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GUARDIANS AD LITEM IN WISCONSIN*

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That the law guards zealously the rights of minors and incompetents is almost axiomatic. Legislators provide such protection in the form of family codes,[1] children's codes,[2] certain criminal statutes,[3] liquor laws,[4] statutes imputing minors' negligence to others,[5] regulation of the relationship between a general guardian and ward,[6] and a host of miscellaneous provisions.[7] Obviously, any statute relating to guardians *ad litem* also manifests this concern.

Courts, too, have long recognized their duty to protect minor and incompetent litigants.[8] Protection of such nature has been traditionally afforded by the appointment of one whose specific duty it is to safeguard the interest of his ward during the course of a given judicial proceeding.[9] Technically, one appointed in such capacity to represent a plaintiff is called a next friend or *prochien ami,* while one so appointed to protect a defendant is known as a guardian *ad litem.*[10]

The distinction has survived to the present day in Wisconsin statutes regulating practices before justices of the peace. Section 301.21 provides that

> an action instituted by a minor shall be dismissed (on motion of the defendant) unless a next friend for him is appointed. When-

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* This article is based upon a report submitted to the Wisconsin Judicial Council, which instigated and authorized the study.

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1 WIS. STAT. chs. 245-48 (1963).

2 WIS. STAT. ch. 48 (1963).

3 *E.g.,* WIS. STAT. §§940.32, 941.22, 943.35, 944.10, .11, 947.15 (1963).

4 WIS. STAT. §§66.054, 176.30 (1963).

5 WIS. STAT. §§167.10, 331.035, .048, 343.15 (1963).

6 WIS. STAT. ch. 319 (1963).

7 *E.g.,* WIS. STAT. §§102.60 (double or treble damages for minor under workmen's compensation), 175.20 (children under 17 not permitted in dance halls), 313.15 (allowance to minor children from parent's estate), 328.44 (children under seven conclusively presumed incapable of negligence), 330.33 (tolling of statutes of limitation during period of incompetency) (1963).

8 Montgomery v. Erie R. R., 97 F. 2d 289 (3d Cir. 1938); McReynolds v. Miller, 372 Ill. 151, 22 N.E. 2d 951 (1939); Grauman, Marx & Cline Co. v. Krienitz, 142 Wis. 556, 126 N.W. 50 (1910); The Queen v. Gyngall, [1893] 2 Q.B. 232; *In re* Spence, 2 *Phil.* Ch. 247, 41 Eng. Rep. 937 (1847); 43 C.J.S. *Infants* §105 (1945).

9 "As most fundamental among these [underlying principles] must be borne in mind that the infant is always the ward of every court wherein his rights or property are brought in jeopardy, and is entitled to most jealous care that no injustice be done him. The guardian *ad litem* is appointed merely to aid and enable the court to perform that duty of protection." Richardson v. Tyson, 110 Wis. 572, 578, 86 N.W. 250, 251 (1901).

10 City Nat'l Bank & Trust Co. v. Sewell, 300 Ill. App. 582, 21 N.E. 2d 810 1939).

> ever requested the justice shall appoint some suitable person, consenting thereto in writing, named by the plaintiff to act as his next friend in the action. . . .

On the other hand, section 301.22 provides for appointment of a "guardian" for a minor defendant.[11] But the guardian so required may evidently be "any suitable person."[12] Thus, the appointee selected to protect the rights of minor litigants in justice courts apparently need not be an attorney, although a guardian *ad litem* must be an attorney,[13] in both circuit[14] and county court[15] proceedings.

Both the plaintiff's next friend[16] and the defendant's guardian[17] are required to consent to their appointments in written statutory form.[18] The guardian *ad litem* for only a plaintiff need consent in writing to a circuit or county court appointment.[19]

While there is no case law indicating that the situation has caused any problem, justice court statutes make no provision for appointment of a next friend or guardian for an incompetent litigant.[20] Sections 301.21 and 301.22 are specifically restricted to *minor* litigants.[21]

Nor do the statutes make any mention of fees for such next friends or guardians.[22] But here, too, lack of any case law on the subject bespeaks lack of a serious problem.

Especially in the light of the limited jurisdiction of justices of the peace,[23] and of the case of removal to county courts,[24] most of the above discrepancies appear to merit neither further attention nor revision.[25]

Quite the opposite is true, however, of the problems surrounding guardians *ad litem* in circuit and county courts in this state,[26] with which this report is primarily concerned. The following main points will be considered: the necessity of guardians *ad litem;* the requirement that

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[11] The word *guardian* in this section has been construed to mean guardian *ad litem.* 36 OPS. WIS. ATT'Y GEN. 416 (1947).
[12] WIS. STAT. §301.22 (1963).
[13] WIS. STAT. §256.48 (1963).
[14] WIS. STAT. §260.22 (1963).
[15] WIS. STAT. §324.29 (1963).
[16] WIS. STAT. §301.21 (1963).
[17] WIS. STAT. §301.22 (1963).
[18] WIS. STAT. §301.23 (1963).
[19] WIS. STAT. §260.27 (1963).
[20] "Any party, except a minor, may appear by an attorney, agent or in person and conduct or defend any action. . . ." WIS. STAT. §301.20 (1963).
[21] It is probably desirable to relieve a justice of the peace from the burden of passing on the mental competency or incompetency of a litigant.
[22] Although §301.21 makes a next friend responsible for costs and §301.22 relieves a guardian therefrom. This conforms substantially to the practice in circuit and county courts. WIS. STAT. §260.27 (1963).
[23] WIS. STAT. §300.05 (1963).
[24] WIS. STAT. §301.245 (1963).
[25] However, brief reference will be made to the issue of compensation for next friends and guardians in the summary of recommendations at the conclusion of this report.
[26] Because of the ever-increasing concurrent jurisdiction between circuit courts and county courts in Wisconsin, the word *court* as used herein will refer to both, and distinction will be made only where necessary.

they be attorneys; the nature and extent of their responsibility; and their compensation.

Necessity

Although several statutes provide for the appointment of a guardian *ad litem*,[27] there seems to be no clear-cut basis for the distinction between those requiring and those permitting appointment.[28]

Appointment is mandatory for a minor or incompetent parent in a proceeding to terminate parental rights,[29] and for a minor[30] parent in order to make effective that parent's consent to the adoption of his child.[31] On the other hand, appointment is discretionary for a hearing to determine whether a child is delinquent, neglected or dependent,[32] and under the interstate compact on juveniles.[33] It is also permissible for a minor whose adoption is proposed if the pre-adoption investigation casts serious doubt on the desirability of the proposed adoption.[34]

Under the Mental Health Act, the court may or may not appoint a guardian *ad litem* for the patient in a proceeding to determine the mental condition of that patient.[35]

In an action under the Uniform Reciprocal Enforcement of Support Act, no guardian *ad litem* need be appointed for a minor obligee petitioner.[36]

In paternity proceedings, either the district attorney or her private counsel is automatically appointed guardian *ad litem* for a minor or incompetent complainant.[37] In the latter event, a substitute guardian *ad litem* may be appointed if a conflict of interests arises.[38] In other

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[27] WIS. STAT. §§32.05, .06, .15 (condemnation procedure under right of eminent domain) (1963), and WIS. STAT. 318.31 (compromise among adverse claimants to an estate) (1963) provide for the appointment of a *special guardian* to protect the interests of minors and incompetents. However, this terminology does not necessarily require a *guardian ad litem* since "a *special* guardian is one who has special or limited powers and duties with respect to his wards, *e.g.* a guardian who has the custody of the estate but not the person, or vice versa, or a guardian *ad litem*." BLACK, LAW DICTIONARY (4th ed. 1951).

[28] Actual appointment need not be pleaded, Wheeler v. Smith, 18 Wis. 682 (1864), nor proved, Hughes v. Chicago, St. P., M. & O. Ry., 126 Wis. 525, 106 N.W. 526 (1906).

[29] WIS. STAT. §48.42 (1963). Whether this adequately protects the child involved is problematical at best.

[30] The requirement does not apply to an incompetent parent.

[31] WIS STAT. §48.84 (1963). "[This provision] must be strictly construed and the concurrence in the consent of the guardian *ad litem* is a jurisdictional requirement which cannot be waived by the court. . . . Because of the jurisdictional defect in failing to obtain the concurrence of a guardian *ad litem* in the minor mother's consent to adoption, the judgment decreeing adoption is void and must be set aside." Adoption of Morrison, 260 Wis. 50, 68, 69a, 49 N.W. 2d 759, 767, 768 (1951).

[32] WIS. STAT. §48.25 (1963).

[33] WIS. STAT. §48.991 (1963).

[34] WIS. STAT. §48.88 (1963).

[35] WIS. STAT. §51.02 (1963).

[36] WIS. STAT. §52.10 (1963).

[37] WIS. STAT. §52.22 (1963).

[38] *Ibid.* No specific provision is made for appointment of a guardian *ad litem* for either the child or a minor or incompetent defendant. *Cf.* WIS. STAT.

proceedings in which the paternity of a child born to a married woman is questioned, the child must be made a party and a guardian *ad litem* must be appointed for the child.[39]

A guardian *ad litem* is required to be appointed for an interested minor or incompetent in actions to foreclose a right of redemption under a tax deed,[40] actions to foreclose a tax lien,[41] and in proceedings under the drainage laws.[42]

Those guardians *ad litem* provisions which relate at least primarily to probate matters are found in title XXIX of the statutes.[43] When the court requires an accounting by a fiduciary whom he suspects of fraud, waste, or mismanagement, he is required to appoint a guardian *ad litem* for interested minors or incompetents.[44] Similarly, appointment is required for both minors and incompetents on a petition by a trustee or general guardian to sell property.[45] In a proceeding to determine descent of lands, a guardian *ad litem* must be appointed for an interested minor for whom no general guardian appears.[46] But appointment is evidently unnecessary in an assignment of a homestead.[47]

During a proceeding on a petition to have a general guardian appointed for an alleged incompetent, "the court *may* appoint a guardian *ad litem* for the ward or proposed ward."[48] (Emphasis added.) Although the statute seems to render appointment discretionary, the Wisconsin Supreme Court has stated that "we commend the practice of appointing a guardian *ad litem* under this section where it is deemed, by the trial court, to be in the best interests of the ward and we especially recommend such an appointment where an alleged incompetent is unable to be present at the guardianship proceedings."[49]

Of course, where the value of personal property to which a minor is entitled does not exceed $1,500, no guardian need be appointed.[50]

§256.52 (1963), which provides that "in any action or proceeding, *except in paternity proceedings,* under ch. 52, the court may appoint a guardian ad litem for persons not in being or presently unascertainable, if the court has reason to believe that such appointment is necessary to protect the interests of such persons." (Emphasis added.)

[39] WIS. STAT. §328.39 (1963). This section does not apply to children not yet born. Limberg v. Limberg, 5 Wis. 2d 327, 92 N.W. 2d, 767 (1958).

[40] WIS. STAT. §§75.03, .19 (1963).

[41] WIS. STAT. §75.521 (1963). This section also requires appointment of a guardian *ad litem* for any unknown interested person.

[42] WIS. STAT. §88.10 (1963).

[43] WIS. STAT. chs. 310-24 (1963). ("Proceedings in County Courts").

[44] WIS. STAT. §312.11 (1963). In a routine accounting, however, the court has discretion as to appointing a guardian *ad litem* for interested persons unborn or presently unascertainable and even for an incompetent. WIS. STAT. §323.10 (1963).

[45] WIS. STAT. §323.06 (1963).

[46] WIS. STAT. §315.04 (1963). The statute does not provide for appointment for an incompetent.

[47] WIS. STAT. §314.05 (1963).

[48] WIS. STAT. §319.11 (1963).

[49] Guardianship of Nelson, 21 Wis. 2d 24, 30, 123 N.W. 2d 505, 509 (1963).

[50] WIS. STAT. §319.04(2) (1963). *Cf.* WIS. STAT. §269.80(3) (1963), about which more will be said.

The comprehensive guardian *ad litem* provision regulating the county courts is as follows:

> Every person under disability shall appear and conduct or defend by his guardian ad litem, who shall be an attorney, or by the general guardian of his property, who may appear by attorney; but a guardian ad litem shall be appointed in all cases where the minor or incompetent has no general guardian of his property, or where such general guardian fails to appear on his behalf, or where the interest of the minor or incompetent is adverse to that of such general guardian. . . .[51]

The above action is similar in substance to that in title XXV,[52] which applies to "civil actions in the circuit courts and other courts of record, having concurrent jurisdiction therewith to a greater or less extent, in civil actions, and to special proceedings in such courts except where its provisions are clearly inapplicable or inappropriate to special proceedings."[53] Section 260.22 provides that

> when a party to an action or proceeding is a minor, or when the court or judge has reason to believe that a party is mentally incompetent to have charge of his affairs, he must appear either by the general guardian of his property or by a guardian ad litem who is an attorney appointed by the court or by a judge thereof. A guardian ad litem shall be appointed in all cases where the minor or incompetent has no general guardian of his property, or where such general guardian fails to appear on his behalf, or where the interest of the minor or incompetent is adverse to that of such general guardian.

The difficulty in reconciling these sections lies not in the latter parts of each, which are identical,[54] but in the preceding portions which could be differently construed. While both provide in the alternative for appearance by "the general guardian of his property" or by the guardian *ad litem,* the county court statute requires such appearance on behalf of "every person under disability" (without defining *disability*), but the requirement under section 260.22 is aimed at a "minor, or [a party who] the court or judge has reason to believe . . . is mentally incompetent to have charge of his affairs." Granting that both refer to minors and mental incompetents, do the tests differ with respect to alleged incompetents? Is one objective and the other subjective? In order to receive the protection of a guardian *ad litem* under section 324.29, is it necessary that the proposed ward be a judicially-declared incompetent? Or may he be one who the judge thinks is mentally incompetent to have

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[51] WIS. STAT. §324.29(1) (1963).
[52] WIS. STAT. chs. 260-81 (1963) ("Procedure in Civil Actions").
[53] WIS. STAT. §260.01 (1963).
[54] Both sections were amended to include this provision by Wis. Laws 1953, ch. 298, §§1, 2.

charge of his affairs?[55] If the tests be, in fact, different—and there seems no justification for a difference, since inherent necessity for protection would not depend upon the jurisdiction of the court—then the function of a county court judge would be little more than ministerial, while a circuit court judge would be called upon to make at least a finding of fact (and hence be somewhat more susceptible to reversal). On the other hand, if the tests be the same, it would seem that the language of the statutes should coincide.[56]

Controversial section 269.80 provides (in part) that:

> (1) A compromise or settlement of an action or proceeding to which a minor or mentally incompetent person is a party may be made by his guardian ad litem with the approval of the court in which such action or proceeding is pending.
>
> (2) A cause of action in favor of or against a minor or mentally incompetent person may, with the approval of any court of record, be settled by a guardian ad litem without the commencement of an action thereon; and for such purpose, the court may appoint a guardian ad litem. . . .

The first subsection is a composite of sections 260.23(4) (as to minors) and 260.24(2) (as to incompetent persons), which originated as rules of the supreme court.[57] They were proposed by the Advisory Committee on Rules of Pleading, Practice, and Procedure (the precursor to the Judicial Council), whose report of June 12, 1941, to the Wisconsin Supreme Court stated that "proposed [section 260.23(4)] furnishes a definite rule for the settlement of the rights of minors who are parties to an action. As present the practice is varied and the powers of the guardian *ad litem* to compromise or settle a claim are uncertain. A rule on the subject is needed. . . . What has been said relating to the proposed rule for minors . . . applies equally to the rule for . . . incompetents."[58]

These two original sections were consolidated and renumbered to

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[55] There is some authority for this position. At the time of service of summons upon him, the defendant was insane, but had not been so adjudged. After default judgment had been taken against him, the court appointed a guardian *ad litem*, who moved to set aside the judgment. The trial court obliged, and the supreme court affirmed, pointing out that the lower court had both the power and the duty to appoint a guardian *ad litem* when it appeared that the defendant was insane. "The proposition that mere formal service of process upon a person insane in fact, although not judicially declared to be insane, will enable the plaintiff to take a judgment by default which cannot be opened to let in a meritorious defense, cannot be entertained for a moment." Gerster v. Hilbert, 38 Wis. 609, 613 (1875).

[56] Both sections require a representative for even an incompetent *plaintiff*. This is a change from the common law, which permitted a lunatic to maintain his own suit, but denied that right to a minor. Menz v. Beebe, 95 Wis. 383, 70 N.W. 468 (1897); Weisman v. Donald 125 Wis. 600, 104 N.W. 915 (1905).

[57] They were promulgated in 239 Wis. v (1942).

[58] Section 260.24(2) authorized compromise or settlement by either a general guardian or by a guardian *ad litem*.

section 260.23(4) in 1949.[59] The wording of section 260.23(4) was identical to that of the present day section 269.80(1). In fact, the preamble to the amending act[60] stated that its purpose was "to consolidate, revise and renumber . . . 260.23, 260.24(2) and (3) and 260.25 to be 260.23."[61] There was no acknowledged intent to create, but the new section 260.23(5) authorized settlements without action, in the language of today's section 269.80(2),[62] *even though* none of the old sections mentioned in the preamble had dealt therewith. Thus, the authors have the decidedly uneasy impression that somehow, somewhere along the way, someone pulled wool over the eyes of the venerable legislature.[63]

Probably no great harm has been done, however, since the supreme court has enunciated an even stronger rule, with but passing reference to section 269.80(2). *Andresen v. Mutual Serv. Cas. Ins. Co.*,[64] a fairly recent case involving settlement of a minor's personal injury claim, gives a clear picture of the court's attitude toward the necessity of a guardian *ad litem*. The young plaintiff had been injured by the defendant's insured. The boys' father signed and filed, in the county court, a petition for an order approving a settlement of $600. There was a hearing, at which the child was represnted by an attorney, and the court signed the order of approval. No guardian *ad litem* had been appointed, and three years later the settlement was vacated on that ground, on the petition of a newly-appointed guardian *ad litem*. The trial court at the second hearing interpreted section 269.80(2) "to mean that the right to settle such a cause of action, with the approval of the Court, is limited exclusively to a guardian *ad litem*, and that it was not intended to permit the settlement to be made, even with the permission of the Court, by a friend or even by a parent of the minor. . . ."[65] But the trial court relied far more heavily on sections 260.23(2) and 324.29.[66]

In affirming, Justice Gordon looked almost exclusively to section 260.22. "We are asked to treat the appointment of a guardian *ad litem* as a mere technicality on the theory that the child was fully and adequately represented. It is a complete answer to this contention to note that [section] 260.22 . . . provides that the minor 'must appear either

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[59] Wis. Laws 1949, ch. 301. This act deleted the authority of the general guardian. See note 58 *supra*.

[60] Wis. Laws of 1949, ch. 301.

[61] *Ibid.*

[62] This subsequent renumbering was accomplished by Wis. Laws 1955, ch. 210.

[63] Correspondence with several people who were members of the pertinent committee at that time shed no light on the mystery. However, in view of the ease with which an action may be commenced, so as to make §269.80(1) operative, the issue is probably of little or no practical importance.

[64] 17 Wis. 2d 380, 117 N.W. 2d 360 (1962).

[65] Brief for Defendant, p. 106 (appendix).

[66] *Id.* at 107-09.

by the general guardian of his property or by a guardian *ad litem* who is an attorney appointed by the court or by a judge thereof.' "[67]

The defendant had argued that sections 319.04(2) and 269.80(3), authorizing payment of sums less than $1,000 directly to a minor, applied and abrogated the necessity of appointment of a guardian *ad litem.* To this contention, Justice Gordon replied: "[B]ut in neither section is there any suggestion that the minor's claim may be compromised without compliance with [section] 260.22 regarding the appointment of a guardian *ad litem,* if there be no general guardian. [Section] 319.04(2) and [section] 269.80(3) provide for the *distribution* of the minor's assets without the appointment of a general guardian where the amount involved is small. However, it cannot be said that such actions sanction judicial approval of the settlement of a minor's claims without the formality of having a guardian *ad litem.* Indeed, [section] 269.80(2) expressly provides for the appointment of a guardian *ad litem.*"[68] Thus has the permissive language of section 269.80(2) apparently been made mandatory.

Usually, appointment of a guardian *ad litem* is considered a procedural matter.[69] "As a general rule, the appointment of a guardian *ad litem* for an infant defendant is held to be a matter of procedure and not one of jurisdiction. Being a matter of procedure, the failure of the court to conform to proper procedure may make the judgment erroneous but it is not void. In this respect the failure to appoint a guardian *ad litem* is analogous to failure of an infant plaintiff to be represented by a next friend."[70]

Thus, lack of a guardian *ad litem* makes a judgment voidable, and subject only to direct attack.[71] As to other parties, the proceedings may be binding.[72]

Where an adverse party has objected for the first time on appeal to failure to appoint a guardian *ad litem* for a victorious minor plaintiff, the court has dismissed the objection as one not going to the merits of the action or defense,[73] or has held it waived if not taken by demurrer or answer.[74] The court in one such case termed the failure "at most,

[67] Andresen v. Mutual Serv. Cas. Ins. Co., 17 Wis. 2d 380, 383, 117 N.W. 2d 360, 361 (1962).
[68] *Id.* at 383-84, 117 N.W. 2d at 362.
[69] *Contra,* Adoption of Morrison, 260 Wis. 50, 49 N.W. 2d 759 (1951).
[70] Estate of Thompson, 212 Wis. 172, 178, 248 N.W. 167, 169 (1933).
[71] "True, a judgment rendered against a minor where he is not represented by a guardian *ad litem,* is not void. Such representation is not jurisdictional. Notwithstanding abuse of it, the judgment is proof against collateral attack. It can only be avoided by appeal for error, where the minority appears of record, or otherwise by motion or other direct proceeding in the action seasonably resorted to." Grauman, Marx & Cline Co. v. Krienitz, 142 Wis. 556, 563, 126 N.W. 50, 52 (1910).
[72] Jenks v. Allen, 151 Wis. 625, 139 N.W. 433 (1913).
[73] Hafern v. Davis, 10 Wis. 501 (1860); Redlin v. Wagner, 160 Wis. 447, 152 N.W. 160 (1915).
[74] Fey v. I.O.O.F. Mut. Life Ins. Co., 120 Wis. 358, 98 N.W. 206 (1904).

a technical irregularity which could not affect any substantial right of the defendant."[75]

On the other hand, an unrepresented minor may avoid a judgment against him by making a timely motion to open the judgment.[76] But when the unrepresented minor waited for twenty-six years after reaching majority and then attempted to open a final judgment construing a will, the court found him guilty of laches.[77]

Failure to appoint may result in failure to comply with notice requirements. Twice, in nearly irreconcilable cases, lower courts appointed an administrator *de bonia non* where there was no guardian *ad litem* for minor heirs. In one,[78] it was reversible error; in the other,[79] it was valid.

In a dispute between an executor-trustee and the sureties on his bonds, a guardian *ad litem* was appointed for incompetent heirs but not for minor residuary legatees.[80] This failure constituted a reversible error.[81]

However, where a minor's interest is so remote that he is not a necessary party to the action, evidently no guardian *ad litem* is necessary for him.[82] But in such a situation, an aggrieved party (other than a general guardian) may not take an appeal on behalf of the minor.[83]

For lack of statutory requirement, no guardian *ad litem* is apparently necessary in proceedings before the Industrial Commission.[84] Nor need one be appointed for unknown minor and incompetent heirs in a probate proceeding if the court is told by the proponents of the will that the decedent has no heirs,[85] or if all heirs and devisees are known and are *sui juris*.[86]

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[75] Hepp v. Huefner, 61 Wis. 148, 151, 20 N.W. 923, 924 (1884).
[76] Grauman, Marx & Cline Co. v. Krienitz, 142 Wis. 556, 126 N.W. 50 (1910).
[77] *In re* Brandstedter's Estate, 198 Wis. 457, 224 N.W. 735 (1929).
[78] Hubbard v. Chicago & N.W. R.R., 104 Wis. 160, 80 N.W. 454 (1899).
[79] Jenks v. Allen, 151 Wis. 625, 139 N.W. 433 (1913). The court seemed to feel that in Hubbard v. Chicago & N.W. *supra* note 78, cognizance had not been taken of the correct notice statute.
[80] Estate of Thompson, 212 Wis. 172, 248 N.W. 167 (1933).
[81] "[I]t was called to the attention of the trial court that the residency legatees were not represented. The court should thereupon have appointed a guardian *ad litem* for such residuary legatees, and the failure to do so makes the judgment erroneous for the reason that the executor and his sureties should not be bound and required to pay when it appears from the record that other parties have an interest in the controversy who are not concluded by the same judgment." *Id.* at 178-79, 248 N.W. at 169.
[82] *In re* Austin's Estate,258 Wis. 578, 46 N.W. 2d 861 (1951) (petition to have alimony and support money paid from a testamentary trust); *In re* Estate of Koch, 148 Wis. 548, 134 N.W. 663 (1912) (claim against an estate in which there were minor heirs); McKinney v. Jones, 55 Wis. 39, 11 N.W. 606 (1882) (action on express contract made by general guardian for benefit of wards).
[83] *In re* Guardianship of McLaughlin, 101 Wis. 672, 78 N.W. 144 (1899).
[84] Bellrichard v. Industrial Comm'n, 248 Wis. 231, 21 N.W. 2d 395 (1945); Menominee Bay Lumber Co. v. Industrial Comm'n, 162 Wis. 344, 156 N.W. 151 (1916).
[85] *In re* Knoepfle's Will, 243 Wis. 572, 11 N.W. 2d 127 (1943).
[86] Estate of Strange, 7 Wis. 2d 404, 97 N.W. 2d 99 (1959).

Nor is a guardian *ad litem a sine qua non* in federal courts. Rule 17(c) of the Federal Rules of Civil Procedure provides that

> whenever an infant or incompetent person has a representative, such as a general guardian, committee, conservator, or other like fiduciary, the representative may sue or defend on behalf of the infant or incompetent person. If an infant or incompetent person does not have a duly appointed representative he may sue by his next friend or by a guardian ad litem. The court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person.[87]

The foregoing rule is interpreted to mean that the court may dispense with the appointment of a guardian *ad litem* only after having made a judicial determination that the infant or incompetent person is adequately protected.[88] The underlying philosophy of the rule seems to contrast with that of the Wisconsin Supreme Court as set forth in *Matter of Andresen.*[89] Rule 17(c) has been succinctly explained as follows:

> Rule 17(c) does not make the appointment of a guardian *ad litem* mandatory. If the court feels that the infant's interests are otherwise adequately represented and protected, a guardian *ad litem* need not be appointed. . . . But the rule does not mean that a judge may ignore or overlook such a fundamental requirement for the protection of infants. We spell out the rule to mean: (1) as a matter of proper procedure, the court should usually appoint a guardian *ad litem;* (2) but the court may, after weighing all the circumstances, issue such order as will protect the minor in lieu of appointment of a guardian; (3) and may even decide that such appointment is unnecessary, though only after the court has considered the matter and made a judicial determination that the infant is protected without a guardian *ad litem*. . . .
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> The record in this case shows that no one gave a thought to the appointment of a guardian *ad litem* until after judgment was rendered below. Apparently, it was an oversight. We believe that the discretion lodged in the trial judge in Rule 17(c) was not intended to apply to such a situation. The orderly administration of justice and the procedural protection of minors requires the trial judge to give due consideration to the propriety of an in-

[87] 28 U.S.C. (1958).

[88] Roberts v. Ohio Cas. Ins. Co., 256 F. 2d 35 (5th Cir. 1958).

[89] 17 Wis. 2d 380, 383, 117 N.W. 2d 360, 361 (1962). "The legislature has wisely directed that a guardian *ad litem* be appointed for a minor who does not have a general guardian. This is a desirable way of assuring that in every case the infant's rights will be fully protected. This is true even though there is an attorney who has been chosen by the parents to assist in the processing of the child's claim. While in the great bulk of cases the child's interests and the parents' interests fully coincide, there will be some cases where the infant's rights can better be protected by an officer whose interests do not extend beyond the child and the court."

> fant's representation by a guardian *ad litem* before he may dispense with the necessity of appointing the guardian.[90]

The conclusion is almost inescapable that if the above guide-lines are followed, a minor or incompetent person would be as well protected, with far less expense, as under a system in which appointment is mandatory. True, the burden on the court may be somewhat heavier in certain situations, but after all, "when an infant appears as a party to an action pending before a court, he becomes a ward of the court, and *it is the duty of the court to see that the interest of its ward is protected.*"[91] "The guardian *ad litem* is appointed merely to aid and enable the court to perform that duty of protection."[92]

Attorney as Guardian Ad Litem

The general requirement that a guardian *ad litem* be an attorney is found in section 256.48 of the Wisconsin statutes:

> In all matters in which a guardian ad litem is appointed by the court, the guardian ad litem shall be an attorney admitted to practice in this state. . . .[93]

Although this section would seem to be all-inclusive, there are a few other specific statutory references to the requirement.

Under the Children's Code, "[the guardian ad litem] shall be an attorney admitted to practice in this state."[94] In the county courts, he "shall be an attorney,"[95] while in the circuit courts he "is an attorney."[96]

The old provisions that a guardian *ad litem* be a "reputable attorney"[97] were repealed by chapter 572 of the Laws of 1963. The authors will not comment on the possibility of any inference to be drawn therefrom!

Since either private counsel or the district attorney is automatically appointed guardian *ad litem* for the complainant in a paternity proceeding, he would *ex officio* be an attorney.[98] If a conflict of interest arises, "the court may then appoint another *qualified person* to act as guardian ad litem."[99] (Emphasis added). Presumably, this "qualified person" would have to be an attorney, under the provision of section 256.48.

Since it is the duty of a guardian *ad litem* to protect the legal interest

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[90] Roberts v. Ohio Cas. Ins. Co., 256 F. 2d 35, 39 (5th Cir. 1958).
[91] Will of Jaeger, 218 Wis. 1, 10, 259 N.W. 842, 846 (1935), 99 A.L.R. 738, 745.
[92] Richardson v. Tyson, 110 Wis. 572, 578, 86 N.W. 250, 251 (1910).
[93] Chapter 256 is a part of title XXIV ("Courts of Record"), and so applies alike to circuit and county courts.
[94] WIS. STAT. §48.02 (1963).
[95] WIS. STAT. §324.29(1) (1963).
[96] WIS. STAT. §260.22 (1963).
[97] WIS. STAT. §§88.22, 89.05 (1961).
[98] WIS. STAT. §52.22 (1963).
[99] *Ibid.*

of his ward throughout a given judicial proceeding,[100] the requirement is probably wise. To the extent, then, that a guardian *ad litem* is necessary, he should probably be an attorney.

Nature and Extent of Responsibility

To say that the rights of a guardian *ad litem* are not statutory is as much an understatement as: "The duties of a guardian *ad litem* are not prescribed by statute."[101]

In fact, the language of the controlling statutes in the area leads one to wonder whether the legislature contemplated a responsibility in the county court differing from that in the circuit court. Section 324.29, which controls county courts, provides that "every person under disability shall *appear and conduct or defend* by his guardian ad litem."[102] (Emphasis added.) On the other hand, section 260.22, which applies to circuit courts, provides that a person under disability "must *appear* either by the general guardian of his property or by a guardian ad litem." (Emphasis added.)

If this distinction were carried to its illogical conclusion, it might mean that in a circuit court a guardian *ad litem* could simply appear with hands folded over his closed briefcase, and then collect his fee and slip quietly away; while in a nearby county court-room, a guardian *ad litem* was controlling the litigation.

It is as difficult to believe that the difference is intended,[103] as it is to find a justification for any difference. Again, it would seem that neither the inherent need for protection, nor the type of protection

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[100] Authorities cited notes 9 and 10 *supra.*

[101] Will of Jaeger, 218 Wis. 1, 10, 259 N.W. 842, 846 (1935), 99 A.L.R. 738, 745.

[102] *Cf.* WIS. STAT. §328.39(1)(a) (1963), which provides that "the court . . . shall appoint a guardian ad litem to *appear for and represent* the child whose paternity is questioned." (Emphasis added.)

[103] Section 324.29 was created by the Wis. Laws 1887, ch. 295, which provided that "every person under disability shall *appear and conduct or defend* by his guardian ad litem," language which has survived to the present time. Section 260.22, on the other hand, is a consolidation of two separate lines of statutes. The provisions relating to minors consistently required *appearance* by a guardian, WIS. REV. STAT. ch. 122, §16 (1858), WIS. REV. STAT. §2613 (1878), WIS. REV. STAT. §2613 (1898), or by a guardian *ad litem*, WIS. STAT. §260.22 (1963), as amended by order of the supreme court, 212 Wis. vii (1933), and Wis. Laws 1949, ch. 301. However, the provisions relating to mental incompetents originally required an action to be *prosecuted or defended* by a guardian, WIS. REV. STAT. ch. 96, §14 (1849), WIS. REV. STAT. ch. 122, §10 (1858), WIS. REV. STAT. §2615 (1878), WIS. REV. STAT. §2615 (1898), WIS. STAT. §260.24 (1925). As revised by supreme court order, 212 Wis. vii (1933), a guardian *ad litem* was appointed to *represent* a mental incompetent. The statutes relating to minors and mental incompetents were consolidated by Wis. Laws 1949, ch. 301, and renumbered to §260.22, which was still worded in terms of *appearance* on behalf of a minor and *representation* on behalf of a mental incompetent. It was under Wis. Laws 1953, ch. 298, that the current language emerged to require *appearance* for both. Perhaps the legislature merely intended to bring the rule pertaining to mental incompetents in line with that covering minors, and simply overlooked the discrepancy between §§260.22 and 324.29.

needed, would or should depend upon the jurisdiction the court—especially since so much jurisdiction is now concurrent.[104]

Although, as will be pointed out, there are a few specific statutory regulations, and some rules to be gleaned from pronouncements of the court, the guidelines were established long ago in the *Tyson* cases.[105]

In Justice Marshall's words:

> The appointment of [a guardian *ad litem*] is for all purposes of the action. It is necessary on account of the disability of the minor defendants. For that reason it continues till such disability ceases, unless the guardian is sooner discharged by the court. While such guardian is at all times under the control of the court, the responsibility of protecting the infant's interest wholly devolves upon him, and he is answerable in damages for negligence in that regard. It is his duty to examine into the case, and to use all the usual methods for the protection of the interests of the minor which the exercise of reasonable care and prudence would dictate. . . . The mere perfunctory performance of duty does not meet the requirements of the position. It is the duty of the guardian to use all reasonable means to thoroughly master the minor's case, and to make a vigorous defense, if in his judgment the circumstances are such as to demand it for the protection of

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[104] WIS. STAT. §253.11 (1963).

[105] This was a series of cases arising from an inter vivos trust, under which the grantor reserved a life estate in himself, with a gift over to his daughter and the remainder to her children, then unborn. The lower court held that the trust deed was invalid and that all the property passed to the daughter, who brought a quiet title action in which a guardian *ad litem* was appointed for the children which she had by that time. The trial court quieted title in the daughter, and the guardian *ad litem* filed his notice of appeal. The statutory time ran out, however, before he could find someone to put up the bond for the undertaking, and he was finally forced to move, in the supreme court, for permission to file the undertaking. Opposing counsel moved to dismiss the appeal on the ground that the guardian *ad litem* had exceeded his authority. The supreme court granted permission, saying that "if the guardian *ad litem* deemed the interest of the minor defendants prejudiced by the judgment rendered against them, especially when supported in that view by the advice of eminent counsel called to his assistance, it was not only his right, but it was his duty, to proceed in the only way open to him for a review of such judgment." Tyson v. Tyson, 94 Wis. 225, 231, 68 N.W. 1015, 1017 (1896). Then came the appeal on the merits, with the guardian *ad litem* again emerging victorious, as the supreme court held that his wards had a valid contingent remainder. Tyson v. Tyson, 96 Wis. 59, 71 N.W. 94 (1897). Next the guardian *ad litem* was forced to appeal from an order disallowing a lien on the remainder estate for his services. Again the lower court was reversed. Tyson v. Richardson, 103 Wis. 397, 79 N.W. 439 (1899). The next, and last, time that the case went up, the issue was the amount of the guardian *ad litem's* fee, which the supreme court reduced from $5,000 to $2,500! There was, perhaps, some consolation in the court's stating: "The performance of his important functions has already won for [the guardian *ad litem*] commendation from this court, and it is at the express wish of all its members that the writer of this opinion reasserts approval of the loyalty to the wards' interests, the fearlessness and courage against severe opposition and at the sacrifice of personal comfort, and the distinguished industry and professional learning and ability which have characterized *Mr. Richardson's* performance of those official duties resulting from his appointment as guardian *ad litem*. . . ." Richardson v. Tyson, 110 Wis. 572, 578, 86 N.W. 250, 251-52 (1901).

> the interests of such minor. To that end, the guardian appointed in the lower court continues throughout all stages of the case unless discharged. . . . The idea advanced by the respondent that the general powers of the guardian are limited to defending in the court where appointed; that he cannot take an appeal from a judgment against the minor without permission, is contrary to the nature of the office and to the uniform practice. . . .. He may, and often prudence requires that he should, take the advice of the court, and act under its direction in proceedings to maintain the rights of the minor; but he may proceed without such advice or direction if he sees fit. But, whether he proceeds or fails to proceed, unless the direction of the court, he does so at his peril of being held responsible for a reasonably prudent and intelligent performance of duty. In the performance of such duty he may interpose a defense, affirmative or otherwise, set up a counterclaim, or may appeal from an adverse judgment, as in his judgment the exigencies of the situation may require, in order fully to maintain the rights of the minor.[106]
>
> [The guardian *ad litem* is] required to be an officer of the court fully competent to understand and protect the rights of the defendants, and in no way connected in business with the attorneys for the adverse party, and of sufficient financial ability to compensate the infants for any loss that might be sustained by them through his neglect or misconduct in attending to their defense. . . . It was the further duty of the person appointed, being an officer of the court, to accept the trust reposed in him and to seasonably investigate the questions of law and fact involved in the litigation, and to the best of his ability discover the rights of [his wards], to take nothing for granted in [the adverse party's] favor that by any reasonable probability could be the subject of contest, to make no admissions regarding such matters adverse to [his ward's], but to put the [adverse party] to proof of the facts as to every such matter upon which relief in her behalf was demanded, to make a vigorous defense against [the adverse party's] claim where defense was reasonable in any view of the case, to bring all the facts and the law . . . to the attention of the court, not stopping even with an adverse decision if reasonable doubt as to its justice existed. . . .[107]

Little can be added to the above, which is admittedly dicta, without seeming superfluous. But for the sake of completeness, the relevant statutes and cases will be examined.

That a guardian *ad litem* is cast in the role of an advocate, as so admirably appears in the *Tyson* cases, is supported by other authorities.[108] In *Will of Jaeger*,[109] the testator had directed that the residue of his estate was to be placed in trust for veterans and that the trust be administered by a civic committee, naming contingent beneficiaries

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[106] Tyson v. Tyson, 94 Wis. 225, 229-30, 68 N.W. 1015, 1016 (1896).
[107] Tyson v. Richardson, 103 Wis. 397, 399-400, 79 N.W. 439, 440 (1899).
[108] Parsons v. Balson, 129 Wis. 311, 109 N.W. 136 (1906); Marx v. Rowlands, 59 Wis. 110, 17 N.W. 687 (1883).
[109] 218 Wis. 1, 259 N.W. 842 (1935), 99 A.L.R. 738.

if the trust failed within ten years. No civic committee was ever formed and a guardian *ad litem* was appointed for the minor contingent beneficiaries when the trustee's final account came on for hearing. The guardian *ad litem* was of the opinion that the trust was still valid and that his wards, therefore, had no interest in the residue. He so reported to the lower court, and reiterated his position in his brief in the supreme court on appeal by an adult contingent beneficiary from a decree continuing the trust in existence. The supreme court, on its own motion, struck his brief, on the theory that the minors were unrepresented, and appointed another guardian *ad litem.* The court conceded that "where the duty of an attorney to his client conflicts with his duty to the court, the duty to the court is the higher duty, and the performance of that duty excuses the performance of the duty which is owing to the client. . . . No attorney is required by his duty as guardian *ad litem* or as counsel to stultify himself. . . . Of course, there may be cases where the facts and the law are such as to admit of no controversy as to the rights of parties. Certainly this is not one of those cases."[110] The correct procedure under the circumstances would have been for the guardian *ad litem* to resign and for another to be appointed in his stead.

On the other hand, where all beneficiaries under a testamentary trust were parties to an agreement which completely changed the dispositive plan, the guardians *ad litem* had the duty to protect their wards' "interest in the testamentary scheme if it was valid, not endeavor to obtain the same or greater interest by destroying it. . . . It was [their] duty to vindicate the will, if it was valid, rather than to enter into any scheme to supersede it."[111]

The duty to act as an advocate emphasizes the fact that a guardian *ad litem* is not a party to the action.[112] As has been noted,[113] a guardian *ad litem* for a plaintiff (but not for a defendant) is required to consent in writing to his appointment.[114] The distinction may be based upon

[110] *Id.* at 11-12, 259 N.W. at 846, 99 A.L.R. at 745-46.

[111] Will of Rice, 150 Wis. 401, 473, 474, 136 N.W. 956, 984 (1912). In this case the court said of one guardian *ad litem* that he would have fulfilled his duty had he "merely entered appearance whenever necessary in the proceedings to enable the court to make a binding and orderly termination, stimulated the executors and their attorneys to do their duty, and occupied an advisory or adversary attitude toward them as occasion required, and otherwise remained passive in the administration proceedings, unless there was some reasonable necessity to do otherwise. . . ." *Id.* at 475, 136 N.W. at 984. This is, of course, not necessarily contradictory, and must be read in the light that the court was reprimanding the guardians *ad litem* for having exceeded their authority.

[112] Steel v. Ritter, 16 Wis. 2d 281, 114 N.W. 2d 436 (1962); Scheiderer v. George Schulz Co., 169 Wis. 6, 171 N.W. 660 (1919); Burbach v. Milwaukee Elec. Ry. & Light Co., 119 Wis. 384, 96 N.W. 829 (1903).

[113] See note 19 *supra.*

[114] "No person slall be appointed but upon his written consent as guardian for a plaintiff; and no guardian of a defendant shall be liable personally for costs unless by special order of the court for some misconduct therein." WIS. STAT. §260.27 (1963). This provision was created by WIS. REV. STAT. §2618

the fact that at one time a guardian for a plaintiff was personally liable for the costs of an action.[115] The language of section 260.27 which hints that a plaintiff's guardian *ad litem* could be personally liable for costs while exonerating a defendant's guardian *ad litem* therefrom is probably overshadowed by section 271.14 which provides that

> in any action or proceeding prosecuted or defended in any court in Wisconsin by . . . [a] guardian ad litem . . ., unless otherwise specially provided, costs shall be recovered as in an action by and against a person prosecuting or defending in his own right; but such costs shall be chargeable only upon or collected of the estate, fund or party represented, unless the court shall direct the same, to paid by the plaintiff or defendant[116] personally, for mismanagement or bad faith in such action, proceeding or defense. . . .

Thus it would appear that under normal circumstances no guardian *ad litem* should be personally liable for costs.

Theoretically, of course, a guardian *ad litem* is subject to the requirement that he post a bond.[117] Since, however, the requirement is predicated upon receipt of money or property belonging to the ward, it is difficult to imagine under what circumstances the statute would become operative.[118] For the same reason, the possibility that a guardian *ad litem* would be required to make an accounting[119] seems remote.

A guardian *ad litem* may not waive personal service of a summons on his ward in the circuit courts,[120] nor notice of a petition to prove a will or for administration in the county courts.[121] Thus, although in neither court may initial process be waived, waiver of notice of subsequent proceedings in the county court is permitted.[122]

(1878), and the revisor's note thereto indicates that it was intended "to define an established and necessary practice as to guardians for plaintiff, and to declare the law as to guardians for defendants. By rule, any attorney is bound to act as a guardian for a defendant on direction of the court."

115 Huebl v. Scollard, 142 Wis. 589, 126 N.W. 12 (1910), and Burbach v. Milwaukee Elec. Ry. & Light Co., 119 Wis. 384, 96 N.W. 829 (1903), based upon WIS. REV. STAT. §2931 (1898), which specifically made a plaintiff's guardian responsible for costs.

116 The phrase *plaintiff or defendant* refers to the fiduciary. Roberts v. Lamberton, 117 Wis. 635, 94 N.W. 650 (1903); Beem v. Kimberly, 72 Wis. 343, 39 N.W. 542 (1888); Ladd v. Anderson, 58 Wis. 591, 17 N.W. 320 (1883).

117 "No guardian appointed under the provisions of this chapter shall be permitted to receive any money or property of the ward, except costs and expenses allowed to the guardian or recovered for his ward, until he has executed to the ward and filed with the clerk a bond . . .; except he be also the general guardian of such ward. . . ." WIS. STAT. §260.27 (1963).

118 However, "on appeals from county courts to the supreme court, no bond shall be required or costs awarded against any child or person acting in behalf of the child on an appeal from an order of adoption; and no bond shall be required of any executor, administrator, guardian, trustee or alleged insane or incompetent person." WIS. STAT. §324.04(2) (1963). The second clause would, presumably, include guardian *ad litem*.

119 WIS. STAT. §§324.35, .351, .356 (1963).

120 WIS. STAT. §262.16 (1963).

121 WIS. STAT. §324.18(2) (1963).

122 *Ibid; cf. In re* West's Estate, 231 Wis. 377, 284 N.W. 565 (1939).

The guardian *ad litem* has the duty to investigate all questions of law and fact involved in the litigation in order to ascertain the rights of his ward.[123] In adoption proceedings, he is required to join in the consent of a minor mother.[124] However, the mother must sign her consent before the adoptive parents may present their petition; and the guardian *ad litem* is not appointed until the petition for adoption is filed.[125] "This would indicate that the function of the guardian *ad litem* in adoption cases is not to counsel with the mother at the time of signing her consent, but rather that he is to make his own independent investigation thereafter as to whether the mother freely and voluntarily executed such consent, and also whether the best intersts of the child would be promoted by his joining in such consent. It would seem that such action by the guardian *ad litem* . . . should take place promptly after [his] appointment. . . ."[126]

There is some authority to the effect that a guardian *ad litem* need not be served with copies of any of the pleadings.[127] However, in the interest of caution and courtesy, the better practice would probably be to serve him.

The issue of the right of the guardian *ad litem* to retain counsel to represent his wards or himself is raised in cases in which he has in fact done so and is seeking to recover the attorney's fee as part of his costs. For the guiding principle in this respect, we turn once again to a *Tyson* case:

> The policy in this state . . . is that attorneys be appointed to such position on the assumption that the guardian himself will be unable to render the professional services necessary to any ordinary situation. Hence the employment of additional counsel can only be justified by unusual or extraordinary circumstances. If the guardian takes such step without an order of the court, he assumes the peril that it may be disproved, and he be left to bear the expense personally. Nevertheless, if, after the fact, it appears that such precaution was reasonably necessary for the welfare of the minors, and such as the court would have authorized in advance had application been made, no reason is apparent why the reasonable expense should not be allowed. . . . [I]t still remains in such case a question for the court whether the extraordinary circumstances do exist to make necessary or proper such employment, and whether the services rendered by the attorney are merely those which the guardian might himself have rendered, or are such as, owing to the situation, he could not properly perform. There is no absolute limit on the *power* of

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[123] Parsons v. Balson, 129 Wis. 311, 109 N.W. 136 (1906); Tyson v. Richardson, 103 Wis. 397, 79 N.W. 439 (1899).

[124] WIS. STAT. §48.84 (1963).

[125] Adoption of Morrison, 260 Wis. 50, 49 N.W. 2d 759 (1951).

[126] *Id.* at 67-68, 49 N.W. 2d at 767-68.

[127] Jolitz v. Graff, 12 Wis. 2d 52, 106 N.W. 2d 340 (1960).

the court to allow such disbursement; merely considerations restrictive of the exercise of its judgment and discretion.[128]

Thus, attorney's fees were allowed for consultations, since the guardian *ad litem* was relatively inexperienced and wanted confirmation of his opinion that his wards had a valid remainder interest,[129] and for services at the hearing on the guardian *ad litem's* petition for costs and fee.[130] Similarly, an attorney was allowed compensation from the estate when he was retained by the guardian *ad litem* to represent the ward at an out-of-state construction of the will.[131] But services rendered by the attorney merely as an accommodation while the guardian *ad litem* was out of the state were considered as only a part of the total services rendered by the guardian *ad litem*.[132]

The authority of a guardian *ad litem* to compromise a claim or controversy on behalf of his ward is subject to the approval of the court.[133] Neither guardians *ad litem* nor anyone else may execute an agreement which completely changes a testamentary plan of disposition.[134]

Under the Children's Code,[135] a guardian *ad litem* must join in his ward's consent to termination of the ward's parental rights,[136] to adoption of the ward's child,[137] and to the ward's consent to return to the demanding state under the Interstate Compact on Juveniles.[138] Similarly, a trustee or general guardian may not purchase any property from the trust without the written consent of all parties and of the guardian *ad litem* for any interested minors or incompetents.[139]

The extent of the guardian *ad litem's* participation in the proceedings lies somewhere between his role as a party who is not a party[140] and the fact that he has no right to control the litigation.[141] It has been said

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[128] Richardson v. Tyson, 110 Wis. 572, 583, 586, 86 N.W. 250, 253-54 (1901). See also Will of Rice, 150 Wis. 401, 136 N.W. 956 (1912).

[129] Richardson v. Tyson, *supra* note 128.

[130] "At that hearing the entire conduct of [the guardian *ad litem*] was on trial; the facts as to the detail and volume of the services rendered by him, their quality, and the embarrassments and opposition under which they were performed, all were to be investigated, and in large measure must call for extended examination and cross-examination of himself as a witness. All this would have rendered his conduct of the hearing as his own advocate highly embarrassing, if not unseemly. . . ." Richardson v. Tyson, 110 Wis. 572, 588, 86 N.W. 250, 255 (1901).

[131] Ford v. Ford, 88 Wis. 122, 59 N.W. 464 (1894).

[132] Richardson v. Tyson, 110 Wis. 572, 86 N.W. 250, (1901).

[133] WIS. STAT. §§269.80, 318.31 (1963). Section 318.31 gives such authority to "a special guardian appointed by the court." As has been noted, this may include a guardian *ad litem*. See note 27 *supra*.

[134] Will of Rice, 150 Wis. 401, 136 N.W. 956 (1912).

[135] The Children's Code, incidentally, specifies that thereunder a guardian *ad litem* "has none of the rights of a general guardian." WIS. STAT. §48.02(8).

[136] WIS. STAT. §48.42 (1963).

[137] WIS. STAT. §48.84 (1963). Adoption of Morrison, 260 Wis. 50, 49 N.W. 2d 759 (1951).

[138] WIS. STAT. §48.991 (1963).

[139] WIS. STAT. §323.06 (1963).

[140] See note 112 *supra*.

[141] *In re* Estate of Patterson, 193 Wis. 392, 214 N.W. 344 (1927).

that "in the performance of [his] duty he may interpose a defense, affirmative or otherwise, [or] set up a counterclaim . . . as in his judgment the exigencies of the situation may require, in order to fully maintain the rights of the minor."[142] However, the only statutory provision for the subpoenaing of witnesses and presentment of proof by a guardian *ad litem* relates to a hearing following an unfavorable report of a pre-adoption investigation.[143] Presumably, his duty to do all things necessary to protect the rights of his ward encompasses a right to participate in the conduct of litigation.[144] In essence, the problem seems to be little more than the practical matter of communication and co-operation with attorneys representing parties who have interests identical or similar to the ward's.[145] Where there are no such parties, his role as an adversary should be beyond dispute.

When his duties in the court of original jurisdiction have been performed, a guardian *ad litem* has the unquestionable right (if not duty) to appeal from an adverse decision rendered by a county court. "The appeal of any minor from an order of adoption may be taken by any person. . . . In all other cases the appeal of any minor or incompetent person may be taken and prosecuted by his general guardian or by a guardian ad litem."[146] Both cases holding that a guardian *ad litem* has the right to appeal involved probate matters.[147] The issue of the right of a guardian *ad litem* to appeal from a circuit court seems never to have been raised. But that the right exists seems indisputable.

By rule of the supreme court, applying alike to circuit and county courts, "attorneys and guardians ad litem, appointed by the court below, will be deemed to continue in service until the contrary appears."[148] A similar statutory provision governs the county court specifically. "The guardian ad litem shall continue to act throughout the proceeding in relation to the same estate or matter, until its final settlement or conclusion, unless otherwise ordered. In the discretion of the court, the appointment may be revoked and another guardian ad litem appointed."[149] Generally speaking, then, a guardian *ad litem* continues in service until the matter for which he was appointed is finally settled[150]

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142 Tyson v. Tyson, 94 Wis. 225, 230, 68 N.W. 1015, 1016 (1896).
143 WIS. STAT. §48.88(3) (1963).
144 *Cf.* Roberts v. Vaughn, 142 Tenn. 361, 219 S.W. 1034 (1920), 9 A.L.R. 1528.
145 Jolitz v. Graff, 12 Wis. 2d 52, 106 N.W. 2d 340 (1960).
146 WIS. STAT. §324.01 (1963).
147 Jones v. Roberts, 96 Wis. 427, 70 N.W. 685 (1897); Tyson v. Tyson, 94 Wis. 225, 68 N.W. 1015 (1896).
148 WIS. STAT. §251.88 (1963), promulgated at 17 Wis. 2d xv (1963).
149 WIS. STAT. §329.29 (1963).
150 Hubbard v. Chicago & N. W. Ry., 104 Wis. 160, 80 N.W. 454 (1899). *But see* Hicks v. Hicks, 79 Wis. 465, 48 N.W. 495 (1891), holding that a guardian *ad litem* appointed for an incompetent defendant in a divorce action retained his status in a petition for modification of the decree nine years later because he had never been formally discharged.

(unless his ward's disability ends in the meantime[151]), or until he is discharged by the court if, for example, a conflict of interest arises.

Throughout his appointment, a guardian *ad litem* would do well to keep in mind that a cause of action may lie for his negligence. Fortunately, the only authority for the above statement is dicta: "While the guardian *ad litem* is at all times under the control of and subject to the orders of the court, the immediate responsibility for protecting the infant's interest devolves upon the guardian *ad litem.* If he neglect or fail in his duty in that regard. he is answerable in damages for negligence."[152]

Essentially, the responsibility of a guardian *ad litem* to his ward is very similar to the responsibility of any attorney toward his client. His power to compromise is more limited in that it is subject to the approval of the court, and, as a practical matter, his duty to safeguard property belonging to the ward is quite limited in the sense that he so seldom has any in his possession. His statutory duty to join in certain consents[153] is, of course, unique. The possibility of being personally liable for costs and negligence, he shares with all of us! And, with all of us, his primary responsibility as an officer of the court is to protect the rights of the person whom he is representing.

Compensation

The jungle of law relating to compensation can perhaps best be explored by attempting to hew two separate paths—one entitled "Who Pays?" and the second, "How Much?"

The first path has a relatively unentangled beginning. The county has the duty to pay guardians *ad litem* under the Children's Code,[154] the State Mental Health Act,[155] and in actions to foreclose tax liens[156] under procedures set forth in section 59.77. On petitions for a general guardian,[157] as well as in actions affecting marriage (in which the question of paternity is raised) and in paternity proceedings,[158] if the proposed wards or parties to the proceeding are unable to compensate the guardian *ad litem,* his fees are to be paid by the county according to the method established in section 957.26.[159]

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[151] Tyson v. Tyron, 94 Wis. 225, 68 N.W. 1015 (1896).
[152] Will of Jaeger, 218 Wis. 1, 11, 259 N.W. 842, 846 (1935), 99 A.L.R. 738, 745, paraphrasing Tyson v. Tyson, 94 Wis. 225, 229, 68 N.W. 1015, 1016 (1896).
[153] See notes 136-39,*supra.*
[154] WIS. STAT. §§48.02(8), .996 (1963).
[155] WIS. STAT. §51.07 (1963).
[156] WIS. STAT. §75.521 (1963).
[157] WIS. STAT. §319.11 (1963).
[158] WIS. STAT. §328.39 (1963).
[159] Section 957.26 relates primarily to counsel for indigent defendants. only the requirement of payment by the county and *not* the schedule of disbursements as set forth therein, applies to guardians *ad litem.* Shewalter v. Shewalter, 259 Wis. 936, 49 N.W. 2d 727 (1951).

In eminent domain proceedings, the condemnor is responsible for the guardian *ad litem's* fee.[160]

Emerging from the plateau of such special proceedings, we encounter the provision that guardian *ad litem* fees are to be allowed as costs.[161] Thus, the fees may not be recovered as part of a direct money judgment, but only as an item of taxable costs.[162] The rule was applied in a federal court diversity case, brought in the Eastern District of Wisconsin.[163]. Judge Grubb looked to Wisconsin statutes sections 256.48, 271.04(2), and 269.80(3), and concluded that "this Wisconsin law expresses a substantive policy of Wisconsin on a non-conventional item of expense and consequently should be followed by this court in diversity cases. Wisconsin by statute has expressly altered the ordinary, general rule in cases of this sort, which would be to award the guardian *ad litem* fees out of the fund recovered."[164]

The taxable cost rule is helpful insofar as it permits recovery from an unsuccessful litigant, but it does not go so far as to allow recovery by an unsuccessful guardian *ad litem* from a successful adversary.[165] Thus, if the guardian *ad litem* does not prevail, he may not look to the opposing party for payment of his fee under section 271.04.[166]

Section 256.48 provides in part that

> wherever the statutes do not specify who shall pay the fee of the guardian ad litem, the court shall order payment of his fees to be made by the party which the court determines should bear this cost.[167]

However, not even such broad language may be used to tax the fees of a guardian *ad litem* for a minor plaintiff against a successful defendant in a personal injury action.[168] "The litigation here is not in the nature of a probate proceeding or a proceeding *in rem.* Because of the indefiniteness of section 256.48, . . . where no standard is set up for the court to determine who should bear the cost, it should not be applied to burden the successful party with expenses of litigation because the unsuccessful party has no funds to pay them."[169]

[160] WIS. STAT. §32.05(4) (1963).
[161] WIS. STAT. §271.04(2) (1963); *cf.* §269.80(3), which directs the court, in minor settlements where the amount does not exceed $1,500, to "fix and allow the expenses of the action, including . . . fees of guardian ad litem."
[162] Bey v. Transport Indem. Co., 23 Wis. 2d, 182, 127 N.W. 2d 251 (1964).
[163] Gandall v. Fidelity & Gas Co., 158 F. Supp. 879 (E.D. Wis. 1958).
[164] *Id.* at 880-81.
[165] Puhl v. Milwaukee Auto. Ins. Co., 8 Wis. 2d 343, 99 N.W. 2d 163 (1959); *cf.* Gandall v. Fidelity & Cas. Co. 158 F. Supp. 879 (E.D. Wis. 1958), in which the court specifically reserved an opinion as to whether its holding would apply if the question *ad litem* did not prevail.
[166] Puhl v. Milwaukee Auto. Ins. Co., *supra* note 165.
[167] This section was created as an amendment to a county court statute by Wis. Laws 1953, ch. 107, and was originally numbered §324.29(2m). However, it was renumbered by Wis. Laws 1955, ch. 165, and now applies to courts of record generally, by virtue of its inclusion in title XXIV.
[168] Puhl v. Milwaukee Auto. Ins. Co., 8 Wis. 2d 343, 99 N.W. 2d 163 (1959).
[169] *Id.* at 359, 99 N.W. 2d at 171.

The quoted reference to "a probate proceeding or a proceeding *in rem*" may well have been prompted by the guardian *ad litem* fee rules applicable thereto. In order to understand the present law regulating fees of guardians *ad litem* in probate proceedings, it is helpful to stumble through its historical backgrounds.

Originally, guardian *ad litem* fees were payable from the corpus of the estate, notwithstanding the ward's interest therein.[170] This was evidently based upon the theory that the ward who must appear in order that the decree be binding on other parties, could appear only by guardian *ad litem*.[171]

However, such practice was ultimately condemned,[172] and the guardian *ad litem* was forced to look for compensation to only that property belonging to his ward which was "actually recovered and under the control of the court."[173] So if the ward had only a remainder interest in the estate, part of the remainder interest had to be sold to compensate the guardian *ad litem*.[174] Or, if the ward was given a specific legacy, the fee was payable therefrom.[175] And if it were determined that the ward had no interest, his guardian *ad litem* received no fee.[176] The guardian *ad litem* had a lien on the ward's interest to the extent of his allowance, but could not recover compensation from the estate at large.[177] At least part of the court's reasoning was based upon lack of statutory authorization for the original practice.[178]

Taking the hint thus provided, the legislature passed chapter 267 of the Laws of 1907, which provided that

> a guardian ad litem appointed for an infant who is a necessary party to a proceeding to probate a will, or in a proceeding or action to construe a will, or in a proceeding in the settlement of an estate, may be allowed compensation for his services and for his necessary expenditures in the litigation, to be fixed by the court, in which such proceedings or litigation is had, and paid out of the body of the estate or property in controversy, if the infant has no available property out of which such payment can be directed by the court.[179]

The new statute was upheld as constitutional on the theory that it merely authorized payment from a general fund *in custodia legia*, in a proceeding in rem where "guardians *ad litem* are as essential to parties

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[170] Ford v. Ford, 88 Wis. 122, 59 N.W. 464 (1894).
[171] *Ibid.*
[172] *In re* Donge's Estate, 103 Wis. 497, 79 N.W. 786 (1899).
[173] Tyson v. Richardson, 103 Wis. 397, 401, 79 N.W. 439, 440 (1899).
[174] *Ibid.*
[175] Stephenson v. Norris, 128 Wis. 242, 107 N.W. 434 (1906).
[176] Becker v. Chester, 115 Wis. 90, 91 N.W. 650 (1902).
[177] Will of Korn, 128 Wis. 428, 107 N.W. 659 (1906); Stephenson v. Norris, 128 Wis. 242, 107 N.W. 434 (1906); Tyson v. Richardson, 103 Wis. 397, 79 N.W. 439 (1899).
[178] Stephenson v. Norris, *supra* note 175; *In re* Donge's Estate, 103 Wis. 497, 79 N.W. 786 (1899).
[179] WIS. STAT. §4041 b (1911).

interested adversely to the infant as to the latter, since only by use thereof could they succeed, safely, if at all, to the subject of the proceedings."[180] And since the statute was constitutional, the prescribed method of payment was permissible, but only because of the "special legislative authority."[181] So, once again, a guardian *ad litem* could look to the estate at large for payment of his fees, *provided that* his ward had no other property from which the court could order payment.[182]

Eventually the proviso was dropped,[183] and the statute assumed its present form:

> A guardian ad litem for a necessary party to a proceeding to probate a will, or in a proceeding to construe a will, or in a proceeding in the settlement of an estate, may be allowed compensation and his necessary expenditures, to be fixed by the court, and paid out of the estate or property in controversy.[184]

Ordinarily, then, this section will protect guardians *ad litem* in probate proceedings.[185] However, a guardian *ad litem* for an *un*necessary party still serves without fee[186]—as, it appears, do those who represent unsuccessful wards in civil litigation.[187]

Turning into our second path ("How Much?"), we encounter the once firmly established judicial rule which pervades the entire subject of the amount of compensation to which a guardian *ad litem* is entitled if he finds someone to pay him.

The standard to be applied is not that which governs agreements between a client who has the capacity to contract freely and at arms' length with an attorney whom he has voluntarily chosen.[188] Instead, because an attorney as an officer of the court has the duty to serve as

[180] Will of McNaughton, 138 Wis. 179, 195, 118 N.W. 997, 1003 (1909), *rehearing denied on other grounds,* 138 Wis. 179, 120 N.W. 288 (1909).

[181] *Ibid.*

[182] Apparently, if the ward did have a present available interest in the estate, the fee for his guardian *ad litem* could still be made a lien thereon. Estate of Wells, 156 Wis. 294, 144 N.W. 174 (1914).

[183] Wis. Laws 1945, ch. 345.

[184] Wis. Stat. §324.13(2) (1963). By analogy, this section was held to permit recovery from the general estate by an attorney appointed under the Soldiers and Sailors Civil Relief Act. *In re* Ehlke's Estate, 250 Wis. 583, 27 N.W. 2d, 754 (1947).

[185] *Cf.* Will of Griffith, 165 Wis. 601, 163 N.W. 138 (1917). However, in order to qualify for fees and reimbursements from the estate, the proceedings for which the guardian *ad litem* is appointed evidently must be one specified in the statute. One appointed in a proceeding to modify a trust agreement in a divorce action was not entitled to recover compensation or disbursements from the trust estate, for lack of the "special legislative authority" required by the *McNaughton* rule. Yates v. Yates, 165 Wis. 250, 161 N.W. 743 (1917).

[186] Estate of Strange, 176 Wis. 2d 404, 97 N.W. 2d 99 (1959); *In re* Austin's Estate, 258 Wis. 578, 46 N.W. 2d 861 (1951).

[187] See note 165 *supra.*

[188] "[J]udicial officers perform their public duties 'for pecuniary rewards wholly incommensurate to what the same industry, learning, and ability would have commanded at the hands of clients.' It is upon such basis 'rather than with private contract that compensation should be made in measuring the allowance to' a guardian *ad litem.*" Will of McNaughton, 138 Wis. 179, 198, 118 N.W. 997, 1004 (1909).

guardian *ad litem* when called, his measure of compensation should be analogous to that of other officials performing public services.[189] The term *compensation* as it applies to guardians *ad litem* has been defined as "a reasonable charge, not measured by the high salaries or rewards for services which large establishments and wealthy clients may voluntarily pay to lawyers of their choice, but measured more nearly by the compensation which the law allows to public officers having similar duties. The reason is that guardians *ad litem* are in a true sense public officers, and not merely that but public officers of *justice.*"[190]

Some statutes which specifically authorize payment of compensation set up a standard of reasonableness.[191] Section 256.48 does more than establish such a standard, however, for it provides that a guardian *ad litem* "shall be allowed reasonable compensation for his services, reasonable compensation to be such as is customarily charged by attorneys in this state for comparable services."[192]

The Wisconsin Supreme Court had occasion to construe the above rule in *Blasi v. Drafz*[193] in which the trial court awarded minor plaintiff's guardian *ad litem* a fee "in the amount of 33⅓ per cent of the face amount of the judgment in favor of" the minor plaintiff against the defendant. On appeal, the percentage base was upheld,[194] and the court enunciated the following guidelines:

> In setting the amount of the guardian *ad litem* fees under [section 256.48], it is incumbent upon the trial court to consider [1] the

[189] "A duty of public service without such compensation as would be demanded for similar labors for individuals rests upon all members of the community. . . . Especially has been recognized from earliest times the duty of lawyers to aid their courts in the protection of the helpless or the oppressed without thought of pecuniary benefit. . . . At it would be the duty of an attorney, however eminent, to defend one accused of crime for the very moderate compensation now fixed by statute, or for none at all if none were allowed; as it is the duty, and . . . the custom, of attorneys to serve the court in disbarment proceedings without compensation, so it is a professional duty to aid the court as guardian *ad litem,* either without compensation if the case requires it, or, when funds exist, for compensation to be measured by the standard of official emluments, rather than by that of the highest prices demanded and paid between individuals free to contract as they will." Richardson v. Tyson, 110 Wis. 572, 578-79, 86 N.W. 250, 259 (1901).

[190] Estate of Wells, 156 Wis. 294, 314, 144 N.W. 174, 181 (1914).

[191] WIS. STAT. §§32.05 (condemnation under right of eminent domain; "reasonable fees of such special guardian"), 48.02 (Children's Code; "reasonable compensation"), 48.996 (Interstate Compact on Juveniles, under Children's Code; "reasonable fee"), 51.07 (commitment or discharge proceedings under State Mental Health Act; "reasonable charge") (1963).

[192] For history of this section, see note 167 *supra.*

[193] 12 Wis. 2d 14, 106 N.W. 2d 307 (1960).

[194] "We see no abuse of discretion in basing the fees in this instance on the amount of [the judgment]. But such a basis is not a rule to be followed in all situations since, under a number of circumstances, its application would bring about absurd and inequitable results. . . . It may be observed, however, that had the court specified the amount of the fees allowed rather than a percentage of the minor's recovery from respondents, the question here presented would not have arisen." *Id.* at 20, 106 N.W. 2d at 310

> amount of the minor's recovery, [2] the proportion of his negligence, [3] the amount of contribution, if any, [4] the time spent and the effort and diligence exercised on the minor's behalf by the guardian *ad litem,* as well as [5] the customary charges of attorneys in Wisconsin for comparable services.[195]

Nowhere in the *Blasi* case is there a reference to the standard established by *Will of McNaughton,*[196] *Richardson v. Tyson,*[197] and *Estate of Wells.*[198] However, in the *Blasi* case, the guardian *ad litem* also served as attorney of record for the plaintiff—a fact which should probably be recognized in applying the guidelines set down therein.

The court has yet to hold that section 256.48 abrogates its long established standard and demands application of the minimum bar fee schedule.[199] Authority for denying application of the full minimum bar fee rates to guardian *ad litem* fees may be found in recent cases involving fees for counsel for indigent defendants. These cases also illustrate that the norm to be applied to determine "customary charges for comparable services" is that measuring the compensation of other guardians *ad litem.*

Conway v. Sauk County[200] is one such case. The court was called upon to determine the amount of the fee payable under section 256.49, which requires that compensation for court-appointed attorneys "shall be such as is customarily charged by attorneys in this state for comparable services." Writing for the court, Justice Fairchild said that "apparently the legislature considered that the former specific limitations[201] provided inadequate compensation for services of court-appointed counsel and the legislature accordingly authorized the appointing court to fix a fee which would be fair and reasonable for the services reasonably necessary under the circumstances."[202] Even under the statute, the court reserved the right to determine the character and extent of the services for which the attorney was entitled to compensation. The rate applied thereto at the request of the attorney, and upheld on appeal, was two-thirds of the minimum bar fee schedule.[203] The su-

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[195] *Ibid.*

[196] Note 188 *supra.*

[197] Note 189 *supra.*

[198] Note 190 *supra.*

[199] Evidently the issue has not been raised. (Hopefully, this report will not operate as a catalyst.)

[200] 19 Wis. 2d 599, 120 N.W. 2d 671 (1963).

[201] Section 957.26 had provided that counsel for indigents receive a maximum of "$25 for each half day in court, $15 for each half day of preparation not exceeding 5 days, $15 for each half day attending at the taking of depositions. . . ." This was changed by Wis. Laws 1961, ch. 500, to provide for compensation "pursuant to [section] 256.49." WIS. STAT. §957.26 (1963).

[202] Conway v. Sauk County, 19 Wis. 2d 599, 603, 120 N.W. 2d 671, 674 (1963).

[203] "The schedule of minimum fees of the State Bar or other bar associations constitutes only the collective judgment of the committees or groups that passed upon it as to a scale of fees generally fair for the types of services listed. They are some evidence relative to the question of a reasonable charge for services, but have no other legal force." *Id.* at 604, 120 N.W. 2d at 675.

preme court found no abuse of discretion since the allowance was not "clearly unreasonable."[204]

In *Schwartz v. Rock County*[205] (another indigent defendant case), the parties had evidently stipulated that full minimum bar fees be allowed, but the trial court reduced the appointed attorney's compensation to two-thirds thereof. In affirming, the supreme court said:

> It is urged that [section] 256.49 . . . requires this court to apply the full minimum bar rates to services rendered by court-appointed counsel. . . . We do not construe this section as requiring the application of the full minimum rates of the State Bar of Wisconsin. The going rate for representation of indigents in Rock County is two-thirds of the minimum bar rates. Such practice is prevalent in other parts of Wisconsin and is used as a guide line in allowing compensation to counsel appointed by this court for indigents. We find no error in the rate used by the trial court.[206]

Thus, the indigent defendant cases, decided under a statute almost identical to section 256.48, may well provide the authority for keeping guardian *ad litem* fees at rates less than those prescribed by the minimum bar fee schedule.

The court came perilously close to the issue in a personal injury action against a minor driver and his insurance carrier.[207] The attorney for the insurance company was appointed guardian *ad litem* for the minor defendant. Judgment went in favor of the minor against an impleaded third party, and the attorney requested a guardian *ad litem* fee of $300, the per diem rate for a two-day circuit court trial as established by the minimum bar fee schedule. The fee was disallowed on the theory that his duties as guardian *ad litem* were coincidental to the duties owed to the carrier to defend its assured and that no additional service as a guardian *ad litem* was actually rendered. The court held that the intent of the legislature in enacting section 256.48 was not to allow double recovery in such circumstances. However, again without reference to the old rule requiring fees similar to those of other public servants, and by way of dicta, Justice Hallows said that

> [section] 256.48 . . . contemplates a guardian *ad litem* who actually performs legal services in that capacity. Otherwise, there is no purpose in defining a reasonable fee based on legal services. Before the creation of this section of the statutes some sections provided for appointment of guardians *ad litem* but no requirement existed that they be attorneys, and in some, no provision was made for the payment of fees. The intent of [section] 256.48 was to assure attorneys who were appointed guardian *ad litem*

[204] The *Conway* case expresses a warning that court-appointed counsel seek permission before making "substantial disbursements" lest they be disallowed.
[205] 24 Wis. 2d 172, 128 N.W. 2d 450 (1964).
[206] *Id.* at 180, 128 N.W. 2d at 455.
[207] Dickman v. Schaeffer, 10 Wis. 2d 610, 103 N.W. 2d 922 (1960).

that they would be paid the customary legal fees for legal services.[208]

However, what the court will do with the old rule if and when the issue is properly presented remains speculative.

It adhered strictly thereto when it was faced with the construction of section 324.13(2) in its original form.[209] The language of the statute was and is discretionary, and the court refused to construe it as mandatory.[210] Furthermore, since the section, then as well as now, provided no basis for compensation—not even the use of the word *reasonable*—[211] the court applied its old standard in determining the amount of fees to be awarded thereunder. "It is quite manifest that a basis of compensation, as in ordinary cases between party [*sic*] and client, was not thought of. That would be contrary to the standard in that regard for guardians *ad litem* in general and particularly in this state. The rule was firmly established here long before the law was passed that the basis should be that ordinarily paid to compensate for official services of a somewhat similar character."[212]

The distinction between sections 324.13(2) and 256.48 is also "quite manifest." An additional problem is raised by the fact that section 324.13 applies to probate proceedings in county courts, as did section 256.48 originally, but now section 256.48 relates to courts of record generally.[213]

To hold that section 256.48 requires application of minimum bar fee rates to guardians *ad litem* in probate proceedings would do more than abolish our once firmly-established judicial rule. Since the fees may evidently be charged against the corpus of an estate,[214] it would also overturn the many cases in which the court has recognized its duty to preserve funds within its control.[215]

In reliance upon one or both of these two principles, the supreme court has several times been forced to reduce guardian *ad litem* fees.

Attorneys testifying for the guardian *ad litem* in the *Tyson* cases

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[208] *Id.* at 619, 103 N.W. 2d at 927.

[209] Note 179 *supra.*

[210] Will of McNaughton, 138 Wis. 179, 118 N.W. 997 (1909). The statute provides that a guardian *ad litem* "may be allowed compensation"; while under §256.48 he "shall be allowed reasonable compensation." In Blasi v. Drafz, the court made the unsupported statement that "[section 256.48] makes the allowance of fees discretionary with the trial court." 12 Wis. 2d at 20, 106 N.W. 2d at 310 (1960). This was evidently meant to refer to *amount* of compensation.

[211] Other statutes authorizing payment of compensation to a guardian *ad litem* are similarly devoid of any reference to a standard to be applied. WIS. STAT. §§75.521 (foreclosure of tax liens), 319.11 (petition for general guardian), 329.38 (paternity proceedings) (1963).

[212] Will of McNaughton, 138 Wis. 179, 198, 118 N.W. 997, 1004 (1909).

[213] See note 167 *supra.*

[214] Note 184 *supra.*

[215] *E.g.,* Will of McNaughton, 138 Wis. 179, 118 N.W. 997 (1909); Richardson v. Tyson, 110 Wis. 572, 86 N.W. 250 (1901); *In re* Donge's Estate, 103 Wis. 497, 79 N.W. 786 (1899).

estimated the value of his services at $5,000.[216] But he recovered only half of that, not only because the estimates were evidently based on the present value of the estate rather than upon the wards' remainder interests, but also because the court apparently felt that the recommended amount corresponded too closely to the going rate for attorneys' fees. "Such however, is not the true rule as to compensation of court officers. . . ."[217]

In the *McNaughton* case, attorneys for the other parties agreed to a guardian *ad litem* fee of $3,000, which the supreme court reduced to $500. "The case did not involve any very intricate questions of law nor any of fact as regards methods of proof. The rules to be followed in the litigation were substantially removed from all uncertainties by many decisions of this court. . . . The property involved consisted of somewhere about $40,000 money value, but the work was neither more nor less because of the magnitude of the estate, though, of course, the responsibility was, by reason of that feature, somewhat enhanced."[218] Furthermore, the agreement with the attorneys was not binding because none of them had power to stipulate away the trust funds.

A similar agreement was struck down as constituting a waste of trust funds where the stipulated guardian *ad litem* fees again exceeded the amounts which the court considered adequate.[219]

In *Estate of Wells*,[220] the court relied upon the rule that compensation be based upon that awarded to public officers. With little discussion other than the statement of the rule, it reduced fees for the guardians *ad litem* from $33 to $15 per day of trial and from $17.50 to $10 per day of work outside court.[221]

Thus is the law with respect to guardian *ad litem* fees far from clear-cut. However, it would seem that the more troublesome problems could be overcome by statutory authorization for payment of allowable fees and expenses to unsuccessful guardians *ad litem* by counties and by a fee schedule applicable to guardians *ad litem*.

Recommendations

No simple solution suggests itself with respect to the major problems surrounding the necessity and compensation of guardians *ad litem*.[222]

[216] Richardson v. Tyson, 110 Wis. 572, 86 N.W. 250 (1901).
[217] *Id.* at 588, 86 N.W. at 255.
[218] Will of McNaughton, 138 Wis. 179, 200, 118 N.W. 997, 1005 (1909). The trial had lasted eight days, with an estimated preparation time of from ten to twenty days. The court noted that counsel for indigent defendants were being paid $15 per day.
[219] Will of Rice, 150 Wis. 401, 136 N.W. 956 (1912).
[220] 156 Wis. 294, 144 N.W. 174 (1914).
[221] *Cf.* Will of McNaughton, *supra* note 218.
[222] That a guardian *ad litem*, when one be necessary, should be an attorney seems sound in light of his requisite knowledge of legal rights and duties. In this regard, the nature and extent of his responsibility is basically similar to that of any attorney representing any client and little change in the exist-

In some ways it would seem best that appointment be discretionary with the trial judge.[223] This could be done either through adoption of a statute modelled after Federal Rule 17(c), or by the amendment of existing statutes.[224] If the former method were adopted, the new statute should probably be placed in title XXIV, so that it would apply to all courts of record, and should be broad enough to include not only probate proceedings, but other special proceedings such as adoption and land condemnation. In either event, all subservient statutes should be amended so as to conform to the controlling ones—which, at the very least, represents a major statutory revision.

The other practical objection is that of the additional burden on the trial judges to make the necessary determination. The safe and easy way out for them would be to continue to appoint guardians *ad litem* for every minor and mentally incompetent person who appears before them. Thus, the discretionary element could be defeated as a matter of practice.

The controlling objection, however, appears to be the legislative and judicial policy as declared in this state. That policy indicates a strong awareness of the necessity to protect the rights of persons under disability, and to that extent should not be discouraged. The scale tips far in its favor even when weighed against the expense incurred when it appears *ex post facto* in some instances that protection would have been adequate without a guardian *ad litem.*

For these reasons, mandatory appointment is recommended.[225] To effectuate this end, and to avoid confusion, statutes which appear to make appointment discretionary should be amended.[226]

Furthermore, section 260.22 should be amended to provide that a party under disability "appear *and conduct or defend*" by the general guardian of his property or by his guardian *ad litem,* so as to conform to section 324.29, governing county courts. And section 324.29 should probably be amended to provide for appointment of a guardian *ad litem*

ing law seems indicated. However, if there be any doubt that a guardian *ad litem* has the right to appeal from a circuit court to the supreme court, statutory provision should be made or rule of court promulgated. In addition, it might be well to adopt the practice of discharging a guardian *ad litem* formally and of record when his duties are finished. This protection could be prescribed by statute or rule of court, but, especially in light of Hicks v. Hicks, *supra* note 150, it seems a wise precaution.

[223] However, in any situation in which a guardian *ad litem* is required to join in the consent of his ward, notes 136-38 *supra,* or of other parties, note 139 *supra,* appointment would, of course, be mandatory.

[224] If a test similar to that under FED. R. CIV. P. 17(c) (see note 90 *supra*) were adopted, certainly any party under disability would be adequately protected.

[225] No opinion is expressed as to the advisibility of requiring or permitting appointments in proceedings before the Industrial Commission.

[226] WIS STAT. §§48.25, .88, .991, 51.02, 319.11 (1963). The discretionary language of §269.80 has apparently been made mandatory by judicial construction. See note 67 *supra.* The discretion in §§256.52 (guardian *ad litem* for persons not in being or presently unascertainable) and 323.10 (possible persons unborn or presently unascertainable) should probably be retained.

"when the court or judge has reason to believe that a party is mentally incompetent to have charge of his affairs" so as to conform to section 260.22.

No matter which policy is pursued, those statutes which provide for appointment of a guardian *ad litem* for a minor, but omit reference to an incompetent,[227] should be revised to include both.[228]

Very likely, the recommendation that appointments be mandatory is no more than that *status quo* be maintained, and hence should represent no appreciable increase in cost.

However, the radical suggestions resulting from this study concern cost, and are two-fold. It seems as unfair that a guardian *ad litem* should serve without fee (and possibly incur liability for costs), as it does that he be awarded a fee which over-compensates his time and responsibility.

With all due respect for the philosophy which requires an attorney to serve as guardian *ad litem* as an adjunct to his professional eminence, it does not seem unreasonable that the government which compels the performance of his duty be authorized to compensate him therefore—win, lose, or draw.[229]

Under existing rules, and the continuation thereof herewith proposed, a judge is required to appoint a guardian *ad litem* when it appears that a minor or mentally incompetent person has an interest in the action or proceeding. If, after the fact, it appears that he had none,[230] the responsibility of his guardian *ad litem* is not thereby diminished. And, whether the proceeding binds other parties depends upon the appointment of a guardian *ad litem*. Therefore, it would seem neither unconstitutional nor inequitable if an organ of the government were required to compensate him. Thus, it is recommended that the county in which the proceeding is brought have the duty to reimburse a guardian *ad litem* for his expenses (at the very least) *and* to pay his fee (preferably), *if* no other party or fund be liable therefor under other provisions of the law.[231]

The amount of such fee is the subject of the second radical suggestion. Many judges who responded to the survey[232] indicated a desire

[227] WIS. STAT. §§48.84, 315.04 (1963).

[228] The provisions of chapter 52 regulating paternity suits prescribe that a guardian *ad litem* be appointed for a minor or incompetent mother, but make no mention of one for a minor or incompetent father or child. Perhaps this should also be changed.

[229] Of course, some statutes already provide for payment by the county. See notes 154-58 *supra*.

[230] If, for example, it were determined that the ward had not been a necessary party, see note 186 *supra*, or if the guardian *ad litem* were unsuccessful in establishing his ward's rights, see note 165 *supra*.

[231] This would apply to situations mentioned in note 226 *supra*, and would presumably abrogate the necessity of written consent by a guardian *ad litem* for a plaintiff, see note 19 *supra*. No estimate of possible cost to counties has been made.

[232] Results of the survey are summarized in the appendix to this report.

that a standard be established for compensation of guardians *ad litem*. Although it is recommended that a guardian *ad litem* not be required to serve without fee, no inference is intended that he be compensated at fees similar to those for attorneys serving private clients. Serve he does, and should be paid, but he serves as one whose license to practice makes him eligible and whose principal has little or no choice in his selection.

Thus, it is recommended that a fee schedule applicable to guardians *ad litem* be adopted, and that such schedule be the equivalent of from fifty to sixty-five per cent of the minimum bar fee schedule.[233] Furthermore, it is strongly urged that in order to qualify for court approval of compensation, all guardians *ad litem* be required to submit a verified statement of the time and duties for which they are seeking payment.[234]

This would seem to insure both that guardians *ad litem* entitled thereto be adequately compensated and, on the other hand, that appointment as guardian *ad litem* not serve as a bonanza to one who expends little or no time thereon.

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With these observations, this study closes—in the hope that it has not only presented an exposé of the existing law, but that it will be helpful in formulating future policies.

APPENDIX

As an adjunct to the study of the law of guardians *ad litem* in Wisconsin, a questionnaire was sent to all the circuit and county court judges in Wisconsin. The purpose of the questionnaire was to determine how the guardian *ad litem* statutes were applied in the various state courts. A consensus of judicial opinion as to present and future guardian *ad litem* procedures was also requested. Unfortunately, the response to our questionnaire was limited and unenthusiastic (only 51% answered the questionnaire), so that it is impossible to draw any useful conclusions from the survey. Only the results of the survey will be stated, since only 83 of the 160 questionnaires sent out were returned and of those 83, very few had answered all the questions contained therein.

Questionnaire

1. Do you use any list or formal source for making appointments of guardians *ad litem*?

Circuit Courts:	Yes 5	No 17
County Courts:	Yes 21	No 40
Total:	Yes 26	No 57

If so, of what is the list or source composed? Total replies 26.

Usually, the attorney selected to be a guardian *ad litem* was selected from an alphabetical list of attorneys, such as the bar association directory or telephone directory.

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[233] Some attorneys consulted felt that two-thirds of the minimum bar fees would be fair; others thought it high. The schedule should probably include minimums and maximums. Unless the guardian *ad litem* is also attorney for his ward in a cause traditionally compensated on a percentage basis, his fee should be based strictly on time expended.

[234] Statutes specifically allowing fees for guardians *ad litem* could be amended so as to incorporate the schedule by reference. Those statutes which establish a standard of "reasonableness," see note 191 *supra*, as well as those which omit any such frame of reference, see note 211 *supra*, could be similarly amended.

2. Do you have *direct* knowledge of the legal abilities of the attorneys whom you appoint?
Circuit Courts: Always 9; usually 13; about one-half the time ___; occasionally ——; never——.
County Courts: Always 46; usually 15; about one-half the time ___; occasionally ——; never——.
Total: Always 55; usually 28; about one-half the time ___; occasionally ___; never——.

3. Does your method of selection vary with the type of issue involved?

Circuit Courts:	Yes 17	No. 4
County Courts:	Yes 40	No 18
Total:	Yes 57	No 22

If so, what is the basis for your distinction? Total replies 53
The attorney nominated by the judge to be the guardian *ad litem* depends upon the nature of the case, the amount involved, the experience of the attorney and the ability of the attorney as a trial lawyer.

4. In approximately what percentage of cases does a minor request a specific person to be appointed as his guardian *ad litem*?

Circuit Courts:	0-24% 11;	25-49% 1;
	50-74% 2;	75-100% 5;
County Courts:	0-24% 42;	25-49% ___;
	50-74% 8;	75-100% 2.
Total:	0-24% 53;	25-49% 1;
	50-74% 10;	75-100% 7.

Do you honor such requests?
Circuit Courts: Always 1; usually 9; about one-half the time ___; occasionally ___; never 7.
County Courts: Always 5; usually 27; about one-half the time ___; occasionally 3; never 4.
Total: Always 6; usually 36; about one-half the time ___; occasionally ___; never 11.

5. Do you favor the practice of appointing the attorney retained to represent the ward as guardian *ad litem*?
Circuit Courts: Always 3; usually 10; about one-half the time 1; occasionally 3; never 4.
County Courts: Always 11; usually 29; about one-half the time 3; occasionally 9; never 3.
Total: Always 14; usually 39; about one-half the time 4; occasionally 12; never 7.
Explain: Total replies 54.
This procedure seems to be acceptable as long as the judge is certain that no conflict of interest will arise.

6. Do you appoint a guardian *ad litem* for a minor defendant who has adequate and uncontested insurance coverage?
Circuit Courts: Always 19; usually ___; about one-half the time ___; occasionally 1; never 1.
County Courts: Always 20; usually 16; about one-half the time 1; occasionally 5; never 7.
Total: Always 39; usually 16; about one-half the time 1; occasionally 6; never 8.

7. Have you ever had occasion to appoint a substitute guardian *ad litem* during the course of any proceeding?

Circuit Courts:	Yes 14	No 8
County Courts:	Yes 27	No 33
Total:	Yes 41	No 41

If so, under what circumstances? Total replies 40
The most frequent circumstances are (1) the guardian *ad litem's* inability to continue to serve because of sickness or death, or (2) a conflict of interest when he is serving both as attorney for one of the parties and as guardian *ad litem*.

8. Notwithstanding the provisions of section 256.48, in your opinion is it *always* necessary that a guardian *ad litem* be an attorney?

Circuit Courts:	Yes	20	No	1
County Courts:	Yes	53	No	8
Total:	Yes	73	No	9

If not, please explain briefly under what circumstances a lay person might serve, indicating any possible relationship between the guardian and ward (*i.e.*, parent and child, husband and wife, general guardian and ward, etc.). Total replies 14

A lay person may in some cases be better qualified to act as guardian *ad litem* if no conflict of interest will arise and if such lay person is a relative. Furthermore, an attorney is more expensive than an adult relative of the disabled party. Many of the "explanations" were non-responsive and indicated a misunderstanding of the question.

9. In your opinion are there circumstances under which the judge alone might adequately protect the interests of a minor or incompetent litigant?

Circuit Courts:	Yes	5	No	16
County Courts:	Yes	23	No	37
Total:	Yes	28	No	43

Explain: Some judges feel that a minor could be adequately protected by the judge in juvenile cases. However, the majority of the judges feel that the trial judge would have difficulty remaining impartial if he were the only person protecting the interests of the minor.

10. Would you favor absolute discretion in the presiding judge as to:

(a) Necessity of appointment?

Circuit Courts:	Yes	8	No	13
County Courts:	Yes	23	No	33
Total:	Yes	31	No	46

Explain: Total replies 46

Most judges are not in favor of any judicial discretion as to the necessity of appointment of a guardian *ad litem* because they are not aware of all the facts before the trial commences. Several judges stated that an absolute rule requiring the appointment of a guardian *ad litem* protects the judge from an abuse of discretion. However, a few judges did express the view that there are cases when a guardian is simply not necessary.

(b) Qualifications of appointee (*i.e.*, attorney, parent, spouse, general guardian, etc.)?

Circuits Courts:	Yes	14	No	6
County Courts:	Yes	46	No	7
Total:	Yes	60	No	13

Explain: Total replies 55

Most of the comments expressed the desire that the status quo be maintained by requiring that a guardian *ad litem* be an attorney. The judges feel that unless the case is quite simple and routine, the guardian *ad litem* should be an attorney to prevent the responsibility of protecting the minor from shifting to the judge and to prevent the delay which would ensue were the judge required to educate a lay guardian *ad litem*.

11. Do you permit a guardian *ad litem*:

(a) To examine and cross examine witnesses?

Circuit Courts: Always 13; usually 3; about one-half the time 1; occasionally 2; never 2.

County Courts: Always 52; usually 4; about one-half the time ___; occasionally 3; never ___.

Total: Always 65; usually 7; about one-half the time 1; occasionally 5; never 2.

Explain: Total replies 56.

The judges feel that the guardian *ad litem* has a duty to cross-examine witnesses "when the circumstances require it." Often it is necessary for the guardian *ad litem* to obtain judicial permission to cross-examine witnesses.

(b) To submit other evidence?

Circuit Courts: Always 11; usually 2; about one-half the time ___; occasionally 2; never 3.

County Courts: Always 49; usually 9; about one-half the time 1; occasionally 4; never ___.

Total: Always 60; usually 11; about one-half the time 1; occasionally 6; never 3.

Explain: Total replies 53
. Same answer as 11(a) above.

12. When a party united in interest is represented by separate counsel (as in insurance cases, for example), are the duties of a guardian *ad litem* merely routine?
Circuit Courts: Always 2; usually 13; about one-half the time 3; occasionally 2; never ___.
County Courts: Always 5; usually 34; about one-half the time 4; occasionally 4; never 6.
Total: Always 7; usually 47; about one-half the time 7; occasionally 6; never 6.
What circumstances render the duties more than mere routine?
Total replies 40
Problem here seems to arise when there is a question as to damages. For example, the parent might disagree with the guardian *ad litem* as to the proper amount of a settlement, or sometimes the possibility exists that damages might exceed the coverage.

13. Has a guardian *ad litem* ever retained separate counsel to represent him or his ward?

Circuit Courts:	Yes 2	No 20
County Courts:	Yes 6	No 51
Total:	Yes 8	No 71

If so, approximately what percentage of cases? 1%
Do you or would you, require him to seek your approval before doing so?

Circuit Courts:	Yes 7	No 2
County Courts:	Yes 19	No 7
Total:	Yes 26	No 9

14. Please describe briefly the method you use in determining how much a guardian *ad litem* should be paid for his services in the following cases: Total

(a) Tort Actions

Basis	Number of Judges Using Each Basis
Time	42
Responsibility	6
Amount	27
Bar Schedule	24
Other	17

(b) Real property actions or proceedings

Basis	Number of Judges Using Each Basis
Time	33
Responsibility	5
Amount	21
Bar Schedule	15
Other	12

(c) Probate proceedings

Basis	Number of Judges Using Each Basis
Time	29
Responsibility	3
Amount	12
Bar Schedule	15
Other	14

(d) Other

Basis	Number of Judges Using Each Basis
Time	27
Responsibility	3
Amount	8
Bar Schedule	19
Other	17

15. Is the amount of compensation at all dependent upon the amount recovered by, or preserved for, the ward?

Circuit Courts:	Yes 16	No 6
County Courts:	Yes 38	No 18
Total:	Yes 54	No 24

Explain: Total replies 54

Judges feel that although the fee of the guardian *ad litem* should not be based on the amount of recovery, it is obvious that this result cannot be avoided, since it is impossible to award a $1,000 fee to the guardian *ad litem* where the recovery was $800. The view is also expressed that the fee of the guardian *ad litem* should be greater when the amount recovered is more, because the guardian *ad litem* has a greater responsibility in cases involving large amounts of money. Most of the judges agree that the amount recovered for the ward is only one of many elements to consider when determining the fee for the guardian *ad litem*.

16. In settlements of causes in which an insurance company compensates a minor or an incompetent, does the insurance company pay the guardian *ad litem's* fee in addition to the award?
Circuit Courts: Always 6; usually 11; about one-half the time 2; occasionally 2; never ___.
County Courts: Always 15; usually 27; about one-half the time 2; occasionally 5; never 3.
Total: Always 21; usually 38; about one-half the time 4; occasionally 7; never 3.

17. When an insurance company agrees to pay a guardian *ad litem's* fee in addition to the award, do you review the amount of the fee?
Circuit Courts: Always 14; usually 3; about one-half the time ___; occasionally 2; never 1.
County Courts: Always 27; usually 11; about one-half the time ___; occasionally 4; never 8.
Total: Always 41; usually 14; about one-half the time ___; occasionally 6; never 9.
Explain: Total replies 43

Generally there is no review of such fees unless they are unusually high or low. Several judges will review the guardian *ad litem* fee to be certain that there is no evidence of divided loyalty by the guardian *ad litem* between the minor and the party paying the fee.

18. Is a guardian *ad litem* for an unsuccessful litigant ever compensated for his services if the ward has no property of his own, in the following cases:
(a) Tort actions? Yes 11 No 42
If so, when and how? Total replies 14

If his appearance is necessary, the guardian *ad litem* may receive compensation out of the proceeds. Some judges claim that insurance companies should reimburse an unsuccessful guardian *ad litem*.

(b) Real property actions or proceedings? Yes 19 No 30
If so, when and how? Total replies 18

Allowed if there is real property that can be reached.

(c) Probate proceedings? Yes 24 No 8
If so, when and how? Total replies 28

It seems that judges do award the guardian *ad litem* his fee out of the estate rather freely.

(d) Other? Yes 21 No 15
If so, when and how? Total replies 21

Some judges feel that the guardian *ad litem* should be compensated if through no fault of his own there is no recovery.

19. Is a guardian *ad litem* for an unsuccessful litigant ever reimbursed for his expenditures?

Circuit Courts:	Yes 10	No 8
County Courts:	Yes 28	No 7
Total:	Yes 38	No 15

If so, by whom? Total replies 32

Usually the guardian is without expenditures, because such expenses are taken care of by the attorney for the minor or the parent of the minor. Frequently, the insurance company will pay these expenses. A few judges will place this expense upon the party which secured appointment of the guardian *ad litem*.

20. Would you favor consolidation of the existing statutory and case law in Wisconsin into a Guardian *ad Litem* Code?

Circuit Courts:	Yes	9	No	9
County Courts:	Yes	32	No	16
Total:	Yes	41	No	25

If so, what would you like included therein? Total replies 31

Almost all the circuit court judges do not want any change in the law concerning guardians *ad litem*. However, many county court judges request (1) a guide which may be used to determine fees, (2) more clarification of discretion areas, and (3) a statutory proclamation of the duties, responsibilities, authority and liability of the guardian *ad litem*.

21. In this, the final question, the judges were asked for suggestions for changing or improving the existing system.
Total replies 18

Several judges simply stated that the present system needed reform but a far greater number of judges claimed that they experienced no problem under the present system. Various suggestions as stated by the judges were: (1) a statute establishing specific fees for the guardian *ad litem* when public funds are involved, (2) a court rule to standardize procedure throughout the state, (3) repeal of section 269.80, and (4) an increase of the amount stated in sections 269.80(3) and 319.04 to $2,500 or more.