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Representing the Interests of the Abused and Neglected Child: The Guardian Ad Litem and Access to Confidential Information

Dayle D. Deardurff

REPRESENTING THE INTERESTS OF THE ABUSED AND NEGLECTED CHILD: THE GUARDIAN AD LITEM AND ACCESS TO CONFIDENTIAL INFORMATION

*Dayle D. Deardurff**

I. INTRODUCTION

Susan, a seven-year-old Ohio resident, was placed in a temporary shelter for abused and neglected children when she and her mother, a single parent, were evicted from their home. The mother had no friends or relatives with whom she and her daughter could live. Susan now visits with her mother only twice a month, one hour each visit. This is the visitation policy of the agency that keeps Susan. Mother believes she will get Susan back soon and therefore, does not seek a lawyer. Susan has never been away from her mother and wants to see her more often. The child went into a serious depression within two weeks after being placed in the temporary shelter. Who will request that the family court order more frequent visitation? What will happen to Susan if the agency social worker and the court only focus on mother's housing problem? What if Susan prefers to live in a crowded, shared apartment with her mother and others, rather than a strange shelter or foster home?

In this simple example, the need for an independent representative or voice on behalf of the child is clear.[1] The child's representative

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* Director, ProKids, Cincinnati, Ohio. B.A., Bowling Green State University (1975); J.D., Creighton University School of Law (1979).

1. On the need for independent representation of children, one court commented:

> When the child has no independent representative, the duty of initiating such representation falls upon the court. It is not difficult to conjure circumstances where either parties—ex: parents, welfare department—would prefer that the child be unrepresented. From an examination of the record in this case, it is reasonable to conclude that the parents would be the last parties who would want an independent representative for their child. Nor is the welfare department likely to encourage such an independent potential threat to the operation of their bureaucracy.

In re Myer, No. 80-CA-10, slip op. at 7 (Ohio Ct. App., Delaware County June 16, 1981) (neglect proceeding). *See also In re* Johnson, No. C-810516 (Ohio Ct. App., Hamilton County Apr. 28, 1982) (discussing the distinctly different roles of counsel versus guardian ad litem for the child). *See generally* NATIONAL LEGAL RESOURCE CENTER FOR CHILD ADVOCACY AND PROTECTION, PROTECTING CHILDREN THROUGH THE LEGAL SYSTEM (1981); NATIONAL LEGAL RESOURCE CENTER FOR CHILD ADVOCACY AND PROTECTION, NATIONAL GUARDIAN AD LITEM POLICY CONFERENCE MANUAL 256 (1980) (annotated bibliography of guardian ad litem law review articles) [hereinafter cited as ANNOTATED BIBLIOGRAPHY]. Further information concerning the role of guardians ad litem may be obtained from the National Legal Resource Center for Child

would serve to assure that the needs and wishes of the child are brought forth and that the best researched and considered decision is made for the child.[2] This representative is referred to in abuse and neglect custody cases as a guardian ad litem.[3] The guardian ad litem generally provides information in a court proceeding concerning the child's status that is not presented by any other party and also clarifies or verifies any information that is presented.[4]

The importance of protecting the rights of children through representation has been recognized by the United States Supreme Court. In *In re Gault*,[5] the Supreme Court recognized the right of legal representation for children in criminal proceedings. In that decision, the Supreme Court explored the need for due process and judicial safeguards which should apply to both children and adults, declaring: "Under our Constitution, the condition of being a boy does not justify a kangeroo court."[6]

The child who is the victim of abuse and neglect and whose destiny is to be determined by state authorities is in no less need of adequate representation than is a child in a criminal proceeding. Historically, children's interests and rights in estate, property, custody, and personal injury cases have been asserted by their legal custodians, guardians ad litem, and attorneys.[7] In domestic custody matters, Ohio has, to a certain extent, recognized the interests of children by allowing those children over the age of twelve to advise the court of their pre-

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Advocacy and Protection, 1800 M Street, N.W., S-200, Washington, D.C. 20036 and the National Association of Counsel for Children, 1205 Oneida, Denver, Colorado 80220.

2. The court in *In re* Christopher, 54 Ohio App. 2d 137, 376 N.E.2d 603 (1977), when dealing with a custody matter, remarked that the representative or guardian ad litem should be a person "who can serve uninhibited by any ties or loyalties with either the [parent] . . . or proposed adoptive parents of [the child]. . . ." *Id.* at 144, 376 N.E.2d at 607. *See also infra* notes 42–50 and accompanying text.

3. A guardian ad litem has been "defined as a person appointed by a court to promote and protect the interests of a child involved in a judicial proceeding through assuring representation of those interests in the courts and throughout the social service and ancillary service systems." Davidson, *The Guardian Ad Litem*, in PROTECTING CHILDREN THROUGH THE LEGAL SYSTEM 835, 843 (1981).

4. *See generally* Johnson, *Representation for Abused and Neglected Children: So What, Unless?*, 33 JUV. & FAM. CT. J. 51 (1982); Kelly & Ramsey, *Do Attorneys for Children in Protection Proceedings Make a Difference?—A Study of the Impact of Representation Under Conditions of High Judicial Intervention*, 21 J. FAM. L. 405 (1982); Comment, *The Non-Lawyer Guardian Ad Litem in Child Abuse and Neglect Proceedings: The King County, Washington, Experience*, 58 WASH. L. REV. 853 (1983).

5. 387 U.S. 1 (1967).

6. *Id.* at 28.

7. *See, e.g., Christopher*, 54 Ohio App. 2d 137, 376 N.E.2d 603 (1977) (guardian ad litem appointed in custody matter for minor where interests of parents and child were in conflict); Beaver v. Bates, 109 Ohio App. 164, 164 N.E. 429 (1958) (guardian ad litem should be appointed to protect a minor's interest in partition action).

ferred physical custodian.[8] However, no such statutory recognition of a child's interest in custodial preference is given to the child who has been abused or neglected. Instead, representation of the child's interests is provided for by the appointment of a guardian ad litem and a final disposition which serves the best interests of the child.[9] These two mandates should cause the proceedings to focus on the child's needs and on the parents' behavior toward the child.

While the guardian ad litem has an important role to play in abuse and neglect custody proceedings in the Ohio courts, the guardian ad litem is provided with little in the way of statutory direction. Of particular concern is the guardian ad litem's ability to gain access to information concerning the child. To represent children properly, guardians ad litem must gather and review all available information concerning the child and the case.[10] While it initially appears that a guardian ad litem will have access to all necessary records regarding the child by the very nature of his or her appointment to an abuse or neglect custody case, Ohio has no statutory provision which provides the guardian ad litem with access to records concerning the child.[11] Without clear access to all records pertaining to the child's situation, the extent to which the guardian ad litem may or should investigate and advocate on behalf of the young client is difficult to determine.

As will be explored, guardians ad litem in Ohio may face formidable obstacles in their attempts to gain access to children's records. This article will identify those obstacles, suggest some methods for overcoming them, and finally propose a more permanent solution to the problem of limited accessibility in the form of a legislative response.[12] The role of the guardian ad litem in Ohio, however, will first be put into perspective.

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8. *See* OHIO REV. CODE ANN. § 3109.04(A) (Page Supp. 1985) (child may choose custodial parent unless court finds such parent "unfit to take charge").

9. *See id.* § 2151.353(A)(4).

10. *See generally* Fraser, *Independent Representation for the Abused and Neglected Child: The Guardian Ad Litem*, 13 CAL. W.L. REV. 16 (1976).

11. Ohio is not the only state that fails to provide guardians ad litem access to such records. The vast majority of states are also lacking statutory provisions in this area. *See* 2 U.S. DEPT. OF HEALTH AND HUMAN SERVICES, STATE STATUTES RELATED TO CHILD ABUSE AND NEGLECT: 1984 249–69 (1985) [hereinafter cited as STATE STATUTES].

12. The arguments posited in this article are premised on the theory that the child's independent representative can effectively present the child's wishes, needs, and interests through the child neglect and abuse proceedings. The time of appointment, extent of training, and use of volunteer lay advocates instead of attorneys to serve as the guardian ad litem will admittedly bear upon the success of the child's representation. These concerns, however, will not be addressed in this article.

This article focuses primarily on Ohio law. However, many, if not most, of the issues addressed by are of concern to other states.

II. LEGAL REPRESENTATION FOR THE ABUSED AND NEGLECTED CHILD: PAST AND PRESENT

Until the 1870's there was no organized private or governmental agency in this nation for protecting children from the abuse and neglect of their custodians. For instance, one particular case involving a child in New York City named Mary Ellen, utilized a law to prevent cruelty to animals to protect the abused, adopted child.[13] The case began the movement in this nation to protect children from the injustices of their custodians. Prior to this case, governmental interference with the integrity of a family was virtually nonexistent.[14]

The United States Supreme Court has regularly commented on the importance of the maintenance of families and has expressed its reluctance to allow governmental intrusions into this private sphere.[15] When courts have agreed to allow state intervention into the family unit it has been traditionally viewed as an exercise of the *parens patriae* power. This power, however, is not unlimited nor does it constitute an "invitation to procedural arbitrariness."[16] In fact, the Supreme Court has recently declared that the state must prove by *clear and convincing evidence* that the child has been so abused or neglected that the best interests of the child would be served by the state taking legal custody of the child.[17] Prior to this case, each state had determined its

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13. *See* Radbill, *A History of Child Abuse and Infanticide* 13 (1965) (paper presented at the Pediatric History Club, American Academy of Pediatrics, Oct. 26, 1965) (on file with the University of Dayton Law Review).

14. *See id.*

15. *See, e.g.*, Santosky v. Kramer, 455 U.S. 745 (1982) (parents have fundamental liberty interest in the care, custody, and management of their children); Skinner v. Oklahoma, 316 U.S. 535 (1942) (marriage and procreation are fundamental to existence and survival of race); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (right of parents to educate children is the very essence of personal liberty and freedom).

16. Kent v. United States, 383 U.S. 541, 555 (1966). Referring to the District of Columbia's Juvenile Court Act, the Court stated:

> Its proceedings are designated as civil rather than criminal. The Juvenile Court is theoretically engaged in determining the needs of the child and of society rather than adjudicating criminal conduct. The objectives are to provide measures of guidance and rehabilitation for the child and protection for society, not to fix criminal responsibility, guilt and punishment. The state is *parens patriae* rather than prosecuting attorney and judge. But the admonition to function in a "parental" relationship is not an invitation to procedural arbitrariness.

Id. at 554–55 (footnote omitted).

17. *See Kramer*, 455 U.S. 745 (1982). In *Kramer*, the Court found the preponderance of the evidence standard used by the state of New York in its custody proceedings violated the fourteenth amendment right of due process. The Court noted:

> A majority of the states have concluded that a "clear and convincing evidence" standard of proof strikes a fair balance between the rights of the natural parents and the State's legitimate concerns . . . . We hold that such a standard adequately conveys to the factfinder the level of subjective certainty about the factual conclusions necessary to satisfy due process.

own required standard of proof for these cases, commonly being of a lesser degree.[18]

Cases of child abuse and neglect in Ohio are brought to courts having jurisdiction over juvenile matters in the county where the child resides.[19] Typically, the county or state welfare or human services agency is notified of an allegedly abused or neglected child and will dispatch a social worker to investigate and determine the authenticity and severity of the claim.[20] The social worker is charged with the duty of protecting the child.[21] If it appears to the social worker that there is some form of improper parenting causing serious harm to the child, the social worker may file a complaint in the appropriate court, requesting that legal custody of the child be awarded to the state.[22] Ohio also allows any individual with knowledge of child abuse and neglect to file a complaint and inititate judicial proceedings.[23] The purpose of the complaint is to bring the allegations before the court for a judicial determination of the merits of the allegations and for a disposition serving the best interests of the child. The social worker and his or her agency are represented at trial by the county prosecutor or the agency staff attorney. The parents or legal custodians may choose to be represented by an attorney. Ohio law requires that legal counsel be offered to indigent parents when parental rights are being terminated involuntarily, either temporarily or permanently.[24] In addition, federal law requires the individual states to either provide for the appointment of guardians ad litem for children subject to such proceedings or face the loss of federal funding.[25] There is no definition, however, of the role or duties

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Id. at 769 (citation omitted). *See also* N.Y. JUD. LAW § 622 (McKinney 1975) (amended 1982).

This standard of proof has since been incorporated into Ohio law. *See* OHIO REV. CODE ANN. § 2151.35 (Page Supp. 1985). *See also In re* Fassinger, 43 Ohio App. 2d 89, 334 N.E.2d 5 (1974) (a finding of neglect in dependency proceedings requires clear and convincing evidence).

18. *See, e.g.*, N.Y. JUD. LAW § 622 (McKinney 1975) (amended 1982) ("fair preponderance of the evidence"). *See also Kramer*, 455 U.S. at 747.

19. *See* OHIO REV. CODE ANN. §§ 2151.06–.07, .23 (Page 1976 & Supp. 1985).

20. *See id.* § 2151.421 (Page Supp. 1985). *See also* OHIO DEP'T. OF HUMAN SERVICES, CHILD WELFARE MANUAL, chs. 3000, 6000 (1983).

21. *See* OHIO REV. CODE ANN. § 5101.46(A) (Page Supp. 1985). *See also id.* §§ 2151.421, 5103.05 (Page 1976 & Supp. 1985); OHIO DEPT. OF HUMAN SERVICES, CHILD WELFARE MANUAL, chs. 3000, 6000 (1983).

22. *See* OHIO REV. CODE ANN. § 2151.353(A)–(B) (Page Supp. 1985).

23. *See* OHIO R. JUV. P. 10 (filing and general form of complaint). *See also* OHIO REV. CODE ANN. § 2151.421 (Page Supp. 1985).

24. *See, e.g.*, OHIO REV. CODE ANN. § 2151.352 (Page 1976); OHIO R. JUV. P. 4(A). *See also* State *ex rel.* Heller v. Miller, 61 Ohio St. 2d 6, 399 N.E.2d 66 (1980) (recognizing the constitutional right to counsel under the due process and equal protection clauses of the Ohio constitution for indigent parents whose parental rights may be permanently terminated in an involuntary proceeding).

25. *See* 42 U.S.C. 5103(b)(2)(G) (1982). To be eligible for federal economic assistance in preventing child abuse, states must "provide that in every case involving an abused or neglected

of the guardian ad litem, only a requirement that this person may not be the attorney responsible for presenting the evidence of abuse and neglect.[26] Since 1969, Ohio has provided for guardians ad litem in abuse and neglect proceedings.[27]

If the state is able to prove to the court that the child should be adjudicated neglected or abused, the issue of disposition is considered.[28] The state may request that it be awarded either temporary or permanent custody of the child.[29] If a temporary commitment to the state is granted, this should dictate the implementation of treatment services to rehabilitate the parents, provide for the needs of the child, and ultimately reunite the family.[30]

Until the late 1970's, there was a presumption that services would be provided to the child and parents. Studies which began surfacing in the 1970's concluded, however, that years of governmental intervention into families, intended to protect children, had instead created a growing population of misplaced, untreated, and homeless children.[31] As one commentator noted, "Inadequate funding [of child welfare agencies] implies insufficient, poorly paid staff, many of whom may not be well qualified. Lack of resources can force agency action or policy which the staff recognizes is detrimental to the children affected."[32] An August, 1985, study by the Institute for Child Advocacy, found thirteen thousand children were in Ohio's legal custody, of which approximately one thousand had been in the state's permanent custody for nine or more years.[33]

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child which results in a judicial proceeding a guardian ad litem shall be appointed to represent the child in such proceedings." *Id. See also* 45 C.F.R. § 1340.14(g) (1985).

26. *See* 45 C.F.R. § 1340.14(g) (1985). Although most states do not meet this requirement, see STATE STATUTES, *supra* note 11, at 249–69, Ohio does provide for such exclusion. *See* OHIO REV. CODE ANN. § 2151.281(B) (Page Supp. 1985). The person responsible for protecting a child's interests in a delinquency proceeding may not be a representative of the system or an individual charging the child because of the possibility of a conflict of interest. *See id.* § 2151.281.

27. Act of Aug. 20, 1969, 1969 Ohio Laws 2040 (codified as amended in scattered sections of tit. 21 OHIO REV. CODE ANN. (Page 1976 and Supp. 1985)).

28. *See* OHIO REV. CODE ANN. § 2151.353 (Page Supp. 1985).

29. *See id.*

30. *See id.* §§ 2151.353, .412. These provisions grant the state legal custody of the child; the parents may be permitted to retain physical custody. Family reunification plans are required if the child is not abandoned or orphaned. *Id.* § 2151.412(C).

31. *See generally* EDNA MCCONNEL CLARK FOUNDATION, KEEPING FAMILIES TOGETHER (1985); NEW YORK INSTITUTE OF PUBLIC AFFAIRS, WHO KNOWS? WHO CARES? FORGOTTEN CHILDREN IN FOSTER CARE (1979)(report of the National Commission on Children in Need of Parents); WASHINGTON D.C. CHILDREN'S DEFENSE FUND, CHILDREN WITHOUT HOMES: AN EXAMINATION OF PUBLIC RESPONSIBILITY TO CHILDREN IN OUT-OF-HOME CARE (1978).

32. Bryant, *Advocating for Children in Emergency Removal Proceedings*, in PROTECTING CHILDREN THROUGH THE LEGAL SYSTEM 31, 33 (1981).

33. *See* THE INSTITUTE FOR CHILD ADVOCACY, WITH ONLY THE STATE AS PARENT: A STUDY OF OHIO'S CHILDREN IN PERMANENT CUSTODY 16 (1985). This study also found that a

Federal legislation[34] mandating the states to provide individual, time-limited, written treatment plans, and periodic judicial reviews[35] was passed in 1980 in hope of remedying the failings of the child welfare system. Amended Substitute House Bill 695,[36] enacted in 1980 by the Ohio legislature, adheres closely to the federal requirements.[37] Both federal and Ohio laws aim at rehabilitating the family to the extent feasible and securing appropriate permanent living plans for the child.

It appears that our nation has made the full swing in one hundred years from utilizing laws which protect animals for the protection of children to now having created a largely unstable body of children in legal limbo. Where are the guardians ad litem? Ohio's statutory and case law typically recognizes the guardian ad litem as a *party* to abuse and neglect custody proceedings.[38] Notice of hearings and other procedural safeguards, such as discovery, are accorded the guardian ad litem as would be accorded any other party.[39] The guardian ad litem may generally be appointed at any point in the custody proceedings, although this is not delineated within the appointment statute or rule.[40] In addition, at least one Ohio court has attempted to define the general responsibilities of the guardian ad litem and delineate the issues the guardian ad litem should examine on behalf of the child.[41] Neverthe-

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child in Ohio held in the permanent custody of the state, therefore being eligible for adoption, had a less than six in one hundred chance of being adopted. *Id.*

34. *See* Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500 (codified as amended in scattered sections of tits. 38 and 42 U.S.C. (1982)).

35. *See* 42 U.S.C. §§ 627, 671, 675 (1982). Eligibility for receipt of federal child welfare grants is dependent upon individual states complying with the federal legislation. *See id.* §§ 627, 671.

36. Act of July 25, 1980, 1980 Ohio Legis. Serv. 5-397 (Baldwin) (codified as amended in scattered sections of tits. 21 and 51 OHIO REV. CODE ANN. (Page 1981 and Supp. 1985)).

37. *See* OHIO REV. CODE ANN. § 2151.412 (Page Supp. 1985) (requiring the development of temporary commitment and comprehensive reunification plans); *id.* § 5103.151 (Page 1981) (requiring annual review of children in state's custody).

38. *See, e.g.*, OHIO REV. CODE ANN. § 2151.281 (Page Supp. 1985); *In re* Myer, No. 80-CA-10 (Ohio Ct. App., Delaware County June 16, 1981).

39. *See, e.g.*, OHIO R. JUV. P. 2(16).

40. *See* OHIO REV. CODE ANN. § 2151.281 (Page Supp. 1985). Ohio's rules of juvenile procedure provide: "When the complaint alleges that a child is an abused child, the court must appoint an attorney to represent the interests of the child." OHIO R. JUV. P. 4(A). *See also* STATE STATUTES, *supra* note 11, at 249–69.

41. *See Myer*, No. 80-CA-10, slip op. at 9. In *Myer*, the court held:

> The guardian ad litem is not simply a legal mechanic, concentrating on the adequacy of the legal procedures. His responsibility is "to protect the interest of the child." . . . Surely, that function ripens into its highest expectation in the dispositional phase of the juvenile court process . . . .
>
> In advocating dispositional alternatives that would be in the best interests of a child found to be neglected, the guardian ad litem can be of significant assistance to the court, answering questions such as:
>
> 1. Does the child need special medical, psychological, health or educational

less, a guardian ad litem operating in the Ohio court system is without clear statutory or judicial guidance regarding his or her duties and responsibilities.

The lack of a clear directive as to the timing and duration of appointment, independence from other parties, and role of the guardian ad litem can create serious problems in protecting the child's interests. *In re Christopher*[42] exemplifies these problems. *Christopher* involved a custody action brought in the Morrow County Juvenile Court. After the court failed to appoint a guardian ad litem in a hearing concerning termination of a temporary commitment, the welfare agency requested a reconsideration of the decision and moved for a stay on the grounds that this failure was a substantive error.[43] The court denied the request for a reconsideration, but appointed the agency attorney as the guardian ad litem and stayed its previous order pending appeal.[44] The agency attorney then left the agency.[45] A new guardian ad litem, who knew the potential adoptive parents, moved the court to conclude the previous hearing.[46] This request was denied and he appealed.[47] The appellate court indicated that a guardian ad litem should be appointed in any hearing where it appeared the parent and the child had conflicting interests.[48] It also concluded that the independence of the guardian ad litem was essential.[49] "The guardian ad litem and counsel for [the child] should be a person or persons who can serve uninhibited by any ties or loyalties with either the mother . . . or prospective adoptive parents . . . ."[50]

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care?

2. Is there an appropriate relative placement?

3. What are the prospects of meeting the child's needs for permanence in a familial relationship?

4. Should permanent custody (termination of parental rights) be expedited? Delayed?

5. Are there inheritance rights to be considered?

6. How will the child be supported?

7. Is the child adoptable?

8. If the child is of the age of some discernment what are his feelings?

9. Is there additional testing of the child that needs to be done? Or of the parents?

10. Is there an adequate adoptive option?

Id. at 8–9. *See also* ANNOTATED BIBLIOGRAPHY, *supra* note 1.

42. 54 Ohio App. 2d 137, 376 N.E.2d 603 (1977).

43. *Id.* at 141, 376 N.E.2d at 606.

44. *Id.* at 142, 376 N.E.2d at 606.

45. *Id.*

46. *Id.*, 376 N.E.2d at 606–07.

47. *Id.*, 376 N.E.2d at 607.

48. *Id.* at 143, 376 N.E.2d at 607.

49. *Id.* at 143–44, 376 N.E.2d at 607.

50. *Id.* at 143, 376 N.E.2d at 607.

Christopher demonstrates some of the problems inherent in the lack of statutory direction for when a guardian ad litem should be appointed. An additional concern caused by the lack of statutory direction relates to the accessibility of a child's adoptive and treatment records. The problems often confronted by a guardian ad litem in attempting to gain access to information concerning a child client presents at best an unneccessary expenditure of resources and at worst a denial of adequate representation of the child's interests. The need for legal clarification is clear.

III. Access to Records and Discovery by the Guardian Ad Litem: The Need for Clear Legal Authority

A. The Need for Access

When representing the child, a guardian ad litem cannot be certain of giving an adequate presentation, conducting meaningful cross examination, or bringing forth relevant information or important witnesses without having had prior access to all relevant documents, witnesses, and service providers. Public agency professionals obviously hold valuable information concerning children under that agency's care that would be of interest to a guardian ad litem. As such,

> [t]he attorney must have access to these professionals to provide the base line data and help in its interpretation. Absent such aids, the attorney, especially for the parent and child, cannot effectively challenge the conclusions and recommendations of the public agencies, potentially turning the court procedures into a rubber stamping forum.[51]

Informal communication with attorneys and lay advocates across Ohio and elsewhere indicates that they, like this author, are informally expected to review social services files, medical records, and school records, in addition to interviewing the child, parents, professionals, and other witnesses prior to a presentation in court.[52] The timing of the

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51. Horowitz, *Upgrading Legal Practice in Juvenile Court*, in Protecting Children Through the Legal System 868, 871 (1981).

52. Court-ordered reports are generally reviewable by a guardian ad litem. The Ohio Juvenile Rules, like most court rules, begin by outlining the need for liberal interpretation of the rules themselves in order to insure a fair hearing, enforcement of constitutional rights, elimination of unjustifiable delay, and to provide for the care, protection, and development of the children subject to the juvenile court. Ohio R. Juv. P. 1. The rules recognize the need to protect "the public interests by treating children as persons in need of supervision, care, and rehabilitation." *Id.* To assure that pertinent current information about the children is presented to the juvenile court, the rules allow the court to order a social history, or mental or physical examination of the child. *Id.* This report may be inspected by counsel subject to any court-ordered limitations. Ohio R. Juv. P. 32(C). *See also In re* Green, 18 Ohio App. 3d 43, 480 N.E.2d 492 (1984) (where a court ordered a psychological evaluation per the request of the indigent party and such evaluation was admitted into evidence over the objection of that party).

disclosure is critical for trial preparation. *In re Gault*[53] pointedly told the juvenile justice system that withholding details of the case from the child and parents until the initial hearing is of limited use to the child or his parents in preparing the defense or explanation.[54] This logic applies equally to the abuse and neglect proceedings.

B. The Problem of Non-disclosure

1. Procedural and Practical Stumbling Blocks

Cases and statutes allude to examination of confidential records as they pertain to child abuse and neglect investigation.[55] As in any case, the final decision determining the parties' ability to view each other's records lies within the court's discretionary power.[56] Where the court feels the guardian ad litem should review the records without question, appointment entries may be worded to provide such access.[57] Despite direct court approval of an entry, personal experiences of this author and comments from other guardians ad litem suggest that some agencies and professionals, both private and public, are still uncomfortable with revealing the information sought. In some instances, refusal to reveal information has gone so far as to include refusal of access to the child-client.

Denial of access results in the preparation and filing of a motion to insist upon the discoverable materials or to request that the witnesses and their materials appear in court. The wasted time involved in these proceedings is easy to imagine. For example, in Hamilton County, Ohio, an average of forty cases per month are assigned to guardians ad litem.[58] If each case involved only one professional denying the guardian ad litem records for one child, ten cases per week, using the time of

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53. 387 U.S. 1 (1967).

54. *Id.* at 25.

55. For example, Ohio disregards the physician-patient privilege when it relates to a case involving child abuse or neglect. *See* OHIO REV. CODE ANN. § 2151.421(C) (Page Supp. 1985).

56. *See* State *ex rel.* Daggett v. Gessaman, 34 Ohio St. 2d 55, 57, 295 N.E. 2d 659, 661 (1973). In *Dagget*, the Ohio Supreme Court held: "In discovery practices, the trial court has a discretionary power not a ministerial duty." *Id.* It is possible that bank and school records belonging to the child would be significant in comprehending the child's needs and the family's situation. However, neither case law nor statutory law provide any guidance on such indirect issues.

57. The language used for one Hamilton County, Ohio, entry was actually written by a hospital's attorney after she agreed that the guardian ad litem had a right to access but felt the entry should suggest the same. The entry read: "The Court upon its own motion hereby appoints _____ as guardian ad litem for the above named child and hereby authorizes said guardian ad litem to request any hospital, medical, dental, psychiatric, psychological, education, or other records of said child." This language is now used for all entries appointing guardians ad litem in Hamilton County.

58. ProKids is responsible for appointing guardians ad litem for the Hamilton County Juvenile Court.

at least three attorneys (representing the parent, agency, and guardian ad litem) and possibly more (that of the professional), would cause the juvenile or family court docket to become congested. Practically, no guardian ad litem could expend the necessary efforts to obtain the withheld information in every case. Financially, most guardians ad litem are paid such nominal fees that they could not justify the time. Finally, it is difficult for the attorney to determine which records are the most likely to produce information that will aid the child's case without some knowledge of what the documents contain. This state of affairs has created a recurring situation where guardians ad litem, in need of information and armed with judicial approval, are still forced to jump through several unjustified hoops to gain access to the desired records—access which may or may not prove to be of any value.

2. The Confidentiality of Records

A party or witness refusing to divulge information or documents to a guardian ad litem will frequently rely upon one of four arguments to justify the refusal. The arguments usually are: (1) the information is confidential; (2) state law prevents disclosure of the information; (3) federal law requires protecting the records; or (4) the child is a ward of the state and there is no pending hearing. While each of these four arguments may not be fully comprehended by the party or witness, they are nevertheless asserted because the individual has the perception that to divulge any information will subject him or her to potential liability. Dispelling the myths may, unfortunately, require a court hearing.

The argument most frequently asserted by record holders is that the records are confidential. The privilege of confidentiality in the case of adults clearly belongs to the patient or client, not to the professional to whom the patient or client has communicated.[59] As such, the adult to whom the records pertain is free to waive the privilege.[60] But what about the child-patient? If the child holds the privilege, certainly the child may give his or her guardian ad litem access to all requested information. In practice, however, it is often not clear if the holder of the privilege is the child, the parent, or the agency. Nevertheless, the assertion of confidentiality by the record holder indicates that the person requesting the records has no right to receive the requested information. There seems to be a presumption that a child who visits a physician, psychologist, or psychiatrist does not have any personal right to

59. *See* OHIO REV. CODE ANN. § 2317.02 (A)–(C) (Page Supp. 1985) (attorneys, physicians, and clergy may not testify about communications absent express consent of communicator).

the records generated, but that the records belong to the parent or legal custodian. Presumably, the confidential records of a child in the legal custody of an agency would be turned over to the agency.[61] If state probate, juvenile, and domestic relations laws give legal custodians full authority over the minor, the inference is that these custodians have the right to the records and the child or patient does not. If the child is under the temporary custody of the state, it is unclear what rights the parents have to the records.

If the parent is said to be the holder of the privilege, he or she may choose to waive the privilege, thereby obligating the professional to reveal information. If the parent chooses not to waive the privilege, state reporting statutes eliminate the privilege in cases of child abuse and neglect.[62] The extent to which the privilege is set aside is generally not elaborately described, only that the privilege may not be asserted for purposes of judicial proceedings involving the abuse or neglect.[63] A guardian ad litem is involved in those proceedings and should logically have access to the information. The professional, however, may feel they must only reveal information pertaining directly to the detection of the abuse or neglect because of the language encompassed in the statutory waiver of liability.[64] No doubt a court would protect the party who provides the full case record, but this does little for a guardian ad litem arguing with a physician who insists upon seeing the law which gives the guardian ad litem the right to review recorded information that does not directly relate to the detection of abuse or neglect.

If the professional asserting the claim of confidentiality is a social worker, Ohio law is also quite significant. It is assumed here that the parent is perceived as the holder of the privilege, that the parent refuses to sign a waiver, and that the information sought does not arise directly from the report of the abuse or neglect. Ohio Revised Code subsection 2317.02(G) may create a privilege for communications made to a social worker.[65] However, this subsection, unlike the subsec-

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61. Ohio statutes do not indicate whether the parent, child, or agency is the holder of the privilege when the child is in the temporary care of the agency.

62. *See, e.g.*, OHIO REV. CODE ANN. § 2151.421(C) (Page Supp. 1985) (eliminating patient-physician privilege in child abuse or neglect proceedings).

63. *See id.*

64. *Id.* The relevant portion of the statute provides:

> Anyone or any hospital, institution, school, health department, or agency participating in the making of the reports, or anyone participating in a judicial proceeding resulting from the reports, shall be immune from any civil or criminal liability that might otherwise be incurred or imposed as a result of such actions. . . . [T]he physician-patient privilege shall not be a ground for excluding evidence regarding a child's injuries, abuse, or neglect, or the cause thereof in any judicial proceeding from a report submitted pursuant to this section.

Id.

65. *See id.* § 2317.02(G).

tions asserting privileges for communications with attorneys,[66] physicians,[67] and clergy,[68] includes four distinct exceptions to the right of confidentiality.[69] One exception involves situations in which there are "indications of present or past child abuse or neglect of the client [which] constitute a clear and present danger."[70] Another exception allows for a judicial determination of whether the specific information is germane to the social worker-client relationship so as to even qualify for the privilege.[71] These two exceptions should allow the guardian ad litem direct access to the information sought—until the state agency social worker points to section 5153.17 of the Ohio Revised Code which generally requires that agency records be kept confidential.[72] Section 5153.17 does not make a direct exception for the child's legal representative, much less for the adult client.[73] The Ohio Privacy Act[74] also does not include a legal representative, absent written authorization,[75] among the enumerated individuals who are entitled to inspect records maintained in an information system by local or state agencies.[76] Al-

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66. *See id.* § 2317.02(A).

67. *See id.* § 2317.02(B).

68. *See id.* § 2317.02(C).

69. Subsection (G) of Ohio Revised Code section 2317.02 actually contains six exceptions to its provisions. *Id.* § 2317.02(G). Only four exceptions, however, apply to communications made to social workers. These exceptions to the general rule of confidentialty include situations where:

> (1) The communication or advice indicates clear and present danger to the client or other persons. For the purposes of this division, cases in which there are indications of present or past child abuse or neglect of the client constitute a clear and present danger;
>
> (2) The client gives express consent to the testimony;
>
> (3) If the client is deceased, the surviving spouse or the executor or administrator of the estate of the deceased gives express permission;
>
> . . . .
>
> (5) The court in camera determines that the information communicated by the client is not germane to the counselor-client or social worker-client relationship . . . .

Id. § 2317.02(G)(1)–(3), (5).

70. *Id.* § 2317.02(G)(1).

71. *Id.* § 2317.02(G)(5).

72. *Id.* § 5153.17 (Page 1981). This section provides:

> The county children services board or county department of welfare shall prepare and keep written records of investigations of families, children, and foster homes, and of the care, training, and treatment afforded children, and shall prepare and keep such other records as are required by the department of public welfare. Such records shall be confidential, but shall be open to inspection by the board or department of public welfare, the director of the county department of welfare, and by other persons, upon the written permission of the executive secretary.

Id.

73. *Id.*

74. Act of Oct. 24, 1980, 1980 Ohio Legis. Serv. 5-568 (Baldwins) (codified at §§ 1331.16, 1347.01, 1347.03–.10, 1347.99, and 1347.071 OHIO REV. CODE ANN. (Page Supp. 1985)).

75. OHIO REV. CODE ANN. § 1347.08(A) (Page Supp. 1985).

76. *Id.* Only the individual who is the subject of the information or his legal guardian may inspect such records. *Id.* § 1347.08(A).

though not addressed by the Ohio judiciary, it may be argued that the purpose of these laws is to protect the subject of the records from embarassment or harrassment by a third party, not from themselves and not from statutorily permitted users.[77] Furthermore, denying the family access to the fruits of an investigation made into the family unit has been viewed as violating due process.[78]

To counter the public agency's assertion that agency records must be protected from public viewing, the guardian ad litem may be able to argue the applicability of a judicial cooperation statute. Section 2151.40 of the Ohio Revised Code allows a court to order public agencies to submit records to any court-appointed official.[79] Unfortunately, the Ohio statute does not indicate what information the agency or institution may or must include from the record. One written policy of Hamilton County's Department of Human Services instructs the social worker to delete names and addresses of all witnesses and it distinguishes psychological and psychiatric tests performed by in-house staff from those administered by private practitioners.[80]

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77. *See* Stivahtis v. Juras, 13 Ore. App. 519, 511 P.2d 421 (1973) (nondisclosure statute designed to protect persons from exploitation by third parties, not from themselves); State *ex rel.* Dombrowski v. Moser, 108 Wis. 2d 658, 323 N.W.2d 182 (Ct. App. 1982) (nondisclosure provision interpreted to permit putative father in paternity action to inspect case file of mother for impeachment purposes).

78. *See* Sims v. State Department of Public Welfare, 438 F. Supp. 1179 (S.D. Tex. 1977). The district court noted:

> Although some intrusion into a family unit is permissible when the state pursues its interest in investigating reports of abuse, there is no compelling reason to deny the family access to the fruits of that invasion or the conclusions reached. Of course, a certain confidentiality must be maintained for sources of information who request anonymity, but the reports and records of the state compiled during the investigation should be available to the parents so that they may be fully apprised of the nature of any accusation to be made by the state. Due process requires no less. A state may deny the parents access to the records concerning their family only where the source must remain confidential or where there has been a judicial determination of the need for confidentiality in an adversary proceeding.

Id. at 1191.

79. OHIO REV. CODE ANN. § 2151.40 (Page 1976) ("All institutions or agencies to which the juvenile court sends any child shall give to the court or to any officer appointed by it such information concerning such child as said court or officer requires.").

80. Specific guidelines were prepared by the Hamilton County Department of Human Services for the release of information to ProKids. These guidelines provide:

> 1. The whole record is *not* to be given to the ProKids Advocate for review.
> 2. Delete *informant's* names and addresses from dictation copies, if copies requested.
> 3. Delete *foster parents'* names and addresses from dictation copies, if copies requested.
> 4. Delete *other witness and party* names and addresses from dictation copies, if copies requested.
> 5. Natural parent's address may be released.
> 6. Psychological or psychiatric reports done on *committed children* by a psychiatrist or psychologist *under contract to HCWD* can be shown to the ProKids Advocate.
> 7. Psychological or psychiatric reports prepared by other professionals *not* under con-

Recognizing that the original reporter of the child abuse or neglect is to remain anonymous by law,[81] the agency records in entirety should be presented to the guardian ad litem. Protection of the identity of foster parents may be appropriate when discussing the *parents'* access to records.[82] However, for the guardian ad litem, the comments of the foster parents can be quite helpful.

3. Federal Mandates

Some of the aforementioned Ohio provisions, relied on by public agencies to deny access to records, originated as a response to federal mandates. Federal welfare legislation often stipulates that information pertaining to welfare recipients is to remain confidential.[83] As such, many state courts will deny access to welfare agency records because they believe that such denial is necessary in order to receive federal assistance.[84] As indicated previously, federal funding is provided to those states adhering to federal laws and regulations in the area of foster care and treatment of children.[85] At least one commentator has asserted that such reliance is inappropriate when a guardian ad litem requests information held by agencies that pertain to a particular child.[86]

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tract to HCWD on *committed children* (usually stamped "CONFIDENTIAL-NOT TO BE RELEASED TO OTHERS") *cannot* be exhibited to ProKids Advocates, but the Advocate should be referred directly to the involved doctor. If that doctor requires a signed consent to release of information before the ProKids Advocate can receive the information, Katie Byrne is willing to sign the Consent to Release of Information on committed children.

8. Hospital and doctor medical reports on *committed children* may *not* be released to the ProKids Advocate without the express consent of the involved hospital or doctor, via a written consent to release of information signed by the legal custodian of the child.

9. Copies of hospital and doctor reports on the *parents* cannot be released to the ProKids Advocate without the *Parents'* written consent to release of information directed by the ProKids Advocate to the hospital or doctor.

10. The agency's plan for the child can be released to the ProKids Advocate.

11. Inner-office memoranda are not usually part of the case record. If there are some from agency counsel, they cannot be released to the ProKids Advocate as they are "work product of counsel" and not discoverable.

As submitted to ProKids in November, 1985, by M.R. Helmling, J.D., Social Services Legal Section, Cincinnati, Ohio (on file with the University of Dayton Law Review).

81. *See* OHIO REV. CODE ANN. § 2151.421 (Page Supp. 1985).

82. The identity of foster parents is frequently not revealed. *See, e.g., supra* note 80.

83. *See, e.g.*, 42 U.S.C. § 602(a)(9) (1982) (restricting disclosure of information regarding Aid to Families with Dependent Children).

84. *See* Levine, *Access to "Confidential" Welfare Records in the Course of Child Protection Proceedings*, 14 J. FAM. L. 535, 540 (1975).

85. *See supra* notes 34–37 and accompanying text.

86. As this commentator noted: "Unfortunately, state welfare officials have interpreted this federal legislation with great latitude. Likewise, the federal government has encouraged the state authorities to prohibit, or limit the client's access to records." Levine, *supra* note 84, at 541 (foot-

One federal statute concerning state plans for foster care and adoption assistance also speaks to the issue of disclosure, but clearly does not mean to prevent all disclosure:

> In order for a State to be eligible . . . it shall have a plan . . . which:
> (8) provides safeguards which restrict the use of or disclosure of information concerning individuals assisted under the State plan to purposes directly connected with (A) the administration of the plan . . . (B) any investigation, prosecution, or criminal or civil proceeding conducted in connection with the administration of any such plan . . . (C) the administration of any other Federal or federally assisted program which provides assistance, in cash or in kind, or services, directly to individuals on the basis of need . . . .[87]

States are also required by the Child Abuse Prevention and Treatment and Adoption Reform Act of 1978[88] to provide for methods of preserving "the confidentiality of records in order to protect the rights of the child, his parents or guardians.[89] However, this requirement does not prevent access by a party to his or her own records.

While these latter regulations imply that access by a guardian ad litem may be appropriate and permissible, another federal provision expressly mentions guardians ad litem. Subdivision 1340.14(i)(2) of title 45 of the Code of Federal Regulations permits the individual states to authorize, "by statute," access to child protective agency records by a variety of named recipients including a court, a properly constituted authority investigating a report of known or suspected child abuse or neglect, and a guardian ad litem.[90] The regulation provides that such authorization must be granted "by statute," thereby precluding the use of a court order to gain access.[91] Ohio's judicial cooperation statute arguably meets this requirement.[92]

The state and federal statutes pertaining to public agencies obvi-

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note omitted).

87. 42 U.S.C. § 671(a)(8) (1982).

88. Pub. L. No. 95-266, 92 Stat. 205 (codified as amended at 42 U.S.C.A. §§ 5101–5115 (Supp. 1986)).

89. 42 U.S.C. § 5103(b)(2)(E) (1982).

90. 45 C.F.R. § 1340.14(i)(2) (1985).

91. Section 1340 of the Code of Federal Regulations implements the Child Abuse Prevention and Treatment Act of 1974 which was directed towards eradicating child abuse and neglect. *See id.* § 1340. *See also* Child Abuse Prevention and Treatment Act of 1974, Pub. L. No. 93-247, 88 Stat. 4 (codified as amended at 42 U.S.C.A. §§ 5101–5115 (1983 and Supp. 1986)). Among the regulations contained within § 1340 is a requirement that records pertaining to child abuse and neglect be kept confidential in order that the states receiving federal funding for the maintenance of their programs. *See* 45 C.F.R. § 1340.14(i)(1) (1985). Access by guardians ad litem is an exception to this provision.

92. See accompanying text.

ously do not prepare the guardian ad litem for the arguments of the private professionals or agencies who are intent on not disclosing information. It should be noted, however, that court-ordered reports are generally reviewable by a guardian ad litem.[93] In addition, when private service providers do not recognize the guardian ad litem's right to information, the reporting statute exception[94] and general powers of judicial discretion may be called upon.[95]

4. Post-Committment Discovery

Once a child has been committed to the temporary or permanent custody of the state agency, the juvenile court may still desire representation for the child. The need for a guardian ad litem during the post-commitment period was recognized in *In re Christopher*[96] wherein the Morrow County Court of Appeals required appointment of a guardian ad litem for proceedings where a parent was seeking to regain custody of a dependent child.[97] The court noted the possiblity that the interests of the child and parent may conflict, necessitating the appointment of a guardian ad litem.[98] The dispositional focus was the best interests of the child, not the present status of the parent.[99]

Subsequent to *In re Christopher*, the Ohio legislature, in 1980, passed Amended Substitute House Bill 695 (H. 695).[100] Under the provisions of H. 695, once a child has been committed to the temporary or permanent custody of the state, periodic judicial reviews occur and mandatory comprehensive reunification plans must be filed.[101] Recognizing that both federal and state reunification and review statutes have existed for approximately nine years, case law is still developing in this area. Nevertheless, Ohio statutory law, pursuant to federal mandates, places an affirmative duty on the custodial agency to rehabilitate and reunify the family.[102]

The argument that a court cannot serve as both arbitor and advocate for the child applies to the review proceedings as well as to the initial trial proceedings. In review proceedings, the information may be

93. *See supra* note 52.
94. *See supra* note 55.
95. *See supra* notes 56–57 and accompanying text.
96. 54 Ohio App. 2d 137, 376 N.E.2d 603 (1977).
97. *Id.* at 143, 376 N.E.2d at 607.
98. *Id.*
99. *Id.* at 145, 376 N.E.2d at 608.
100. Act of July 25, 1980, 1980 Ohio Legis Serv. 5-397 (Baldwin) (codified at OHIO REV. CODE ANN. §§ 2151.011, 2151.281, 2151.35, 2151.353, 2151.38, 2151.412–.414, and 5103.151 (Page Supp. 1981 and Supp. 1985)).
101. OHIO REV. CODE ANN. § 2151.412 (Page Supp. 1984); *id.* § 5103.151 (Page 1981).
102. *See* OHIO REV. CODE ANN. § 2151.412 (Page Supp. 1985); *id.* § 5103.151 (Page 1981); *see supra* notes 53–57 and accompanying text.

presented solely by the agency holding legal custody,[103] which will attempt to show that the child is receiving the best possible care. The need for continuous representation of the child was noted in the United States Department of Health and Human Services' manual for judges hearing abuse and neglect custody cases: "Representation [of the child] often ceases after the disposition hearing but representation may be needed later to insure that the child does not linger in foster care and to monitor compliance by the parents and the agency with the court's treatment plan."[104]

In the American Bar Association monograph, *Periodic Judicial Review of Children in Foster Care*,[105] the needs and reasons for independent case examination are well explored. Once again it is suggested that a guardian ad litem participate in all review proceedings and obtain records on behalf of the child for the purpose of review. There has been some debate whether the presence of a comprehensive reunification plan, which is incorporated into a court order granting custody to an agency, automatically waives the parent's right to a confidential relationship with a psychologist or psychiatrist.[106] The Ohio Supreme Court has not yet ruled on this issue.

The Ohio Rules of Juvenile Procedure do not limit discovery to pending trials. The rules provide for discovery "upon written request"[107] and for "such other order as it [the court] deems just under the circumstances."[108] These rules do not indicate that there need be a pending hearing to allow the court to order discovery. Consequently, the guardian ad litem should be permitted to obtain information for

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103. *Id.* § 5103.151 (Page 1981).

104. U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, CHILD ABUSE AND NEGLECT LITIGATION: A MANUAL FOR JUDGES 57 (1981). The right of children to have their cases reviewed, as mandated by federal law, 42 U.S.C. § 671(a)(16) (1982), was made clear in Lynch v. Dukakis, 719 F.2d 504 (1st Cir. 1983). The appellate court concluded that foster children may enforce this right granted by federal statute and that this private right of action is not inhibited by the Secretary of Health, Education, and Welfare's authority to enforce state compliance. *Id.* at 510 (citing Rosado v. Wyman, 397 U.S. 397, 420 (1970)). *See also* 42 U.S.C. § 671(b) (1982) (allowing Secretary to withhold federal funding).

105. *See* NATIONAL LEGAL RESOURCE CENTER FOR CHILD ADVOCACY AND PROTECTION, PERIODIC JUDICIAL REVIEW OF CHILDREN IN FOSTER CARE (Sept. 1980).

106. *See In re* Smith, 7 Ohio App. 3d 75, 454 N.E.2d 171 (1982). The court in this case held that there was no psychologist-patient privilege where the parents had been required by the agency and the comprehensive reunification plan to speak with the psychologist. *Id.* at 77–78, 454 N.E.2d at 175. The court focused upon the involuntary nature of the communication. *Id.* More recently, however, in *In re* Decker, 20 Ohio App. 3d 203, 485 N.E.2d 751 (1984), the appellate court distinguished privileged communications that began prior to a comprehensive reunification plan from those which began upon a court-ordered comprehensive reunification plan. *Id.* at 204, 485 N.E.2d at 752–53.

107. OHIO R. JUV. P. 24(A).

108. *Id.* 34(C).

post-commitment proceedings while the child is in the legal custody of an agency. Any question of the juvenile court's continuing jurisdiction can be overcome by a motion to invoke the continuing jurisdiction of the juvenile court. This interpretation is bolstered by both the statutory provision allowing the court to continue temporary custody arrangements until further order of the court[109] and the provision mandating annual agency reviews.[110]

IV. A Proposed Solution: A Legislative Response

Fulfilling the duties of a guardian ad litem will often lead the guardian ad litem to one or more of the aforementioned arguments. The arguments alone, however, will not necessarily place the records on the doorstep of the guardian ad litem. A presentation may have to be made by letter, motion, oral argument, or brief. That these arguments must even be developed by the child's representative is indicative of the need for a direct statutory grant of authority to the guardian ad litem.

Several states have recognized the problem and have provided guardians ad litem full access to records of the child. For example, Delaware has recently enacted one of the most thorough guardian ad litem statutes.[111] It defines the role of the guardian ad litem, protects him or her from civil liability, and grants direct access to all records.[112] The statute uses the term "Court Appointed Special Advocate" which is deemed to be the guardian ad litem for federal law requirements.[113] It grants the advocate "the authority to review all relevant documents and interview all parties . . . ."[114] The statute also ensures that the advocate will be made a "party to any Court Agreement or Court plan entered into on behalf of the child(ren)."[115] It makes all records and information acquired or reviewed by the advocates during the course of their duties confidential; they may only be disclosed pursuant to a court order.[116] In addition, the statute protects the advocate by providing that an appointed advocate "shall not be civilly liable for acts or omissions committed in connection with duties which are part of the program if they have acted in good faith and are not guilty of gross negligence."[117] An important provision allowing access to records by the advocate provides:

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109. *See* OHIO REV. CODE ANN. § 2151.38 (Page Supp. 1985).
110. *See id.* § 5103.151 (Page 1981).
111. *See* DEL. CODE ANN. tit. 31, §§ 3601–3613 (1985).
112. *See id.*
113. *Id.* § 3608.
114. *Id.* § 3605.
115. *Id.*
116. *Id.* § 3609.
117. *Id.* § 3612.

> Upon presentation of the Order of Appointment by the Court Appointed Special Advocate, any agency, hospital, school, organization, Division of Department of State, doctor, nurse, or other health care providers, psychologist, psychiatrist, police department, or mental health clinic shall permit the Advocate to inspect and copy any records relating to the child(ren) or parents.[118]

North Carolina offers similar access to confidential records: "The judge may grant the guardian ad litem the authority to demand any information or reports whether or not confidential, that may in the guardian ad litem's opinion be relevant to the case."[119] A Louisiana statute allowing for the county's service records on the child to be reviewed in full by the child's attorney[120] has been interpreted to allow the child's attorney access to such records, but not the child's parents.[121] Both Alabama and Georgia have statutory provisions that mandate that the guardian ad litem be someone other than a party or employee of a party,[122] but neither statute addresses the duties or discovery rights of the guardian ad litem. Other states have statutes that encourage the independence of the guardian ad litem, but few outline the duties and discovery rights.[123]

At the present time, Ohio does not have a statute delineating the rights and responsibilities of guardians ad litem. There is, however, sufficient precedent on which an effective statute could be based. To address many of the issues mentioned in this article the ideal guardian ad litem statute should contain the following elements:

(1) Require the guardian ad litem to be independent of any other party or witness.

(2) Give the guardian ad litem the right to have access to all information regarding the client and client's parents.

(3) Require the guardian ad litem to perform a full and independent investigation on behalf of the child.

(4) Indicate when the guardian ad litem is to be appointed or allow a guardian ad litem to be appointed at any time on behalf of any child.

(5) Provide immunity from civil and criminal liability if the guardian ad litem acts in good faith and is not guilty of gross negligence.

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118. *Id.* § 3611.

119. N.C. GEN. STAT. § 7A-586 (Supp. 1985).

120. LA. REV. STAT. ANN. § 46:56(F)(1) (1982 and Supp. 1986).

121. *See* State *ex rel.* Interest of F. Delcuze v. Office of Human Development, 397 So. 2d 533 (La. Ct. App. 1981).

122. *See* ALA. CODE § 12-15-8 (1977); GA. CODE § 24A-3301 (1976).

123. *See* STATE STATUTES, *supra* note 11, at 249–69.

(6) Allow the guardian ad litem to file any necessary pleadings or actions, call witnesses etc., on behalf of the client.

(7) Require the guardian ad litem be an attorney or provide an attorney for the guardian ad litem.

It is certainly time for Ohio to provide for the right of the guardian ad litem to examine all records regarding the represented child. Furthermore, until a statute specifically indicates the authority of guardians ad litem and provides guidelines for their duties, the full potential of the child's representative to effectively advocate will not be realized. When the courts are struggling over their custody decision for the child, it is clear that they would benefit from a more informed guardian ad litem. The children in the state's care need representatives with the ability to seek the best-researched decisions affecting the care, treatment, and permanent resolution of problems facing their young lives.[124] A legislative response would aid in achieving these goals.

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124. Guardians ad litem would also benefit from a statutory clarification of their duties and responsibilities as a court-appointed representative in terms of their ability to assess the potential for malpractice for a failure to file a lawsuit against abusive parents. This has become an increasing concern as Ohio has abolished the parental immunity doctrine. *See* Shearer v. Shearer, 18 Ohio St. 3d 94, 480 N.E.2d 388 (1985); Kirchner v. Crystal, 15 Ohio St. 3d 326, 474 N.E.2d 275 (1984). *See also*, Note, *Torts: The Abolishment of the Parental Immunity Doctrine—Children May Recover Damages from Parents in Personal Injury Actions—Kirchner v. Crystal, 15 Ohio St. 3d 326, 474 N.E.2d 275 (1984); Shearer v. Shearer, 18 Ohio St. 3d 94, 480 N.E.2d 388 (1985)*, 11 U. DAYTON L. REV. 737 (1986). The implication is that children and their representatives may file actions to address any legal matters affecting the children. Lawsuits against social workers and parents brought on behalf of an injured or abused child indicate that the child's representative or guardian ad litem may also become the subject of malpractice actions for failure to file a tort action regarding the child's care and custody. *See generally*, D. BESHAROV, CRIMINAL AND CIVIL LIABILITY IN CHILD WELFARE WORK: THE GROWING TREND (1983) (discussion of actions brought against agencies caring for children).

Of interest to guardian ad litems is a recent decision of the United States Court of Appeals for the Tenth Circuit which held "that a guardian ad litem is not acting under color of state law for purposes of § 1983." Meeker v. Kercher, 782 F.2d 153, 155 (10th Cir. 1986). The court stated: "It is the requirement that the guardian ad litem must exercise independent professional judgment that is crucial to the determination of whether a guardian ad litem acts under color of state law and is therefore a person liable under § 1983." *Id.*