt that the local authority had no discernible case and the matter was withdrawn; the guardian persuaded the local authority to place the child with relatives acceptable to the parents, when a care order was being made; the guardian ad litem was able to change a proposed care order to custodianship with paternal grandparents.

It is perhaps important to emphasise that this kind of mediation arises out of the investigative process of the guardian's task rather than the specific activity to which Mr. Justice Bush took such exception. In the examples given, the guardian seems to have effected a change of direction through persuasion. It is where

such persuasion has not been effective, or possibly not even tried, that the greatest controversy about the guardian's role has arisen. This is where the guardian has sought to intervene in the court process itself, by invoking the High Court's assistance in wardship.

The powers of the juvenile court in care proceedings were limited; the court could only make a care order, a supervision order or no order at all. A supervision order, whereby the parental rights remained with the parent was often felt to be inappropriate for protecting a very young child, as the order did not give the supervisor even the right of entry into the home. On the other hand, when a care order was made, the parental rights and duties passed to the local authority, and it then fell to its discretion as to how the care order was to take effect. It had a wide range of choice, from rehabilitation with the parents at one end of the spectrum, to making arrangements, albeit through other court processes, for the child's adoption, at the other.

Wardship, on the other hand, is a much more flexible jurisdiction as far as the court is concerned, and at the conclusion of the case a range of orders, directing with whom the child should live, etc, can be made by the court.

By the time the guardian ad litem provisions were implemented, the case of *A v Liverpool City Council*

(1981) had already established that the wardship jurisdiction could not be used to challenge local authority decisions relating to children in care, or coming into care, because the power to make these decisions is given to the local authority by statute. Regarding children in care, wardship proceedings could only be instituted by others with the local authority's permission, for example, in the Cleveland cases. The guardian ad litem, however, also had a statutory duty in relation to the welfare of children and it remained to be seen whether the "Liverpool" decision was open to challenge.

The first reported case was *Re J. T. (A Minor) (Wardship: Committal to care)* (1986) in which a guardian ad litem warded an infant who was subject to an interim care order in the juvenile court because he believed that the local authority's plan to rehabilitate the child with its mother was too great a risk. This appears to have galvanised the local authority into changing its mind, the guardian ad litem's application for wardship was endorsed, and agreement reached that the child be placed with long-term foster parents with a view to adoption. The experience seems to have been satisfactory for the guardian ad litem as the local authority did not take issue with the jurisdictional point, and the guardian ad litem was commended by the Judge for his actions.

Another case was reported in the Official Solicitor's Submission to the Cleveland Inquiry (Official Solicitor 1988), and used by him as a further example of guardians over-reaching themselves, concerning a two year old boy who had been diagnosed as sexually abused. At an early stage in the proceedings, the court appointed a guardian ad litem but, because of the waiting list, no-one was actually nominated until after an independent medical review panel had failed to substantiate the diagnosis, and the local authority had sent the child home, subject to continuing interim care orders. A case conference recognised the difficulty in satisfying the proof stage of the proceedings and recommended that the court should be asked to discharge them. The guardian ad litem, unhappy at this decision, made representations to the court, but the proceedings were discharged notwithstanding. Despite the fact that her statutory involvement was at an end, the guardian ad litem then instituted wardship proceedings. The outcome of this is not reported, but the Cleveland Report (Secretary of State 1988, para. 16.71) "doubted the suitability of this procedure" and suggested that the Official Solicitor should have been consulted.

The question of whether guardians ad litem could or should use wardship proceedings to challenge a local authority's plans for a child in its care were finally decided by *A. v Berkshire County Council* (1989) and *Re T. (Minors) (Care Proceedings: Wardship)* (1989). In the

Berkshire case the guardian ad litem disagreed with the local authority's long term plan to place the child in a boarding school. In *Re T*, there were four children and two different sets of care proceedings in two juvenile courts. The guardian ad litem wanted to unite the proceedings under one judge in wardship.

In the Berkshire case, the Court of Appeal confirmed the conclusion reached by Sir Stephen Brown in the High Court; that guardians ad litem could not assail the Liverpool decision and invoke the wardship jurisdiction as a means of challenging the local authority and reviewing its decisions. Although *Re T* was somewhat different, and arguably did not challenge any local authority decision, but rather sought to rationalise the proceedings, a course of action that was, indeed, approved by Mrs. Justice Booth in the wardship hearing, the final judgement argued nevertheless that "Liverpool" was relevant. A secondary point was that, although the guardian could ward the children as a private individual if she chose, in which case she would have to pay the costs herself, she had no locus standi to do so in her capacity as guardian ad litem because her role was limited to work in the juvenile court in the course of care proceedings.

Remy Zentar, dissenting from this view, wrote:

"The fact that a panel guardian does not have automatic right to act in that capacity in the wardship proceedings does not mean that she has no locus standi to commence those proceedings, and in

view of the fact that she has a statutory duty 'to regard as paramount the safeguarding and promoting of the child's best interests' there is considerable strength in the argument that if, during the carrying out of her duties she concludes (no doubt in discussion with the child's legal representative) that invoking the wardship jurisdiction is in the child's interest, she has a right, indeed a duty, to do so".(Zentar 1988, p.30)

The implication of the decision in the Re T and the Berkshire case was that guardians would have to confine themselves, reflecting the limitations of the juvenile court itself, to a recommendation about the best legal outcome for the child. This would mean a consideration of the case, not in the light of the practical details of the child's future life, but in the light of where legal responsibility should lie, with the parent or with the local authority. If one relates this limited remit back to the Maria Colwell affair, the conclusion is reached that, had a guardian been appointed in that case, and had she been successful in opposing the discharge of the care order, the local authority could still have exercised its discretion, if the guardian had been unsuccessful in persuading it otherwise, in sending the child home, with the same tragic consequences.

A alternative way of challenging the decisions of a local authority, or indeed any other public body, is by judicial review. Using this avenue, guardians began to win some concessions, though sometimes at great personal cost. The first reported example was R v Birmingham Juvenile Court ex parte G and others (minors) and R (a



Minor) (1989). The same guardian ad litem and solicitor were appointed in each case.

The G application concerned three little girls, two sisters and a cousin, who lived with their mothers, who were sisters. There were signs of sexual abuse of all three children and the local authority commenced care proceedings. The R case concerned a little boy aged one year who lived with his two half sisters. The father assaulted one of the little girls and the local authority commenced care proceedings. The Juvenile Court appointed a guardian ad litem who produced reports in both cases, and in each case recommended a supervision order. At the final (separate) hearings, the local authority wished to withdraw the care proceedings; in G they had decided to work voluntarily with the mothers which, the guardian ad litem submitted, would put the children at risk. The solicitor for the children submitted that the only way the justices could properly decide whether to allow the withdrawal was to hear the evidence. After hearing from all parties, the justices refused to allow the cases to be withdrawn, at which point the local authority simply offered no evidence. The solicitor for the guardian ad litem then applied to call the evidence, including that of the guardian ad litem. However, on the advice of the clerk, and for procedural reasons, the magistrates, on differently constituted benches and on different days,

dismissed the cases. The guardian ad litem applied for judicial review.

Sir Stephen Brown, in the Queen's Bench Division, agreed with the guardian ad litem that the juvenile court had misunderstood the nature of care proceedings which were "not adversarial", they were child-welfare centred and not unduly restricted by technical, formal rules, and to ignore that was an affront to common sense. The local authority should never have applied to withdraw the proceedings without full consultation with the guardian ad litem. The guardian ad litem could have insisted that the court should read her report and consider the alternatives before reaching a decision.

The Court of Appeal confirmed this view, stipulating that, in cases such as this, the juvenile court must act judicially, and even if agreement is reached all round that the proceedings should be withdrawn, this cannot be done without the court hearing the reasons for the decision.

The degree to which the local authority must consult the guardian ad litem before reaching decisions relating to the child's care prior to the hearing were decided by R v North Yorkshire County Council ex parte M (1989).

In March 1987 the juvenile court made a little girl, B, the subject of a care order, her father having been convicted in January of that year of indecently assaulting her. Taking the view that a return home was

not feasible, the decision was taken for B to be placed for adoption. The parents were informed of this in January 1988. This prompted them to apply to the juvenile court for the discharge of the care order and a guardian ad litem was appointed. Access to the parents was allowed to continue but, because of difficulties in finding a stable home for the child that would allow this continuing contact, the adoption panel, who considered the case in May, recommended that access to the parents should be phased out with a view to terminating it. In August, a month before the application for the discharge of the order was due to be heard, the Adoption Panel upheld the plan for adoption. When they heard about this, the parents applied for judicial review on the grounds that their application in the juvenile court would be prejudiced. They were supported by the guardian ad litem. Mr. Justice Hollis granted leave for judicial review, and an injunction restraining the local authority from implementing their decision for the time being. The local authority, advised by Hollis J. to instigate wardship proceedings, chose not to do so.

The review itself was conducted in September by Mr. Justice Ewbank. He could find nothing intrinsically wrong with the local authority's decision, accepting that their view that it was in the interests of the child to be securely placed as soon as possible, was

reasonable. He did, however, take issue with the decision making process. Referring to the Birmingham case, in which the Judge had stressed the importance of consulting the guardian ad litem, he felt that a similar duty applied in this case. The guardian had a duty, under the rules, to take everything into account; the local authority had a reciprocal duty, including listening to the views of the guardian. Eastham J. upheld the review, adjourning the case until such time as the local authority had consulted with the guardian ad litem.

What happened next was that the council allowed the guardian ad litem to submit a report to the adoption panel, but did not allow her to attend in person. The guardian ad litem sought further judicial review of this decision, and the actions of the local authority were upheld, the Judge being of the view that the guardian ad litem's attendance was entirely a matter for the panel. He was also asked to decide whether the High Court could ward a child of its own motion. He decided that it could, in exceptional circumstances, but that these particular circumstances were not "exceptional".

The guardian in this case was suspended by the local authority for "exceeding the boundaries of the role"; she eventually resigned. Without objective information about both sides of the conflict, it is difficult to comment on this, but it does highlight the precarious position of self-employed guardians ad litem

and their freedom to act independently when the local authority with which they are in conflict also controls their membership of the panel.

The limitations of the guardian's role in care proceedings were picked up by the Inquiry into the death of Jasmine Beckford. The subsequent report recommended an extended role for the guardian ad litem, who should be invited to the case conference following the care proceedings and to any case conference at which the question of rehabilitation of the child with family was contemplated (London Borough of Brent 1985, p.251). Such a recommendation was never carried out, but the Charge and Control Regulations (Accommodation 1988), which arose out of the Beckford Inquiry as a way of safeguarding the child where a reunion with his/her parents was planned, allow for the guardian ad litem, among others, to be consulted, but only during the process of care proceedings and not afterwards. This gives the guardian ad litem some redress in cases where she agrees with the care order, but not with the plan to rehabilitate. In my experience, the greatest problem of all for guardians is where the child is allowed home before a guardian ad litem is actually appointed, and enquiries reveal that the child is in a dangerous situation. Since the guardian ad litem has no power to determine the management of the case herself, or to initiate alternative proceedings (such as wardship) the

only redress in these circumstances is to ensure that the evidence is heard by the court as in the Birmingham case, or to apply for judicial review of the local authority's decision, though obviously not on the grounds of "failure to consult".

A case that post-dates Birmingham and North Yorkshire is R v Waltham Forest London Borough ex parte G (1989). Perhaps because judicial review was becoming too easy, this case established that the judicial review of the local authority's actions would only be granted if the problem was aired first with the juvenile court, under that part of the Rules which states that the guardian ad litem

"has a duty to seek the views of the court in any case where difficulties arise in relation to the performance of his duties". (Magistrates Courts 1988, 16 (6)(e))

If the court were then to uphold the guardian's view, which the local authority subsequently disregarded, then that decision would be amenable to judicial review.

The duty to "safeguard and promote the infant's best interest until he achieve adulthood" is difficult to reconcile with a role that is purely investigative. The flaw lies in an anomaly within the Rules themselves, within the legislative framework of the 1969 Children and Young Persons Act, and within the court structure. The ways in which implementation of the Children Act 1989 redresses some of these difficulties will be discussed in Chapter 10. The new arrangements should

also serve to resolve a related issue that has been much debated; namely, the relative merits of a panel guardian ad litem versus the Official Solicitor as guardian ad litem in wardship.

The panel guardian as an alternative to the Official Solicitor

The guardian ad litem in the Berkshire case aroused the court's disapproval, not only by warding the child but by appointing herself as guardian ad litem in the High Court. How she did this is not reported, though it is possible that she made the child the plaintiff in the case, and named herself as "Next Friend". This raised yet another thorny issue, which had first manifested itself in Re ABCD (Minors) in which Mr. Justice Sheldon gave judgement on 20th April 1988 and in Re B in which Mr. Justice Bush (August 1988) reached similar conclusions. The argument centred upon who should be appointed as guardian ad litem in wardship, a panel guardian or the Official Solicitor.

Re ABCD concerned four children taken into care, and wardship proceedings that were instituted by the local authority. The children were joined as parties and the District Registrar appointed a guardian ad litem who was drawn from the local panel. She had not been involved in previous juvenile court proceedings in this case and was unable to begin her investigations for several months. So concerned was Mr. Justice Sheldon at discovering this appointment that he gave judgement in

open court. He wished to remind all concerned of the importance of following the proper practice on such an appointment. The District Registrar had either overlooked or ignored the established principles set out in plainest terms in Re JD (1984) and approved by the Court of Appeal in Re C (a Minor), that, in wardship proceedings where the minor was joined as a party, the Official Solicitor had the advantage of being supported "by the expertise and authority of his office and department" and was generally accepted as a person who would "form an objective and independent assessment of the ward's interests". The court should always consider the following questions before inviting some other person to act as guardian ad litem: whether there was some compelling reason why s/he should be preferred; whether the alternative candidate possessed the necessary expertise and experience; whether s/he had comparable access to expert evidence; was s/he able to obtain the legal representation that was necessary in the High Court and obtain remuneration, not only for the representation, but also for him/herself; whether s/he appreciated the possibly protracted nature of guardian ad litem duties in wardship. (Unlike care proceedings, which come to an end by way of a final hearing, wardship may go on for many years.)

Perhaps the judgement of Sheldon J. in ABCD (Minors) was justified inasmuch as the Official Solicitor had not been invited to act and the panel



guardian ad litem had not been previously involved in the Juvenile Court. In re B, where the guardian ad litem had been involved and where the Official Solicitor had agreed to her appointment, the argument that swayed Mr. Justice Bush was that he feared she would not have the "objectivity and expertise" of the Official Solicitor's Department. It is possible that he was right to worry that that particular guardian ad litem was "too close to the action" but the point that was in her favour, and in favour of any panel guardian ad litem who has already carried out an extensive investigation for the juvenile court, is indeed the "continuity of representation" by which the Official Solicitor sets such store. Continuity of representation in this instance is a practical reality; continuity of representation by a department is not likely to mean very much to children and actual members of staff are as likely to change over time as in any other setting.

One of the biggest stumbling blocks for the panel guardian ad litem was the question of remuneration. The legal representative was entitled to be paid from the legal aid fund, but after many guardians ad litem had become involved in wardship proceedings it transpired that whereas it had been assumed they would be paid as an "allowable disbursement" on the solicitor's fees, as had been independent social workers acting as expert witnesses, a distinction was made regarding the role of

guardian ad litem; at least, this was the case in some legal aid offices thus reflecting the general arbitrariness of the system. Eventually the Lord Chancellor's Department recognised the anomaly and agreed to pay guardians ad litem who had fallen into the wardship trap, but it was made very clear that this was a situation that must not be repeated.

Sometimes local authorities would agree to pay the guardian ad litem for continuing to represent the child in the High Court, provided the Official Solicitor had been given first refusal. Towards the end of 1989 the Official Solicitor agreed to ask panel guardians, on occasion, to act as his agent. In this event, the guardian ad litem would be paid by the Official Solicitor.

#### The Guardian ad litem as "expert witness" on social work matters

One major difference between the Official Solicitor and the panel guardian (see also Chapter 5) is that it is only the panel guardian, as a qualified social worker, who is given the status of expert witness. There was no challenge to this idea until the matter was debated in the House of Commons during the progression of the Children Bill. The suggestion of using someone other than a social worker was mooted in response to the problem of delays in the appointment of guardians ad litem for children, but the ensuing debates also revealed some scepticism on the part of Members about

"social work ideology" and a belief that "life experience" could be a more valuable asset. Suggestions for alternative guardians ad litem included the police, volunteers, people with family experience, doctors, nurses, solicitors and members of the NSPCC (House of Commons 1989, cc.265/267). (Members appeared not to realise that the NSPCC employs social workers.) Putting an end to this part of the debate, David Mellor, then Minister at the Department of Health, stated:

"We should be aware that the guardian ad litem role is specialised and not exercised by someone who gives generalised good wishes to children. The role of the guardian ad litem is specific - he must assist the court and provide an expert - I emphasise the word "expert" - social services view.... and I disagree, with respect, with some of the contributions that have been made to this debate. I do not honestly see a role for policemen as guardians ad litem." (ibid, c.271)

Thus, David Mellor re-affirmed the expert witness status of the guardian ad litem which had been a fundamental part of the role from the beginning.

#### An evaluation of the guardian's role

Because of the ambiguities in the court rules, which were not, in practice, nearly as precise as they first appeared, and because the guardian was free both from the restraints of line management and the requirement to espouse a specific departmental policy, guardians have, to an extent, interpreted the rules themselves. In challenging these interpretations, outside forces, such as High Court judges, have played a part in determining where the boundaries lie. The

central question has been; whether the guardian ad litem should see her role as providing a second opinion based upon an independent investigation, or whether she should attempt to bring about change on the part of the other parties.

That there is room for interpretation either way stems from the dual role of the guardian ad litem as officer of the court and as representative of the child. The Guide for Guardians ad litem in the Juvenile Court seemed to suggest that the guardian should report on the existing situation:

"It would not be appropriate for the guardian ad litem to look for compromise with other parties or to seek to influence their actions in respect of the child." (DHSS Guide 1984, para 37)

Likewise, the guide for panel administrators suggests that it is inappropriate for guardians to attend case conferences, except strictly as observers (DHSS 1988, para 4.81). The guardian ad litem should not, therefore, be involved in decision making. In other words, the Guide seemed to place the greater emphasis on the guardian's role as welfare reporter for the court. In the beginning, most guardians saw their role as being to provide a second opinion, by an investigation of the child's history, described and analysed in the subsequent report.

Murch et al noted that the guardian's dual role as an officer of the court and as representative of the child was an ambiguity which most guardians ad litem had

been slow to grasp, perhaps because it did not often make very much difference in practice (Murch et al, 1990, p.19). As an officer of the court, her job is to provide the court with information upon which to base a decision - a neutral position which parallels that of the Court Welfare Officer - but the role of the representative of the child, on the other hand, is not neutral and rests upon presenting the best possible case for the child. If guardians ad litem interpret the role in this way, it is easy to see how they could feel it their duty to bring about change in the position of the other parties. As the BASW report points out, by the very fact of their involvement, guardians ad litem may act as a catalyst in the situation.

"The participation of the guardian prior to the hearing has sometimes changed situations, because she has asked relevant questions and explored hitherto unexamined alternatives."

(BASW 1986, p.44).

In the Murch et al study, some guardians were more inclined to see themselves as welfare officers (Murch et al 1990, p.21) while some of the guardians ad litem in the later Humberside study (Hunt and Murch 1990, p.46) had gradually changed their approach from one which was "more of an overview" to one which was more child-centred. In Murch's view, the guardian ad litem as representative of the child is justified in attempting to bring about change. If that aspect of the role were to receive greater acceptance some of the conflict about "boundaries" could be avoided. As representative of the

child, there is a further potential split, because the guardian ad litem must represent the child's best interests as well as the child's views, though the views of an older child can be taken on by the solicitor.

The DHSS guide for guardians ad litem advised guardians against being drawn into "active social work" (which meant, presumably, casework) as this was the province of the social worker (DHSS Guide 1984, para 4.17). Nevertheless, there is some overlap between the role of the guardian and that of the local authority social worker; investigation and assessment are part of the social worker's task as well, especially if the family is not well known, or if a new incident has precipitated court action. The social worker also has a statutory duty (Child Care Act 1980, s.18) at least to children in care or in interim care, to ascertain the child's wishes and feelings and to take them into account. This duty has even greater emphasis in the Children Act 1989.

In evaluating the advantages for the child of separate representation via the guardian ad litem/solicitor partnership, the Department of Health study stated:

"In our view it offers children improved protection in proceedings in which both their welfare and their family membership is at risk. It provides an independent mechanism to ensure that proceedings focus on children's interests, their legal rights are protected, their circumstances investigated and a view of their welfare interests argued and

advanced which is free from conflict with other personal or organisational interests".  
(Murch et al 1990)

The provisions for a competent child to instruct his own solicitor "significantly enhance children's rights" (Murch et al 1990, p.8).

Central to the role, and prescribed by the rules, is the guardian's duty to communicate the child's wishes and feelings to the court. In order to find out the child's perspective, guardians must clearly spend some time with children, though within the constraints of an involvement that is time-limited, where many other people may also be involved, and where the guardian ad litem is at a particular disadvantage by being a stranger. Children themselves (aged eleven and over) were interviewed in the Humberside study. They had varying degrees of understanding about the nature of the guardian ad litem's job, but overall they seemed to regard the guardian as a helpful person (Hunt and Murch 1990, p.43). In their Department of Health Study (Murch et al 1990) the authors noted that the guardians had been inclined to place greater emphasis on "safeguarding the interests of the child" than on the child's views, which is not to say that the child's views had been overlooked.

The research carried out into the Children's Society Guardian Ad Litem Project (Hunt and Murch, 1990) showed that both the project workers and their sessional colleagues saw the child as a person with feelings and

opinions and with rights to be consulted and involved in decisions about themselves.

With regard to advantages for the court, the Department of Health study felt that the guardian ad litem provisions introduced an inquisitorial element into adversarial proceedings: they acted as an informal filter system, encouraging local authorities to look at their legal evidence and welfare arguments (Murch et al 1990). The SSI reported:

"there was a consensus that guardians ad litem provided an independent and informed opinion to the courts and this had significantly improved the service provided by the courts".  
(SSI 1990, para 16.2)

Solicitors felt it had been a credit to guardians' professionalism that they had been prepared, when appropriate, to criticise their professional peers. Any criticisms were focused upon delays in appointing guardians ad litem, which in some areas were in short supply.

The response of parents, however, was decidedly mixed (Murch et al 1990, para 1.5). While some saw the guardian ad litem as an ally, or valued the involvement of a neutral person, a "substantial minority" either mistrusted the guardian's perceived lack of independence from the local authority; or felt they had not spent enough time getting to know the family; or were resentful that they had not arranged for the report to be seen in good time before the final hearing. This



last had been an issue in R v West Malling Juvenile Court ex parte K; a case that had established at an early stage in the history of the guardian ad litem that reports should be lodged with the court in good time. These criticisms and a general confusion about the role, were echoed in the Humberside report (Hunt and Murch 1990). The SSI study, however, reported that guardians ad litem had helped parents to achieve a sense of justice (SSI 1990).

Some aspects of the care authority's view are reported in the Humberside study (Hunt and Murch 1990, 1,3). Although relations are not "always free from conflict, suspicion, resentment and acrimony", social services staff often positively welcomed the participation of guardians in care proceedings. Although the reasons for this are largely given in terms of benefit to the court, the child and the parents, from their own point of view they fulfilled a useful purpose, acting as a second opinion, challenging, checking, confirming the agency's action or occasionally strengthening their case. In the absence, sometimes, of proper staff supervision, they occasionally acted, rather inappropriately, as consultants. Expressing rather more reservations about the system than the other groups consulted, concerns included delay, in appointment and in report preparation; duplication of roles and tasks; power without responsibility or accountability; doubts about independence; vagueness of

role boundaries; uncertainty about complaints mechanisms.

It must be remembered that the role as originally conceived was to be an extra safeguard in protecting children from abuse and neglect. In this respect there are obvious flaws; case law had established that although guardians could influence the kind of orders, if any, that were made by courts, they did not have any statutory power to determine how those orders were used, nor did they have any power to mount any challenge by initiating other forms of proceedings. Because it is an essentially advisory role, the influence of the guardian ad litem is rather hard to measure; but it seems clear that the very presence of an independent investigator will have some effect on the way in which the case is prepared and presented by other parties and, because she is respected as an autonomous professional with child care expertise, the guardian ad litem in the witness box can often be a very persuasive force. If there are any trends that can be identified in the development of the role, it is perhaps a move from an approach which is "more of an overview" to one where there is a greater awareness of the advocacy dimension. This view was expressed in a recent article (Eleftheriades 1991) in which Nigel Druce, Director of Social Services for Cornwall, locked in dispute with guardians ad litem over the number of hours they spent on cases, questions

whether the guardian ad litem role is indeed a social work role at all.

"Guardians sit very unhappily in a social services context. I don't necessarily accept that they should be social workers - the work they do is closer to that of lawyers. To me, social work with children implies having a long-term commitment. Guardians should see themselves as children's advocates rather than social workers."  
(Eleftheriades 1991)

Although guardians ad litem generally appear to support the idea that they should have a social work background, perhaps a similar view has been expressed by guardians themselves. In setting up its own professional organisation in 1989/90, members of the steering group for the National Association of Guardians ad litem and Reporting Officers (of which I was a member) were fiercely resistant to the idea of affiliation with existing social work organisations such as BASW, because it was thought that there was something intrinsically different about being a guardian. What appears to have happened is that something that began simply as an extra dimension to an ordinary social work case load, has become, in practice, a specialised occupation where legal knowledge and court-room skills predominate.

The consequences for practice for this independent advocate/expert witness will be discussed in the next chapter.

## CHAPTER 9

### THE PROFESSIONAL PRACTICE OF THE GUARDIAN AD LITEM

#### Introduction

This chapter will examine the implications of the guardian ad litem role for professional practice. It will discuss the importance of training and regular access to information about new developments in legal and social work matters to a role which demands professional accountability and social work expertise. The attractions of the job will be explored, together with its more negative aspects. The necessity to work independently of a line management structure also opened the way to self employment; and as reciprocal arrangements came increasingly under pressure, the self-employed guardian was one viable alternative model. This will be contrasted with the other alternative model that gradually emerged: salaried guardians, either employed in specialist teams within consortia of local authorities; or in specialist teams provided by the voluntary sector (see Chapter 7). Finally, the longer term career prospects for social workers who opt to become guardians will be discussed.

#### The guardian ad litem as "expert witness"

As previously noted, one particularly striking aspect of the new role of social worker as guardian ad litem in care proceedings was that the rules and guidance accorded her the status of "expert witness" and the professional autonomy to act independently of the

usual line management accountability. The guardian was, therefore, accorded an unprecedented professional status, which contrasted with the "semi-professional" organisational model experienced by most social workers (that is, one where professional work is subject to a good deal of control by higher ranks) and with the organisation, for example, of the Official Solicitor's Department, where the staff are not qualified social workers, not regarded as expert witnesses, and not expected to give evidence in court.

The expectation that a guardian ad litem would be seen as an expert social work witness led to guardians themselves becoming quick to grasp the importance of relevant training, of being able to demonstrate a good working knowledge of the law, of being aware of evidential difficulties relating to child abuse, and of the research relating to alternative ways of caring for children who cannot be brought up by their own families. They would also need to become confident and authoritative in court. The BASW report (BASW 1986, p.40) outlined the key areas of knowledge which, in their view, panel members must have, whatever their qualifications and experience. These included: the operation of the court system, including the High Court; the law relating to children and families, including case law; familiarity with the official circulars relating to law and practice; the structure and

functions of the social services department and other agencies; child development; and knowledge of well-validated research in the areas outlined above. Panel members would also need to be skilled in communicating with children and young people, with parents and foster parents, and with other professional people; they would need to be able to sift and analyse data, write letters and reports, give evidence and respond to cross-examination in court.

Although both Coyle's research (Coyle 1987, p.10) and the SSI report (SSI 1990, para 14.1) indicated that the panels were using an experienced work-force, who could be expected to have some of these skills, both reports suggested that the amount of training provided had been variable. Murch (Murch et al 1990, para 1.4) also commented that many administering authorities had been slow to fund or develop training opportunities. By way of compensation, many guardians subscribe to Independent Representation of Children in Need (IRCHIN), British Association of Social Workers (BASW), and/or British Agencies for Fostering and Adoption (BAAF), all of which publish regular periodicals, or to guides and magazines which are aimed primarily at lawyers, such as The Practitioner's Guide to Child Care Law, Family Law, and Family Law Reports. The ADSS report recommended that all guardians ad litem should have access to these (ADSS 1986, p.19); the SSI recommended that all new guardians should have appropriate induction training

(SSI 1990, p.7, para 1.10); and Murch suggested that an initial training programme, perhaps leading to accreditation, might be useful - this ought to be compulsory, not so much to put pressure on the guardians but rather on the administering authority (Murch et al, 1990). The necessity to act as an independent professional and to perform as an expert witness led over half the panel members in Coyle's sample to judge the role to be more complex and stressful than their day to day social work activities (Coyle 1987, p.22). Among the reasons given were: the crucial nature of the recommendations made; the sustained crisis intervention role; the isolation and lack of support, especially in sexual abuse and non accidental injury cases; the attitude of some social services departments towards an "outsider" examining their practices; difficulties in handling critical comments; and the courts' high expectations of the guardian ad litem.

The problem of isolation was picked up by the ADSS Report, which stressed the need for consultation with other members of the panel, and for contact with other panels (ADSS 1986, p.12). It was also mentioned in the BASW report, which noted that panels were developing regular support groups (BASW 1986, p.33). In the SSI report, most of the panel members interviewed felt they had adequate access to professional support (SSI 1990).

The interpretation given by some guardians ad litem to the role, especially the need to: "safeguard the interests of the child until he achieves adulthood", led to challenges to local authority plans and practices in either minor or major ways, examples of which were described in the previous chapter. The personal and professional consequences of these have not as yet been documented, but it is generally agreed among colleagues that conflict with the local authority is the most vexing and exhausting aspect of the job. The evidence of the longer term effects of "taking on" the local authority are, as yet, anecdotal, but the guardian ad litem in the North Yorkshire case (R v. North Yorkshire County Council 1989) was suspended from the panel and could see no solution in the end other than resignation. There are examples of guardians who have criticised the authority being offered no work, and of a "complaint" being received and the guardian suspended for an inordinate length of time while the complaint, eventually unsubstantiated, was investigated (personal communications 1988/89). For free-lance guardians, this means an outright loss of income, worries about future employment prospects and stress suffered both by themselves, and consequently their families.

With regard to the "high expectations" of the courts, Murch notes that: "both reports and first appearances of GALs in court had been impressive" (Murch and Bader 1984, p.107); and the case of Devon CC v



Clancy (1985) confirmed the considerable weight given to the opinion of the guardian ad litem by the courts, when Sir John Arnold, then President of the Family Division, stated on appeal that:

"it is well established in appeals from magistrates that if they fail to follow advice they receive - for example from a Probation Officer, without any justification for that failure, then the appeal will ordinarily be allowed. Exactly the same consideration must apply, in my judgement, to the views of the guardian ad litem."  
(Devon CC v. Clancy, May 1985)

Where Coyle's respondents felt the high expectations of the courts as another source of stress (Coyle 1987, p.44), panel members in BASW's survey "felt they received a surprising degree of respect from all the court personnel" (BASW 1986, p.44).

Indeed, on the whole, panel members appear to have enjoyed an enhanced sense of status from their role as guardian ad litem. The SSI report states:

"Panel members recognised their influential position and almost universally experienced a greater sense of status than they had in their role as social workers. This must arise partly from the key role the GAL takes in court proceedings. Additionally, the opportunity to comment on the work of peers and on the policies and services of the SSD placed the GAL in a more privileged position. Panel members who were mainstream social workers felt they did better work as GALs and that this fed back into the quality of their SSD practice." (SSI 1990, para 16.1)

Murch also comments that: "It is clear from our guardian interviews that the work is intrinsically attractive". While some might not be able to cope with the degree of autonomy required:

"To those who have worked in hierarchically structured and often over burdened and demoralised social services departments panels offered an entirely new prospect." (Murch et al 1990, p.33)

The attractions of the job included the opportunity to remain in direct practice; to concentrate on a time-limited, focussed, specialist task; to be part of an innovative service, developing an inter-disciplinary partnership with specialist solicitors; and at the same time being spared the same degree of responsibility for the supervision and care of children living in potentially dangerous circumstances, as is the lot of the social worker in an area team.

A new way of working : the opportunity for self-employment

The professional autonomy required of the guardian and the necessity to avoid being in the direct employment of the administering authority, which would have compromised independence, meant that it was possible for guardians to become self-employed and to work from home. Some authorities staffed their panels with such people from the beginning; the "solo" option as described in Chapter 6. By 1990, a move away from reciprocal arrangements and a trend towards the greater use of free-lance guardians ad litem, or of social services department staff specialising in guardian ad litem work, is reported by the SSI (SSI 1990, para 1.5), and Murch (Murch et al 1990, p.57) speaks of the "burgeoning use of sessional guardians". While the flexible hours made the work particularly attractive to

those with family commitments or those who had retired, it was also attractive to people who wished to combine guardian ad litem work with other occupations, such as teaching or research. In areas where there was a high demand, some social workers, including team leaders, opted to leave full-time salaried employment to become free-lance guardians ad litem.

The advantages of working in this way are that the hours are flexible, and the amount of work taken on lies within the guardian's personal control, rather than being dictated by management. There is also the enhanced sense of professional status, which is to some extent enjoyed by all guardians but more so, it could be argued, when one is entirely responsible for one's professional standards, though it is arguable that this might also be a source of stress. The more negative aspects are that rates of pay, which are locally determined, do not always reflect the "high professional calibre" (ADSS 1986, p.11) that the job demands. There is no pension, sick pay, or car allowance; and the administrative aspects of being self-employed can be onerous, such as having to account for every moment worked. Then there are the expenses of accountants, subscriptions to journals and to professional membership of various organisations. Perhaps the greatest disadvantage is the insecurity: because the work is subject to peaks and troughs in demand, there can be

periods when little work is available. In areas where the demand is inconsistent, this can lead to an imbalanced panel membership, where men are under-represented. There are also the potentially dangerous consequences of conflict with the administering authority, when one's membership of the panel may be in jeopardy. It is perhaps significant that the greater part of the membership of the National Association of Guardians ad litem and Reporting Officers, launched in April 1990, comprises sessional guardians, who have a particular interest in belonging to a professional organisation that recognises the problems of self-employment.

#### Specialist salaried guardians

Self-employed guardians were strongly criticised in an article by Andy Lusk (Lusk 1988). His main arguments were that self-employed guardians could not possibly be "independent" when they were paid by one of the parties to the case (he fails to pick up the subtle but important distinction between being paid and being employed). Because of this relationship, they dare not risk making contrary representations; and although the gaps in the working lives of some guardians are respectably filled by research, teaching or expert-witnessing, many were not, and those who were retired might well be out of practice and out of touch. As Director of The National Children's Homes, the option he was favouring was the provision of a guardian ad litem

service via partnership with a voluntary agency, and quoted as an example the NCH guardian ad litem project that had been set up in partnership with South Glamorgan County Council in 1986.

In concept, this arrangement was very similar to the Children's Society guardian ad litem project on Humberside, described in Chapter 7, and researched by Hunt and Murch between 1985 and 1988. They write:

"Though the behaviour of the local authority in Humberside has been, to the best of our knowledge, impeccable, it still retains ultimate control. This is the Achilles' heel of the whole enterprise." (Hunt and Murch 1990, p.19)

Not only was the enterprise joint-funded, but the collaborative way of working required for successful partnership could compromise the essentially separate nature of a good guardian ad litem service. Thus, Lusk's criticism about the independence of self-employed guardians could equally be applied to those working within a project. From the point of view of actual working conditions, however, the project model, which is similar to the specialist guardian ad litem units set up within consortia of local authorities, has its own advantages and disadvantages.

Project guardians ad litem, or those who work in specialised units within consortia, enjoy the security of full-time salaried employment and working conditions that "support the development of effective practice" (Hunt and Murch 1990, p.16). There is an office base

which provides clerical and administrative support, an interview room furnished for use with children and a library stocked with specialist journals.

Because the work is full-time, individual guardians are able to acquire experience rapidly without the competing demands of a regular case load. Working in a team helps to off-load some of the stresses of the job and prevents professional isolation; there are opportunities for both structured and ad hoc consultation and discussion. Members of the Humberside project felt they gained confidence from the fact that another person had looked at their reports, and the opportunity to test out ideas acted as a safeguard against acting dangerously. Although, like their sessional colleagues, they were dependent on the administering authority for their re-appointment to the panel, they felt less vulnerable when being critical because of the conditions of their employment (Hunt and Murch 1990, p.17).

Paradoxically, however, in Humberside they also felt more constrained in being critical because of the importance of maintaining good relationships between the voluntary society and the local authority. Other disadvantages which they shared with, for example, salaried colleagues in consortia, were identified in the Humberside research: unlike their sessional colleagues, who were free to refuse work, salaried specialist guardians ad litem were expected to fulfil an annual

quota of cases. Full-time employment in such a unit could have a limiting effect upon career prospects:

"It commits workers to a professionally marginal, narrow, and in career terms, potentially limiting role, which is inherently high pressure and conflictual." (Hunt and Murch 1990, p.19).

The lack of opportunity to exercise a broad range of social work skills was leading to thoughts about possible diversification, perhaps embracing the broader concept of child advocacy.

#### Career prospects

Indeed, the question of career prospects is a problem for all guardians ad litem where guardian work forms a substantial part of their working lives. Appointments to panels are limited to three years. In the context of the predominantly reciprocal arrangements which the government anticipated in 1984, this limit suggests that the intention was for local authority workers to move on and off panels, perhaps allowing colleagues to join in their place. With the demise of this kind of arrangement, joining a panel becomes a much more positive act, indeed an actual career choice.

While Murch saw:

"no justification for the imposition of a more traditional hierarchical bureaucratic model" (Murch et al 1990, p.63)

and the SSI reported that:

"The evidence for this study suggests that GALs were able to provide professional advice to the courts without the support of hierarchical supervisory arrangements." (SSI 1990, para 15.5)

The absence of a career structure has both a negative and a positive side. The respondents in Murch's study, for instance, pointed out that guardians are not necessarily looking for a career structure (Murch et al 1990, p.75) and, indeed, one of the attractions of the job is the release from the pressure to move up the career ladder; the fulfilment of the job comes from doing the work rather than in being promoted. Some guardians, however, need to earn more money and, if there are no opportunities within the service, they will have to leave it. Others may feel they need a change of scene, or become disaffected with the insecurity and poorly paid aspects of sessional work. But where do they go? If they have been out of local authority practice for any length of time, they will have scant credibility as management material, which means that there may not be any alternative but to return whence they came; to mainstream social work, with its attendant pressures and loss of status.

In conclusion, guardians on the whole seem to have enjoyed an enhanced sense of status over their social worker colleagues, which seems to arise from the professional accountability required by the role. This has its stressful side as well, however, especially where there is conflict with the local authority. For those who opt to be self-employed, the main advantages are that both the work load and the way the work is organised lie within personal control. On the other



hand, self-employed guardians can feel isolated, and the fluctuations in the availability of the work make it relatively insecure and, therefore, possibly less attractive to men (always supposing we assume that men tend to be the principal breadwinners). A more secure, and less isolated option is to work as a salaried guardian in an area team. Either way, because there is no career structure and no obviously logical career move to make as a next step, the paradox emerges whereby being a guardian ad litem is more professionally satisfying while being more professionally limiting.

In recognising that guardians have had an important contribution to make, the Children Act 1989 extends the role to other kinds of proceedings. During the passage of the Children Bill, it was rumoured that the new regulations might outlaw self-employed guardians (sometimes rather derogatorily referred to as a "cottage industry") in favour of salaried guardians in specialist teams. In the event, the government favoured the retention of a "mixed economy", at least in the short term. Administrative arrangements for panels of guardians on implementation of the Act, as well as the revised role, will be the subject of the next chapter.

## CHAPTER 10

### THE CHILDREN ACT 1989

This chapter will examine the implications for guardians ad litem of the implementation of the Children Act 1989, in terms of changes in the law, the organisational arrangements of panels and changes to the role.

#### Changes in the law - the Children Act 1989

As was discussed in Chapter 2, the philosophy behind the Children and Young Persons Act 1969 reflected a preoccupation with the delinquent child, but because s/he was also thought to be neglected and deprived, the jurisdiction was to be essentially civil, through "care proceedings". However, the idea of a "fair trial" was felt to be important too, and this was reflected in the quasi-criminal nature of court procedures that ensued. Even though in practice the offence condition was rarely used, the procedures were designed around it and the other grounds for care, such as the child's proper development being avoidably impaired or neglected, or that s/he was in moral danger, beyond control, etc, had been seen as different manifestations of the same problem of family dysfunction.

The Children Act 1989 is a radical piece of legislation in a number of ways. First, it combines in one Act private legislation concerned with parental separation, with public legislation concerning the intervention of the state into family life, ie "care

proceedings". The juvenile offender is now a separate issue so the Children Act 1989 can be thought of as an entirely civil piece of law. Where, previously, a child could come into the care of the local authority through a proliferation of legislation associated with matrimonial proceedings, criminal proceedings and wardship, each with its own differently defined grounds, or even through the purely administrative route of the "Parental Rights Resolution" the Act made one ground for care, based on the concept of "significant harm" or the likelihood thereof, the harm being either attributable to some deficit of parenting, or the child being beyond parental control. Because the grounds are drawn more widely and include an element of prediction, and because the range of orders in "Family Proceedings" (a term to encompass both the private and public aspects of the law) is now much wider, wardship, while continuing to exist, will no longer be an option for local authorities seeking care orders.

The underlying philosophy behind the new legislation is that children are best brought up by their own families. If any state intervention is required, the emphasis must be on the provision of services (home helps, day care, holidays, etc) rather than on the acquisition of court orders. The old "voluntary care" is now to be regarded as an unstigmatised service to give families respite and

to enable them to function better. It introduces the new idea of "parental responsibility" to replace the old idea of parental rights and "custody". Any statutory intervention by the state is to be a last resort and, even if a care order is made, in contrast to the old situation where parental rights became vested in the local authority, the local authority will now acquire "parental responsibility" in addition to the parent, thus continuing the idea of partnership.

As a further example of a philosophy of minimal state intervention, even if the local authority can show that the grounds for care, or "threshold test," is met, the court must still consider whether making an order is better for the child than not making an order. This means that the local authority will not be able to argue simply, as it has in the past, that it needs control of the situation, but will have to give detailed plans for the child's future care. Because the question of custody can now be addressed in public law proceedings, this extends the range of orders that can be made; the care of a child can be allocated to a specific person, for example, via a "residence order". Other orders, such as "contact", "specific issues" and "prohibited steps", which appear in Section 8 of the Act, can be used to address particular matters, reflecting the flexible range of orders that had been available in wardship.

Although falling rather a long way short of establishing a family court, the new legislation extends the idea of "concurrent jurisdiction" to care proceedings. Care proceedings used only to be heard in the magistrates' courts but now the advantages of the higher courts are available, so that the more complex cases can be heard by a judge in the County Court, or even a High Court Judge in the High Court. Most cases will start in the new Family Proceedings Court, as part of a reformed Magistrates' Court system, by a Family Proceedings panel drawn from magistrates previously designated to the juvenile and domestic panels. The old juvenile court is redesignated as the Youth Court and will deal exclusively with juvenile offenders.

To make the proceedings less adversarial and more in line with other civil proceedings, there is no longer a "proof" and "report" stage which was a feature of the old care proceedings. As in other civil matters, written evidence in the form of witness statements and reports is lodged with the court, and read, prior to the hearing.

For a while it was thought that the Official Solicitor might continue to act as guardian ad litem in Children Act care cases that reach the High Court. He has since said (Seen and Heard, 1991, p.8) that he will continue to act as amicus curiae if requested by the High Court under the Act, where an issue of general public importance has arisen. He will act as guardian

ad litem for a child in the High Court, but only if the child does not already have one, if there is some particular reason for the child to have the Official Solicitor rather than a panel guardian ad litem, where there is a foreign element in the case, or where the number of children in the case makes representation by one guardian ad litem too burdensome. This suggests that tensions that have existed between the Official Solicitor and panel guardians ad litem in the past are likely to be eased. (See discussion of the Cleveland Inquiry in Chapter 7 and the relative merits of the Official Solicitor and panel guardians in Chapter 8.)

As far as other aspects of the representation of children are concerned, the divisions between private and public law cases continue. In private law, the child is still not a party and in cases arising from parental separation, court welfare officers will continue to report on the situation to the courts. A reform of Adoption Law is in prospect, but in the meantime the situation regarding representation continues as before.

#### Administrative arrangements

The Regulations to the Children Act 1989 determining the organisation of panels were published in the late summer of 1991, at around the same time as the Court Rules. As expected, responsibility for the service was to remain with the local authorities, (GALRO

1991, para 2 (1)). In an attempt to make the service at least appear more independent, there was a new statutory duty to establish a complaints board and a panel committee, the latter being the "advisory group" redesignated (GALRO 1991, para 3). Although the regulations define its functions as still essentially advisory, it is to undertake delegated tasks connected with appointment and reappointment, training, monitoring standards and investigating complaints, with the overall responsibility remaining with the local authority. In recognition of the rather lax way in which members had been appointed to panels in the past, it was now deemed necessary that they should be interviewed, and notified of their appointment in writing. As before, the appointment is to be for a period not exceeding three years (GALRO 1991, para 4), but renewable.

In a further attempt to enhance independence by distancing the panel from the child-care functions of the local authority, Regulation 7 stipulated that the panel manager should not participate in the local authority social services functions in respect of services for children and their families, other than the administration of the panel or the establishment of an inspection unit. (The significance of the latter will be discussed below.) In addition, far more detailed records should be kept, concerning the type of proceedings in which the appointment of a guardian ad

litem had been made, the time taken, the fees paid, and the outcome, than had been the case in the past.

These efforts to address the problem of independence were, however, somewhat countermanded by the simultaneous publication of the Family Proceedings Courts (Children Act 1989) Rules (Magistrates Courts 1991). They had been circulated in draft form several months earlier, and had not aroused any particular reaction. However, when the final version was published, Rule 10 (7) (a), which had not been in the earlier version, caused something of a stir. It stated:

"A guardian ad litem appointed from a panel established by regulations made under section 41(7) shall not -

Be a member, officer or servant of a local authority which, or an authorised person (within the meaning of section 31(9) who, is a party to the proceedings unless he is employed by such an authority solely as a member of a panel of guardians ad litem and reporting officers."

[underlined by author] (Magistrates Courts 1991, Rule 10 (7)(a))

In other words, local authorities could now employ their own guardians. The fact that no guardian ad litem could act as such if s/he had been directly concerned with the child in the five years prior to the commencement of the proceedings did not go far in mitigating so fundamental a change.

To begin with, when challenged, a spokesperson for the Department of Health claimed that the new rules had been misunderstood and that existing rules had been amended only to the extent that an authority bringing proceedings could have a social worker employed as an



adviser to an otherwise independent panel of guardians (Ivory 1991). However, an article in the same journal two weeks later (Marchant 1991) cited evidence that had been gathered by the National Association of Guardians ad litem and Reporting Officers which indicated that about a dozen authorities were now planning to employ their own "in-house" guardians, on DoH advice. Opinions as to whether or not this actually mattered were divided. Geoff O'Brien, Assistant Head of Legal Services for Surrey County Council (which, it transpired, had employed its own salaried guardians ad litem for the previous three years), cited in the same article (Marchant 1991), said he had no evidence that authorities who had recruited their own guardians had found that the independence or integrity of those guardians had been compromised.

It was, indeed the old argument about whether organisational independence is a pre-condition for professional independence. However, those who advocate that it is not, ignore the very important justice aspects of such an arrangement; in other words, that those using the service, especially parents and children, are unlikely to have much faith that their situation is being independently considered if the guardian ad litem is a salaried member of the social services department's own staff, and likely to be imbued with the policies and practices of the authority.

Lord Mackay, the current Lord Chancellor, is one of those who sees organisational independence as unimportant. Speaking at the National Forum of Guardians ad litem and Reporting Officers, he said:

"I do not accept that the principle that the child's welfare is paramount is compromised in any way by the arrangements for providing the guardian service... The central issue facing you is not one of who pays you but one of professional skill and judgement." (Mackay 1991)

Perhaps a more honest explanation was the one that followed; he went on to say that the measure was a necessary expediency. It was feared that as implementation of the 1989 Act approached there would not be enough guardians ad litem to meet the demand; presumably if local authorities were permitted to recruit from their own ranks, perhaps through secondments, it would help to ensure that enough guardians ad litem were available.

Although guardians ad litem will be appointed in a wider range of proceedings, and wardships will no longer be an alternative, this may be balanced by the new statutory duty to work on a voluntary basis with families and only to take court action as a last resort. Demand for guardians ad litem under the Children Act is therefore difficult to predict; and the guidance (DoH 1989, para 2.2) suggested that it might be wise to postpone making new arrangements until the pattern of demand for the service had begun to emerge. There was a suspicion in some quarters that the haste with which

some local authorities had adopted their own teams of salaried guardians might have something to do with control. The dispute between members of the Cornwall panel and the Director of Social Services for Cornwall, which was also receiving publicity at this time, illustrated the tensions that arise when the local authority is obliged to fund an "independent" service that is in competition with other local authority functions.

At the beginning of November, guardians ad litem on the Cornish panel sought a judicial review to challenge an attempt by Social Services Director, Nigel Druce, to restrict the number of hours they spent on each case to a maximum of 65. No payment would be made to guardians who exceeded this limit without first seeking permission of the panel co-ordinator.

The review was heard by the President of the Family Court Division, Sir Stephen Brown. The case was reported as Regina v Cornwall County Council, ex parte Cornwall and Isles of Scilly Guardians ad litem and Reporting Officers Panel (1991). Granting certiorari to quash the decision of the Director, the President pointed out that the position of the guardian should not be compromised by any restriction imposed directly or indirectly in carrying out his duties. The Director had exceeded the proper use of his authority which amounted to an abuse of power. It was important to emphasise that it was vital for guardians ad litem not only to be

seen to be independent but for them to be assured of their independence while carrying out their duties.

In addition to the conflict-of-interest issue, the case illustrates a further organisational anomaly; ie the empowering of one agency, in this case the courts, to consume resources and manpower provided by another agency, the local authority. Given that s/he pays the bills, it is hardly surprising that the Director should wish to exercise control over how the money is spent. Although it was a victory for the guardians, it has not solved the real issue, and is yet another argument for a centrally-funded service.

It is generally thought to be the case that, in order to separate guardians ad litem from the legal or child care functions of the local authority, they will be organisationally or, in the case of salaried guardians ad litem, physically situated within the so-called "arms' length" Inspection Units. Although organisationally separate from the social services department, and with a remit to oversee and inspect the authority's care provision for both children and adults, the units are open to the same criticism concerning the guardian ad litem system, that there is an incompatibility between being a service provider and a service watch-dog.

It appears that an organisational model, based on the Humberside project, i.e. a core/satellite or "clutch

and cluster" model, is commending itself to local authorities, especially those considering recruiting their own salaried guardians ad litem. Thus a "core" service will be provided by a salaried team, with a "cluster" of free-lance guardians ad litem to cope with the inevitable peaks and troughs in demand. This fits also with the SSI recommendation for a smaller, more dedicated workforce (SSI 1990), but may also be attractive because an in-house work force is easier to control and there is still an uneasy attitude towards free-lancers in some authorities because it is seen as privatisation.

#### The role of the guardian ad litem

The essential duty of the guardian ad litem under the Children Act 1989 remains the same as before; Section 41 (2) (b) states that the guardian ad litem "shall be under a duty to safeguard the interests of the child" as prescribed by the rules, though it is interesting to note that the reference to "until he achieves adulthood" has now been omitted.

It will no longer be necessary to establish a conflict, or potential conflict, of interest before appointing a guardian ad litem, and the court shall appoint one for the child concerned, in any specified proceedings, unless satisfied that it is not necessary to do so in order to safeguard his interests.

The range of "specified proceedings" in which a guardian ad litem can be appointed has widened to

include:

any application for a care or supervision order

any application to discharge a care order or to vary or discharge a supervision order

any proceedings in which the court has made a direction under section 37 (1) and is considering whether to make a care or supervision order

any case where the court is considering making a residence order for a child subject to a care order

any case in which contact for a child subject to a care order is being considered

any application for a child assessment order

any application for an emergency protection order

any appeal arising from any of these proceedings

any (civil) application for a secure accommodation order

any application to change a child's surname or remove him from the jurisdiction while subject to a care order

any application to extend a supervision order.

Those proceedings where the appointment of a guardian ad litem is new are: applications for child assessment orders, emergency protection orders, secure accommodation, a residence order for a child in care, and applications to change the surname of a child in care or remove him from the jurisdiction. Additionally, local authorities can no longer refuse contact to parents administratively, but need to apply to the court. These are all "public law" proceedings; where courts have attempted since implementation of the Act to appoint guardians in private law proceedings, such as

those associated with parental separation, the same difficulties have been encountered regarding who will pay the guardian, as were experienced when guardians were appointed, or appointed themselves, in wardship cases (see Chapter 8).

The guardian will appoint a solicitor for the child unless the court has already done so; and, for the first time, can apply, with the leave of the court, for separate representation for herself, in cases where the child is directly instructing the solicitor. The legal aid board has refused to pay for this, however, and the cost will therefore have to be met by the panel.

The investigative role for the guardian ad litem in safeguarding the interests of the child remains much as before, except that the statutory right to inspect documents, available hitherto only in adoption, is now extended to Children Act cases. As the child's representative, the guardian ad litem shall convey the child's wishes and feelings to the court, observe the "welfare check list" (Section 1 (3)) and advise the court regarding a child's understanding of medical examination/assessment. (A competent child has the right to refuse.) In Family Proceedings concerned with public law, the guardian ad litem is no longer confined to advising the court whether the local authority's application should succeed, but can also advise on possible alternatives to care, such as residence with a member of the extended family, or contact. In addition,

the new Act gives guardians a number of new duties. These new duties arise from the abandonment of the proposed Office of Child Protection.

As was discussed in Chapter 7, after the publication of the Cleveland Inquiry Report (Secretary of State 1988) the government expressed its current concerns in a consultative document, published by the Lord Chancellor's department, entitled Improvements in the Arrangements for Care Proceedings (Lord Chancellor 1988). These concerns were to ensure a more appropriate match between weight of case and level of court; a reduction in avoidable delay through better case management; early independent scrutiny of the local authority's case; and better management of the arrangements for protecting the child's interests. The proposal made in the document was that these functions could be undertaken by an Office of Child Protection.

As we have seen, the proposal for an Office of Child Protection did not come to fruition. Guardian ad litem panels, which would have been taken over by the Office, have remained with local authorities, though with a greater emphasis on management (advisory committees now being mandatory) and separation from its child care functions. The concern about independent scrutiny of the local authority's case arose from the Cleveland affair, where it was felt that far too many Place of Safety Orders were being granted at random.



Hence the appointment of a guardian in applications for Emergency Protection Orders and the establishment of Emergency Duty schemes, though there is an ongoing debate about just how useful a guardian can be at a stage where there is little information available.

Two of the other concerns discussed in the proposals for an Office of Child Protection, namely match of case to court and avoidance of unnecessary delay, are addressed in the Act and form part of the guardian's new duties as an officer of the court. Although a system of concurrent jurisdiction is built into the new arrangements, it is a task for the guardian to advise the court about allocation at the appropriate level. The concern about avoidable delay is to be met by a strict scheme of court timetabling, which the guardian ad litem must oversee. The guardian is also to advise on parties, and on the options available to the court at any stage in the proceedings (Magistrates Courts 1991, Rule 11(4)).

A completely new area for guardians is that they can now be appointed in applications for Secure Accommodation Orders, when these occur in the context of Family Proceedings rather than criminal proceedings. On the very little anecdotal evidence that is available so far, it seems that even in Family Proceedings, the child, or young person, has essentially been involved in criminal activities, such as chronic "joy-riding", or

a number of burglaries. This is something of a paradox in an Act that sought to separate out delinquent children!

The new role of the guardian ad litem - a child protection role?

The essential realisation of the Maria Colwell Inquiry, as far as it related to the creation of the future guardian ad litem, was that if a parent had, or was alleged to have, harmed a child, the child's interests must be separately recognised and represented (Secretary of State 1974). As was discussed in Chapter 3, the 1975 Children Act, in which this philosophy is given legislative expression, perceived children's rights as separate from parents' rights in other ways as well, for example, by recognising the child's need for stability and security as a right and making it easier for children who were unlikely to return to their family of origin to achieve legal security as members of alternative families through adoption or custodianship.

The Children Act 1975 occurred in a context where child abuse was a new "discovery" and a major preoccupation. Government guidelines urged the strengthening of child protection mechanisms through the setting up of abuse registers, through child abuse committees, and the acquisition of control through court orders. The lack of public confidence experienced by social workers at that time arose from a view that they had not intervened enough.

The Committee of Inquiry into the death of Maria Colwell was convinced that the appointment of a guardian ad litem could have saved her. However, as was discussed in Chapter 8, although the guardian ad litem could influence the kinds of order the courts were asked to make, once the local authority had been given the custody of a child through a care order, the guardian ad litem's role was at an end. A guardian ad litem could have supported the local authority's application for a care order in the case of Jasmine Beckford; but could not have prevented the subsequent restoration of Jasmine to her mother and stepfather and thus her eventual murder. A guardian ad litem could not have influenced the situation for Kimberley Carlisle as no court proceedings were ever started. The strength of the guardian ad litem has lain in her position as an outside observer and potential critic, which may sometimes have the effect of making other people and agencies, especially local authorities, more accountable.

Jasmine Beckford, Lucy Gates, Kimberley Carlisle and Heidi Kosega, were all children whom the statutory agencies, including the NSPCC, failed to protect. Then came Cleveland, and the perception, from the point of view of the public, not that social workers had failed to take protective action, but that they had overreached themselves and violated the sanctity of the family. As has already been described, few guardians ad litem were appointed in the Cleveland cases, where they might,

perhaps, have provided a more objective view - though my opinion, stemming from personal involvement, is that they would probably have been as bewildered as anyone else. The cases of alleged child abuse in Rochdale and Orkney were also perceived as an over-reaction by social workers; the children in Rochdale were represented by the Official Solicitor, and Scotland has a different system. More recently still, the scandal of "Pin-down" in Staffordshire, and the Frank Beck case in Leicestershire has shaken public confidence in the statutory agencies yet further, exposing the abuse to which children in public care can be subjected.

In this context, it comes as no surprise to find that the philosophy of the Children Act 1989 emphasises that parental responsibility should lie with parents. Although there are measures, by way of balance, in Part 5 of the Act, "Emergency Protection of Children", which are designed for swift and effective action to be taken should the child's circumstances require it, the overriding principle is that of minimal intervention; it is clearly intended to dilute local authority powers and strengthen family rights. The Act requires authorities to work in partnership with parents, and to resort to courts only when family support services have failed or are inappropriate to safeguard the welfare of the child. Even then the court will have to be convinced that making an order is better than not making one, and that

will depend on the resources of already hard-pressed local authorities and in a climate that reflects a lack of public confidence in public care.

In an Act that perceives children's interests in a different way, what is the guardian ad litem's role? The preoccupations that were expressed in the Lord Chancellor's paper (Lord Chancellor 1988, pp.9/10) were not concerned with measures to protect children from abuse and neglect but with early vetting of the local authority's case and the efficient processing of cases through courts. With the abandonment of the notion of the Office of Child Protection, these tasks were to fall to the guardian ad litem. That the government was more concerned that local authorities were being too interventionist rather than not interventionist enough is illustrated by its anxiety to have a guardian ad litem appointed in applications for Emergency Protection Orders; the task of the guardian ad litem is to vet the local authority's case, but there is no concomitant power for the guardian ad litem to initiate any other action on behalf of the child if, on expiry of the Emergency Protection Orders the local authority should decide to take the matter no further. The same applies should the local authority, having been ordered by the court to investigate a possible welfare concern about the child under Section 37 of the Act, decide not to apply for a care or supervision order. The court can make private law orders of its own motion, but can only

make public law orders when the local authority applies for them. The powers available in the "Birmingham" case are no longer available to the courts.

Where the interests of children are concerned, the guardian ad litem's role continues, as before to be essentially advisory. This was spelled out by the Lord Chancellor in his address to the Sixth National Forum of Guardians ad litem in November 1991:

"The guardian, I would remind you, has no role outside the court proceedings. You may ask what the guardian should do where the local authority seems not to be making available resources which you think it is their duty to supply and which might affect the outcome for a particular child. The answer is that you can raise the matter with them, but at the end of the day you can only advise the court on the basis of what the situation actually is. Neither the court, nor the guardian, who is an officer of the court, has power to order the local authority to look after the child in a particular way, and again, at the end of the day, it is the local authority's job and responsibility to apply its resources with appropriate priority in accordance with the law." (Mackay 1991, p.11)

The Act rests on a number of principles which may, in time, prove incompatible. The welfare of the child is paramount, yet state intervention must be minimal. The Act assumes that parents are reasonable people and that local authorities must act in partnership with them, yet we know that some children are crippled at the hands of their parents. It is perhaps significant that the guardian is no longer appointed where there is a perceived conflict of interest, but in all cases "unless it appears unnecessary to do so for the child's welfare". The Act, indeed, gives no overt expression to

a conflict of interest between parent and child and if, because of the voluntary nature of the arrangements, and the fact that the case may never come to court at all, there is no third party to champion separately the interests of the child, there is a danger the child's situation will not be given the emphasis or prominence that it deserves. It must be suspected that the new "case management" aspect of the role may well have higher priority in the government's mind.

Finally, and paradoxically, the Act is radically child-centred. Contact with the absent parent is the child's right. The child can initiate court actions, can challenge an emergency protection order, seek a contact order when in care, seek discharge of a care order, can apply with the court's leave for a section 8 order, seek the ending or making of a parental responsibility order. In all these cases, the child must have sufficient understanding of the issues involved. The child can also refuse to be medically examined; but in a sexual abuse case, for example, can we be sure that a child who is intellectually mature enough to make decisions, will also be emotionally mature enough to withstand parental pressure? By giving both parents and children so much autonomy, there must be a danger that, in a minimum of cases, children will not be protected either from parents or from themselves and guardians will be powerless to do anything about it.

## Conclusion

In summary, the Children Act 1989 is an entirely civil piece of legislation, combining the "private" law relating to parental separation with the "public" law relating to state intervention into family life. In contrast with the Children and Young Persons Act 1969, the child offender is now a separate issue; and in contrast with the Children Act 1975, there is greater emphasis upon non-intervention by the state, and the issue of conflict of interest between parent and child has become blurred. The demand for guardians ad litem remains difficult to predict because, although they can now be appointed in a wider range of public law proceedings, this is offset by the principle of non-intervention, where the expectation is for voluntary arrangements with parents and less frequent recourse to the courts.

Responsibility for the guardian ad litem service remains with the local authorities, though in response to criticisms about "independence", the panel manager must be organisationally separate from the child care hierarchy of the Department. There is also greater emphasis on "management", with advisory committees, with their hiring, firing and monitoring functions, being a statutory requirement, and with an expectation of precise record-keeping. The "independence" issue, however, has been further inflamed by the court rules



which allow direct employment of guardians by the authority which is party to the case.

The role of the guardian ad litem in care proceedings was originally conceived as an additional safeguard in the armoury of child protection. The emphasis in the Act upon promoting parental autonomy must raise questions about a potential conflict with a duty to protect children, where necessary, from parents. The early appointment of a guardian to vet the local authority's case suggests that the guardian ad litem is to be a curb on local authorities becoming over-zealous; in effect, to safeguard the child from the local authority. Where there is anxiety on the part of the guardian ad litem that the local authority might not be zealous enough, as before, the role remains advisory and there is no power to initiate proceedings on behalf of the child or to challenge the local authority's actions once a care order has been made. Indeed the courts' powers are also diminished in this respect since they can no longer make care or supervision orders of their own motion. This implies that the emphasis on promoting parental responsibility in the Act may be at the expense of protecting children from abuse and neglect, with obvious implications for the guardian's role.

The new role reflects different preoccupations in other ways as well. Some of the proposed functions of the jettisoned "Office of Child Protection" are now given to the guardian who has an additional "case

management" role, aimed at the efficient processing of the case through the court. The new emphasis on families, and extended families, means that the guardian ad litem must apply herself to other aspects of the child's interests, such as contact with family members or indeed, alternative living arrangements within the extended family.

The final chapter will attempt to summarise the main developments both in the role of the guardian ad litem in care proceedings, and the administrative structure, in the eight years between the beginnings of the service in May 1984, and October 1992, one year after implementation of the Children Act 1989. Conclusions will be drawn in the light of the questions posed in the Chapter 1.

## CHAPTER 11

### SUMMARY AND CONCLUSIONS

As was explained in the introductory chapter, the impetus for this study arose out of my work as a guardian ad litem in care proceedings. Its aim is to illuminate the legal and social context of this representational and safeguarding role concerning children and to compare it with representational roles in other kinds of proceedings, such as adoption, wardship and matrimonial/guardianship cases where the "best interest" of the child is a consideration. Because the idea of appointing guardians in care cases had arisen as a response to an increased public awareness that children could be abused and neglected within their own families, this raised the question of how effective this "safeguarding" role could be, within the particular legal and administrative systems in which it had to operate. Implementation of the Children Act 1989 one year before the study was finished, has raised further questions about the purpose of the guardian's role within the context of a new law. The areas of enquiry opened up by the study were: the legal context of the work, representation in other child-related proceedings, the administrative structure, the role and professional practice of the guardian ad litem, and the changes brought about by implementation of the Children Act 1989.

### The legal context

One trigger for the study had been the discovery of the anomalous situation whereby appeals in care proceedings (which are civil) were heard in the Crown Court (which is a criminal court). The search for the answers opened up a complex and fascinating history of the legislation regarding children and the courts; much of it, initially, a response to the social problems of the Industrial Revolution. Although the particular state of childhood gained acceptance in the 19th Century, whereby children were acknowledged as dependent creatures in need of protection, because of the circumstances in which many of them lived, they were also regarded as a threat to the social order and, therefore, in need of control. Indeed, the neglected child and the criminal child were to be regarded as part of a continuum for the best part of a century, which explains why the legislation for both categories of children remained intertwined until separated in the Children Act of 1989. In order to make a distinction, however, for the sake of fairness, between children who had committed offences and those who had not, the juvenile court (which is where such cases were heard from 1908 until 1991) adopted a criminal jurisdiction for the one and a civil jurisdiction for the other. Even in civil proceedings (i.e. care cases) procedure followed a quasi-criminal mode, with a "proof" and "report" stage, echoing the "trial" and "disposal"

stages in criminal cases, so that care proceedings were a unique criminal/civil amalgamation. The only proceedings in magistrates' courts (prior to the Children Act 1989) that were unequivocally civil were domestic proceedings, and appeals in these were heard in the Family Division of the High Court. Appeals in all other magistrates' court cases went to the Crown Court.

Another consequence of the quasi-criminal nature of care proceedings was that the applicant (usually the local authority) acted as the equivalent of the prosecutor, while the child was the equivalent of the defendant. The possible consequences of this arrangement were not fully appreciated until the Maria Colwell affair illustrated that where allegations were made against the mother, who had no party status and right to legal representation, the solicitor nevertheless took his instructions from her. This situation led to the reforms embodied in the Children Act 1975, and the provision for disqualifying parents from representing their children where there was a "conflict of interest" (Section 64).

From 1889 (in the Protection of Children and the Prevention of Cruelty Act) it had been possible to prosecute parents who wilfully ill-treated or neglected their children and to place the child with a "fit person". It was not until the Children and Young Persons (amendment) Act of 1952 that children could be

removed from parents in (civil) care proceedings without a successful criminal prosecution taking place as well. Although the Children and Young Persons Act 1969, which was the relevant statute in the juvenile court when guardians began to be appointed in 1984, recognised the problem of ill treatment (Section 1(2)(a)), it was not attributed to any specific deficiency on the part of the parent, but was one of a number of grounds for "care" (including the commission of an offence), all of which were regarded as symptoms of the malfunctioning family in differing manifestations, i.e. the neglect/delinquency continuum.

The Maria Colwell tragedy raised public awareness of the problem of child abuse in the sense of deliberate harm perpetrated by parents or step-parents; but perhaps even more pertinently, it raised public awareness of the state's child protection responsibilities, in which it had demonstrably failed. The law itself was not changed; the 1969 Act continued to be the relevant statute, with the parts concerned with separate representation being added retrospectively, but the local authorities were advised through government circulars to create multi-disciplinary child abuse committees, to keep registers of children who had been abused or who were thought to be at risk, and to seek control of abusing or potentially abusing families through court orders, i.e. care proceedings. It is not difficult to see how the role of the guardian ad litem

is consistent with this prevailing pre-occupation with child protection.

The difficulty was that a law that had been designed to deal with delinquency, albeit via a welfare approach, was now being used in child protection cases where the parenting function was in question. From 1983 parents had some rights to legal representation but did not have full party status and were not, therefore, entitled to appeal. This was eventually remedied by the Children and Young Persons (amendment) Act of 1986. The child retained his/her party status and right to legal representation, and when the guardian ad litem provisions were implemented in 1984, it became possible for him/her to acquire a guardian as well, thus forming the solicitor/guardian ad litem partnership which is a unique feature of the system.

For guardians ad litem, the main limitation of the Children and Young Persons Act of 1969 was that the court could only make supervision or care orders. Supervision orders were directed at the child, when it was often the parent who needed the supervision; and care orders, which transferred parental rights to the local authority, gave the authority what was to prove to be unassailable power in determining the child's future once the order had been made. Guardians' attempts to challenge this power through the courts have sometimes arisen because the local authority was not

interventionalist enough (see Chapter 8). (For example, in re J.T (a minor) (1986) the guardian ad litem thought a plan for rehabilitation with the mother was too risky.) Yet the courts have made it very clear that the local authority's power once orders have been made is not open to challenge, even by guardians ad litem. Even before this study was begun, the unsuitability of the Children and Young Persons Act 1969 as a format for care proceedings had been recognised, not least by the Short Committee (Social Services 1984), which set in motion a Review of Child Care Law (DHSS 1985), which eventually led to the passing of the Children Act 1989. The laws relating to the arrangements for children after parental separation (the private law) were amalgamated with those relating to the intervention of the state into family life (the public law) which produced a number of changes. The new Family Proceedings Court deals with matters that were previously dealt with by the Domestic Panel, and public law cases where care, supervision or related matters are in question. Because this court no longer has responsibility for juvenile offenders, the proceedings are unequivocally civil, appeals lying with the Family Division of the High Court. A system of concurrent jurisdiction means that cases that are exceptionally complex or grave can be moved to the County Court, or even the High Court to be heard by a judge. There is now one ground for care, based on the concept of "significant harm", such harm



being attributable to a deficiency of parenting or the child being beyond control. Care proceedings can now deal with questions of custody (called "residence" in the Act) as well as "specific issues" that reflect the more flexible kinds of orders that could be made in wardship, thus extending the range of orders that the court can make.

Children continue to have party status in public law proceedings, but not in private ones. Parents, who acquired such status in the Children and Young Persons (amendment) Act 1986, will continue to have it. The Official Solicitor will only act as guardian ad litem if no other guardian has been appointed. (It is assumed that he will continue to act in private law cases that reach the High Court.)

The philosophy of the Act emphasises the importance of the family, support for the family through partnership with the local authority being preferable to statutory involvement, court action being a last resort. "Family Proceedings" are less adversarial in style than care proceedings under the old law, making them more suitable for the deliberation of such delicate matters as the quality of parental care. The courts have at their disposal a wider range of orders, being able to draw upon the private law "Section 8" orders even in public law cases, and guardians are able to comment upon and make recommendations with regard to these, giving

them wider scope than previously. As a child protection measure, supervision orders are more useful than they were, because conditions can now be attached relating, not only to the child, but to the person with parental responsibility, to ensure that certain specified tasks are carried out. The local authority's position with regard to care orders, however, has been weakened in relation to parents (with whom it must now share responsibility), but strengthened with regard to the courts, and by implication the guardian ad litem. There is no provision to impose conditions on a care order, as there was in wardship, nor to add any of the Section 8 orders, which would have the effect of diluting the local authority's powers. Moreover, the court can no longer make care or supervision orders of its own motion, which means that the guardian can no longer provoke the making of a child protection order by bringing evidence herself where the local authority is either refusing to make, or is withdrawing, an application.

The introduction of applications for secure accommodation orders into Family Proceedings, where the child or young person may well be involved in criminal activities, cannot fail to raise once more the question of the relationship between parental care and juvenile offending.

The representation of children in wardship, adoption and matrimonial proceedings

The second trigger for the study was the "Cleveland crisis". Evidential difficulties in the Cleveland cases had prompted the local authority to seek care orders through wardship rather than care proceedings, and guardians from the panel found themselves being appointed, by the District Registrar, to represent children in this unfamiliar forum. It soon became apparent that High Court Judges had serious reservations about this practice (see Chapter 8) and directions were issued that the traditional guardian ad litem in wardship, the Official Solicitor, must be given first refusal. It also raised questions for guardians as to who should pay them, as the panels only had statutory duties in relation to serving the juvenile courts.

What these discoveries highlighted was the way in which wardship, historically, was a completely separate development with its own rules and own way of representing children. The role of the Official Solicitor (who acts as both guardian ad litem and solicitor) has much in common with the panel guardian, that is, from an independent viewpoint to focus on the child's "best interests" and in so doing, investigate, assess and report. It might have been expected, then, that some reference to the role of the Official Solicitor as guardian ad litem might have been made in the debates about representation during the passage of

the Children Bill in 1974. That it was not is further evidence of the separate historical evolution of different parts of the law, especially since wardship has its origins in the common law, while the other laws concerning children have been made by statute.

The closest approximation to an ancestor for the guardian ad litem in care proceedings that the study revealed, was the guardian ad litem in adoption. The appointment of a guardian to safeguard the interests of the child in adoption had been a feature of the system from the passing of the first adoption act in 1926. The guardian ad litem in adoption had always been an officer of the local authority (initially the education authority as the welfare agency) though with certain safeguards to prevent any conflict of interest.

The Children Act 1975 was mostly about adoption. Because of the coincidental publication of the Report of the Maria Colwell Inquiry with the passage of the Children Bill through parliament, it was expedient to include its recommendations about separate representation of the child in care proceedings, and in this context the appointment of a guardian ad litem could be seen as an extension of a system already established in adoption. It appears that without much debate it was accepted that the guardian ad litem in care proceedings would be an officer of the local authority, i.e. a social worker, with similar safeguards to ensure independence from the case.

The interests of children in matrimonial and guardianship proceedings are safeguarded by a Court Welfare Officer, as part of the Probation Service's duties in civil court proceedings. In common with guardians in care and adoption cases, they are qualified social workers. In cases of parental separation, where there is a dispute about where and with whom the child should live and/or contact arrangements with the other parent, the Court Welfare Officer will investigate the circumstances and report to the court with the aim of assisting it to reach a decision about the child's best interests. It is not, however, a representational role; the Court Welfare Officer does not present the child's case and is not bound to make a recommendation.

This legislation has also had its own evolutionary history, which probably explains why there was no reference to the role of the Court Welfare Officer in the parliamentary debates that preceded the Children Act 1975. However, in the debates preceding the passing of the Children Act 1989, reference was made both by the Lord Chancellor and by Mr David Mellor, then Secretary of State, to a rolling programme of reform extending to all matters of family law and business, to include a review of the welfare functions encompassing the Official Solicitor's Department and the Probation Service as well (see Chapter 7). This is particularly relevant now that the private and public aspects of the

law relating to children have been combined. Applications in both public and private law can now be heard together, so that the anomalous situation where one child has a guardian and a solicitor while another, in the same family, has a court welfare officer, is now more sharply apparent. In his Report to the Department of Health (1990), Murch favoured the amalgamation of the civil branch of the Probation Service with the guardian ad litem panels, to provide a new specialist service on a regional basis. While there is a certain logic in this, the question of party status and right to legal representation, which the child does not have in private proceedings, would still need to be addressed.

#### The administrative structure

We have already seen that the closest role model for the guardian ad litem in care proceedings was the guardian ad litem in adoption. It was recognised that it was important for the guardian to be independent of the agency that had placed the child, to prevent any accusation of biased judgment. The Report of the Inquiry into Maria Colwell's death had emphasised the importance of investigation by an independent social worker. That the guardian in care proceedings must act in an independent capacity was laid down in the Magistrates Courts (Children and Young Persons) Rules 1970 (as amended), which stipulated that the guardian ad litem must not be a member, officer or servant of the

local authority that was a party to the case, and neither could she have had any previous involvement with the care of the child (Magistrates Courts 1970, Rule 14A (2)(a) and (b)). The problem of ensuring independence from the agency that had placed the child had been addressed in adoption cases through arrangement with neighbouring authorities (see Chapter 5) and from 1975-1984, when there was provision for a guardian ad litem only in applications to discharge care orders, the possible guardians would be social workers from a neighbouring authority, probation officers, retired social workers, or employees of voluntary agencies engaged in child care. Thus, professional independence was assured.

Section 103 of the Children Act 1975 laid down that it was up to the local authorities to establish the panels and to finance them. As far as administrative independence is concerned, there is an obvious conflict because the local authority is party to the case in care proceedings. In mitigation of this arrangement, given that the appointment of a guardian ad litem was at the court's discretion and the demand difficult to forecast, and the social services departments had the child care expertise, it might perhaps have been premature to use or invent an alternative agency at this stage.

In May 1984, when the provisions were fully implemented, probation officers were disbarred from acting in care cases (see Chapter 6). The local

authorities were allowed some leeway in determining the membership of the panels, and did it either by using social workers from neighbouring authorities, who were to take on the work in addition to their normal duties ("reciprocators"), by recruiting free-lance sessional workers, who might be retired or wishing to work part time for family reasons ("solos"), or a mixture of the two ("hybrids") (Murch and Bader 1984).

The main characteristics of the new service that were identified by Murch in the initial seven months were "diversity" and "ambiguity": diversity in the rate of guardian ad litem appointments, which depended entirely on the courts' discretion, in local authorities' policies with regard to taking cases to court, and in the types of panel that had emerged; ambiguity especially in the role of the panel administrator who might hold a relatively senior post in the hierarchy of the local authority that was bringing the proceedings.

In the ensuing years, the concepts of diversity and ambiguity were to crystallise into recurring themes of supply and demand, and of independence. Differing rates of appointment and differing child care policies contributed to an overloading of the system in some areas and an almost non-existent service in others. To recognise the ambiguity of the arrangements was to acknowledge its essential lack of independence and the



potential for compromise in a system where responsibility for recruitment of panel members, the paying of fees, professional monitoring, investigation of complaints, and even dismissal was held by the local authority that was party to the case.

Although BASW (1986), Coyle (1987) and the Lord Chancellor's Department (1988) put forward suggestions for alternative models of panel administration that would have removed the panels from local authority control, the only concession that the government would make to the issue of independence was to advise the setting up of "advisory groups" to take on the hiring, firing and monitoring functions. Even this was somewhat ambiguous, however, as the local authority retained statutory control. Despite much lobbying during the passage of the Children Bill on the subject of an independent administrative base (see Chapter 7) the local authorities have retained responsibility, though it would appear from the debates that the question of administration of the panels in the longer term is being considered as part of a future rationalisation of court welfare services, including probation and the Official Solicitor. This is in line with Murch's suggestion (Murch et al 1990) that the panels and the civil branch of the Probation Service be combined in a new regional organisation.

One of the greatest changes to occur since the initial setting up of the panels is the composition of

panel membership. Many authorities, especially in the North, began with reciprocal arrangements but soon found that guardian ad litem duties in addition to a normal caseload imposed too great a burden on both the worker and on the team in covering for the guardian's absence. By 1986, a trend towards the use of free-lance guardians ad litem was already being identified in the ADSS report (1986) and BASW (1986). At around the same time, specialist teams of salaried guardians within consortia of local authorities were beginning to emerge, and there were a few guardian ad litem projects, run by the voluntary agencies in conjunction with the local authorities, also providing salaried guardians ad litem. The SSI (1990) found that, although there were two and a half thousand panel members in total, this was the equivalent of only 180 full-time members, and that most of the work was being done by the free-lance or specialist guardians.

Although Hunt and Murch (1990) did not feel that partnership with a voluntary agency addressed the problem of independence, their study of the Children's Society Project on Humberside, where a "core" of salaried guardians was supported by "satellites" of free-lance guardians, was a model that provided both structure and flexibility.

In a consideration of whether the guardian's role in safeguarding the interests of children has been

helped or hampered by the administrative system in which it operates, the questions of court practice in making appointments, of availability of guardians ad litem and of independence are relevant. Appointment that lies with the discretion of the court may mean that in some areas children do not have guardians at all. Where courts favour such appointments there may not be enough guardians available, and the ensuing delays may be prejudicial or even damaging. That the guardian ad litem is recruited and paid by the local authority that is party to the case must raise questions about her ability to represent the child's interests truly independently of her own self-interest in retaining her place on the panel; and even if she is not compromised in her views by this position, the need to be seen, especially by parents, as independent, is still likely to be compromised.

After the passing of the Children Act 1989, responsibility for the guardian ad litem service remains with the local authorities, but independence is strengthened by advisory groups (now called the Panel Committee) being mandatory, and the panel manager being debarred from participation in the authority's child care functions. S/he is required to manage the service more effectively by keeping detailed records.

If administrative independence is strengthened, professional independence is weakened because the new Court Rules permit the salaried employment of guardians

by the administering authority. Not only is this an erosion of perceived independence, but there is also a more acute potential for compromise and a danger of identification, as an employee, with the authority's policies and practice.

During the passage of the Children Bill through Parliament, a "rolling programme of reform" of all the court welfare services, to include the civil branch of the Probation Service, was hinted at (see Chapter 7). Although Murch's report to the Department of Health (Murch et al, 1990) and the Humberside Research (Hunt and Murch 1990) were strongly in favour of the amalgamation of the civil arm of the Probation Service with the guardian ad litem panels into a new independent administration, there do not appear to be any developments of this kind at present. The government has never been entirely convinced that administrative independence is a necessary condition of professional independence (see Chapter 10), and to design an appropriate structure when so many different Departments are involved (the Lord Chancellor's Department, the Home Office and the Department of Health) must inevitably be beset with difficulties.

#### The role and practice of the guardian ad litem

The Committee of Inquiry into Maria Colwell's death recognised that no-one had put the case for the child. It called for an independent social worker to carry out

an investigation on behalf of the child so that the court might have the assistance of a second opinion, which might or might not have endorsed the conclusions and recommendations in Miss Lee's report (see Chapter 3).

The "independent social worker" envisaged by the Committee, was eventually to emerge as the guardian ad litem in care proceedings. The court rules which gave the "job description", defined the philosophical basis of the role as being to "safeguard and promote the infant's best interests until he achieves adulthood". The guardian ad litem would do this by conducting an independent investigation, assessing the child's "best interests", making a report, and deciding with the solicitor how to present the child's case in court, where she would be called upon as an expert witness. The guardian ad litem would be answerable to the court, rather than to the line manager, and might need to criticise the local authority that was bringing the proceedings.

The duty to safeguard and promote the child's interests "until he achieves adulthood" was to cause the guardians some difficulty, because this implied that they needed to do more than just comment on the best legal outcome, and needed to become involved with the arrangements for the child's care in the long term. When they believed that the local authority's plans for the child were not in his/her best interests, they

attempted to challenge them by initiating wardship proceedings instead, or by judicial review, as a way of reviewing the local authority's decisions. The response of the High Court was that guardians had no standing to challenge the local authority's power, which had been given by statute, but made it clear that it was nevertheless incumbent on the local authority to consult the guardian about its plans for the child.

These pronouncements reinforced a view that the guardian's role is advisory. Even if this is so, it still begs the question as to whether the job is simply to provide a second opinion, based upon the guardian's own investigation, or whether she should attempt to bring about change (in ways other than by the initiation of court proceedings) on the part of the other parties. The conundrum arises out of the guardian ad litem's dual role as officer of the court and as representative for the child. The first role implies a neutral position, similar to that of the court welfare officer, but in holding responsibility for presenting the child's case in the best possible way, it is easy to see how the guardian ad litem might legitimately want to change the position of the other parties.

The role, arising as it did out of the Maria Colwell tragedy, was originally conceived as an extra safeguard in protecting children from abuse and neglect by their parents. The Children Act 1989, however,

although concerned, also, to protect children from harm at the hands of their parents, had been much influenced by the Cleveland affair and the realisation that children could also be abused by the system of public care. Now that children's interests are perceived in a different way, a greater emphasis is placed upon the guardian's case management role in protecting the child from harm caused by delay, the early appointment of a guardian ad litem so that she can vet the local authority's case, and the requirement to consider all the options available to the court, in the hope that the use of private orders, for example for "residence", will obviate the need for care.

As far as being able to take any direct measures to protect children from abuse and neglect is concerned, the guardian has even less power than before (see the earlier part of this chapter). The courts can no longer make care or supervision orders (other than interim ones) without an application from the local authority, and it is very clear that the local authority's discretion in deciding how a care order, once made, is used is tempered only by the continuing responsibilities exercised by the parent, and not by the views of the guardian.

The fact that there is now a presumption in the Children Act 1989 that a guardian will be appointed, and that the role has been extended to a wider range of

proceedings, suggests that guardians, even if the role is essentially advisory, have been valuable.

As this study has outlined, the research shows that children have benefited from the involvement of someone whose focus is upon them, who has allowed them to participate in decisions about themselves, and ensured that their wishes and feelings have been communicated to the court. In court, the solicitor/guardian partnership (see Chapters 4 and 8) can prove a powerful and persuasive force, and older children who can instruct their own solicitors can feel that their views have been properly propounded. The courts felt that guardians had introduced an inquisitorial element into adversarial proceedings, and made local authorities more careful about their evidence and their welfare arguments. The reactions of parents were more mixed, some welcoming the involvement of a neutral person, some sceptical about true independence or critical that the guardian's involvement might be of insufficient depth. The care authority was not always free from suspicion, had concerns about role boundaries and duplication, but otherwise welcomed the second opinion (see Chapter 8).

As far as professional practice is concerned, the most exciting development, as far as guardians themselves are concerned, has been the opportunity to work on a self-employed basis, free from the constraints of the hierarchical bureaucracy of the social services department. While the work itself is "intrinsically



attractive" (Murch et al 1990, p.33), working from home, provided one can accept the relative isolation, sometimes indifferent pay and periodic insecurity, has proved popular. Murch (ibid, p.32) speaks of a "surplus of suitable applicants". Such obvious job satisfaction, in a profession which tends to be beleaguered by public antipathy and low morale, is worthy of note. Where flexibility is important, it is also perhaps worth noting that free-lance guardians ad litem tend to have a vested interest in taking work, whilst salaried employees may have a vested interest in keeping it at bay; in other words, free-lance guardians can provide an unusually willing workforce.

Whilst the role is perhaps weakened by a lack of properly independent administrative arrangements, which may give rise to a degree of scepticism and suspicion, particularly on the part of parents, the strength of the role appears to lie especially in the guardian as "the participant observer...as an aspect of change" (BASW 1986, p.44). The very fact of the guardian's involvement as an outsider may act as a catalyst in the situation, making the local authority more accountable, balancing the relative potential strengths and dangers of the various options, and bringing about a more thoughtful, and hopefully imaginative, outcome for parents and children.

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