

SUPERINTENDENCE RULE 48: STANDARDIZING THE GUARDIAN AD LITEM SYSTEM IN OHIO COURTS

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I. INTRODUCTION

Many individuals who are unfamiliar with the juvenile court system have probably never heard the term “guardian ad litem” or understand their role in general. In reality, guardians ad litem are essential to the protection of abused and dependent children because they ensure their “best interests” are represented in courts throughout the country.¹ The ideal guardian ad litem is “an advisor and an advocate whose judgment is unclouded by conflicting interests.”²

A time existed when children lacked the sufficient representation to voice their troubles in a courtroom setting.³ The case of little Mary Ellen Wilson reveals the problems present in a society where no one adequately represents children’s interests.⁴ Mary Ellen’s circumstances gave rise to public concern for abused and neglected children.⁵ Mary Ellen’s mother and father died when she was young, and Mr. Thomas and Mrs. Mary McCormack eventually received custody of her because Thomas McCormack claimed to be her biological father.⁶ However, Thomas died

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¹ See DAVID KATNER ET AL., NATIONAL ASSOCIATION OF COUNSEL FOR CHILDREN, NACC RECOMMENDATIONS FOR REPRESENTATION OF CHILDREN IN ABUSE AND NEGLECT CASES 10 (2001), available at http://www.naccchildlaw.org/resource/resmgr/docs/nacc_standards_and_recommend.pdf.

² Barbara Glesner Fines, *Pressures Toward Mediocrity in the Representation of Children*, 37 CAP. U. L. REV. 411, 411 (2008).

³ See, e.g., *Mary Ellen Wilson: How One Girl’s Plight Started the Child-Protection Movement*, AM. HUMANE ASS’N, <http://www.americanhumane.org/about-us/who-we-are/history/mary-ellen.html> (last visited Dec. 20, 2010).

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

shortly thereafter, and Mary McCormack then married Francis Connolly. Instead of caring for her, they beat her, refused to allow her outside, and gave her inadequate food and clothing.⁷

Etta Wheeler, a Methodist mission worker, visited the tenants in Mary Ellen's apartment building.⁸ Some neighbors informed Mrs. Wheeler that they often heard a child crying.⁹ She eventually investigated and found a child who appeared "dirty and thin, was dressed in threadbare clothing, and had bruises and scars along her bare arms and legs."¹⁰

Mrs. Wheeler made multiple attempts to have Mary Ellen removed from the apartment, but authorities refused to intervene.¹¹ Eventually, she persuaded Henry Bergh, the founder and president of the Society for the Prevention of Cruelty to Animals, to present Mary Ellen's case to the judge.¹² He ultimately persuaded a judge to hear the case, and multiple neighbors agreed to testify.¹³ Eventually, the court removed Mary Ellen from the Connolly's household, and public outcry over the situation arose.¹⁴ Ultimately, the *New York Times* published multiple stories on Mary Ellen, and these stories led to the creation of organizations and agencies that advocated for enforcement of rules to protect abused and neglected children.¹⁵

Even though statutes and associations across the country now provide for protection of children exposed to such atrocities, child abuse and neglect persist to this day.¹⁶ A poem, *His Name Is Today*, eloquently describes the importance of adequate representation for the needs of children:

We are guilty of many errors and many faults,
But our worst crime is abandoning the children,
Neglecting the fountain of life.
Many of the things we need can wait,

⁷ *See id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *See id.*

¹⁵ *Id.*

¹⁶ *See, e.g., Child Maltreatment*, NAT'L ASS'N OF COUNSEL FOR CHILDREN, <http://www.naccchildlaw.org/?page=ChildMaltreatment> (last visited Dec. 20, 2010).

The child cannot wait.
Right now is the time bones are being formed,
His blood is being made,
And his senses are being developed.
To him we cannot answer 'tomorrow.'
His name is Today.¹⁷

This poem clearly articulates the important role guardians ad litem serve in the juvenile court system. These individuals ensure that courts take notice of the specific conditions that neglected and abused children endure. A guardian ad litem aids in ensuring that cases like that of Little Mary Ellen will cease to exist.

The problem in Ohio, however, is the lack of proper statutory guidance for guardians ad litem.¹⁸ The case of *In re Christopher*¹⁹ exhibits why the use of a guardian ad litem could still prevent a child from having his best interests represented in court. The Morrow County Welfare Department placed Shawn Christopher with prospective adoptive parents.²⁰ Shawn's mother lost custody because she displayed little interest in him following his birth.²¹ His mother eventually moved to have the temporary custody by the welfare department terminated, and the Morrow County Court granted her motion without naming a guardian ad litem to represent Shawn's interests.²²

On appeal, the Ohio Fifth District Court of Appeals vacated the judgment and remanded the case for a new proceeding²³ because the interests of Shawn and his mother conflicted.²⁴ His mother's interest was to obtain custody of Shawn, despite the prior neglect.²⁵ Because of the prior neglect, reunification with his mother was not in Shawn's best

¹⁷ CENTRE FOR HEALTH EDUCATION, TRAINING AND NUTRITION AWARENESS (CHETNA), HIS NAME IS TODAY (BOOKLET 4), http://www.bernardvanleer.org/files/chetna/Child_rights_booklet-4.pdf (last visited Mar. 29, 2011).

¹⁸ See OHIO TASK FORCE ON FAMILY LAW AND CHILDREN, FAMILY LAW REFORM: MINIMIZING CONFLICT, MAXIMIZING FAMILIES 20 (2001), available at http://www.supremecourt.ohio.gov/JCS/taskforce/report_final.pdf.

¹⁹ 376 N.E.2d 603 (Ohio Ct. App. 1977).

²⁰ *Id.* at 605.

²¹ *Id.* at 607.

²² *Id.* at 605–06.

²³ *Id.* at 609.

²⁴ *Id.* at 607.

²⁵ *Id.* at 605.

interests.²⁶ For this reason, the appellate court concluded that the trial court should have appointed a guardian ad litem to represent Shawn's interests.²⁷ Its failure to do so required a remand for a new proceeding.²⁸ Even though a rule detailing the appointment of a guardian ad litem was in effect during that custody proceeding,²⁹ the trial court failed to appoint one.³⁰

This case also exhibited another recurring problem faced by Ohio courts in the absence of a statewide standard.³¹ The trial court ultimately appointed a guardian ad litem, but the appointment was made subsequent to the mother's termination hearing.³² The person named guardian ad litem was Michael Boller,³³ who conceded to the appellate court that he had ties with Shawn's adoptive parents.³⁴

For that reason, the appellate court concluded that Mr. Boller should no longer serve as Shawn's guardian ad litem.³⁵ It reasoned that the guardian ad litem "should be a person or persons who can serve uninhibited by any ties or loyalties with either the mother of Shawn Christopher or the proposed adoptive parents of Shawn Christopher."³⁶ Thus, a guardian ad litem should be a disinterested individual who is capable of representing the child's best interests to the court.

The guardian ad litem is important to the judicial system specifically because these individuals ensure that courts hear the interests of abused and neglected children. If proper standards for governing guardians ad litem are nonexistent, the interests of these children may be significantly affected. Thus, an unambiguous statewide standard is essential.

This article argues that the enactment of Ohio Superintendence Rule 48 provides a statewide standard in which Ohio courts can now regulate

²⁶ *Id.* at 607.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *See, e.g.*, OHIO R. JUV. P. 4(B) (detailing when the court should appoint a guardian ad litem to protect a child's best interest in a juvenile court proceeding).

³⁰ *In re Christopher*, 376 N.E.2d at 606.

³¹ *See, e.g., In re A.G.B.*, 878 N.E.2d 49, 52, 54 (Ohio Ct. App. 2007) (finding the trial court failed to appoint a guardian ad litem as required by Ohio's Juvenile Rules of Procedure).

³² *In re Christopher*, 376 N.E.2d at 606-07.

³³ *Id.* at 606.

³⁴ *Id.* at 607.

³⁵ *Id.*

³⁶ *Id.*

guardians ad litem to ensure that they represent the best interests of children. Part II first provides an overview of the guardian ad litem system in Ohio prior to Rule 48. It focuses on various cases and local court rules that articulated standards of compliance for guardians ad litem.

The article then explores Ohio Superintendence Rule 48 in-depth. Part III familiarizes readers with Rule 48 by focusing on its major components. Next, Part IV analyzes Rule 48 by comparing it to various local court rules as well as standards articulated in case law. This section shows the effectiveness of Rule 48 and the changes it will bring to courts throughout the state of Ohio.

Finally, Part V concludes that Rule 48 will enhance the effectiveness and usefulness of guardians ad litem in the state of Ohio. However, this article also suggests that further additions are necessary to maximize the Rule's effectiveness for years to come.

II. BACKGROUND

A. *Role of Guardians Ad Litem in Ohio Courts*

The Guardian ad Litem (GAL) Standards Task Force defined a guardian ad litem in the following manner:

A guardian ad litem is appointed by the court to assist the court in its determination of a child's best interest. To further this goal, the guardian ad litem meets with and establishes a relationship with the child, contacts those persons significantly affecting or having relevant knowledge of the child's life, gathers information, examines records and otherwise investigates the child's situation in order to provide the court with pertinent information and an informed recommendation as to the child's best interest.³⁷

A guardian ad litem serves an important role for juveniles by assuring that their rights are protected adequately.³⁸ Thus, a guardian ad litem must take all efforts to protect the child's best interests in juvenile and domestic

³⁷ HONORABLE DAVID A. ELLWOOD, SUPREME COURT OF OHIO, REPORT OF THE GUARDIAN AD LITEM STANDARDS TASK FORCE 2 (2002), *available at* <http://www.sconet.state.oh.us/publications/GAL/finalreport.pdf>.

³⁸ SUMMIT CNTY. JUV. CT. R. 9.01(B) (2008) (preempted 2009), *available at* <http://www.co.summit.oh.us/JuvenileCourt/JuviPDFs/Juvenile%20Court%20Local%20Rules.pdf>; *see also In re Height*, 353 N.E.2d 887, 890 (Ohio Ct. App. 1975).

relations cases.³⁹ In ensuring those interests are protected adequately, a guardian ad litem is considered an officer of the court.⁴⁰ Thus, the role differs from a “general guardian who has the general care and control of the person.”⁴¹

In addition, attorneys may serve as guardians ad litem, but attorneys’ duties to their clients differ from guardians ad litem’s duties to their ward.⁴² The Ohio Supreme Court distinguished the two roles by noting that attorneys actively represent their client within the bounds of the law.⁴³ In contrast, guardians ad litem simply investigate the ward’s situation so that they can “ask the court to do what the guardian feels is in the ward’s best interest.”⁴⁴ Thus, in the event that attorneys serve in a dual capacity, their duties may conflict with respect to the individual being represented.⁴⁵

Various Ohio statutes provide when the appointment of a guardian ad litem in a particular case is necessary.⁴⁶ In general, a guardian ad litem is appointed in cases where the court determines the child is neglected, abused, or considered a dependent.⁴⁷ Furthermore, a court may also appoint a guardian ad litem in a custody dispute so that the child’s wishes are adequately represented.⁴⁸ The length of time an individual serves as a guardian ad litem depends on the circumstances of each case.⁴⁹ The guardian ad litem may only serve in that role for a few months or could serve in a case “for a period of years until the child reaches the age of majority.”⁵⁰

³⁹ *Lovejoy v. Cuyahoga Cnty. Dep’t of Human Servs.*, 602 N.E.2d 405, 407 (Ohio Ct. App. 1991) (citing *Penn v. McMonagle*, 573 N.E.2d 1234, 1237 (Ohio Ct. App. 1990)).

⁴⁰ *Id.*

⁴¹ *In re Etter*, 731 N.E.2d 694, 698 (Ohio Ct. App. 1998).

⁴² *In re Baby Girl Baxter*, 479 N.E.2d 257, 260 (Ohio 1985).

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *See, e.g.*, OHIO REV. CODE ANN. § 2151.281 (West Supp. 2009) (describing when the court shall appoint a guardian ad litem in a case where the child is adjudged to be delinquent or unruly); OHIO R. JUV. P. 4(B) (detailing when appointment of a guardian ad litem is necessary in a juvenile court proceeding).

⁴⁷ Karen Ross Quinlan, *Law You Can Use: A Guardian Ad Litem Protects Children’s Interests*, OHIO BAR ASS’N (May 20, 2008), <http://www.ohiobar.org/Pages/LawYouCanUseDetail.aspx?itemID=234>.

⁴⁸ *Id.*

⁴⁹ *See id.*

⁵⁰ *Id.*

Although the function of guardians ad litem is simply to protect the best interests of the child,⁵¹ their role in Ohio courts is much more complex.⁵² That role changes with the diverse circumstances of each case as well as “the expectations of the parties, their attorneys, the judge and others.”⁵³ However, the duty to protect the best interests of the child is the most comprehensive role of a guardian ad litem in Ohio courts.⁵⁴

In addition, the guardian ad litem has the statutory authority to perform any functions necessary to protect the child’s best interests.⁵⁵ These functions can include investigating the situation, monitoring any court proceedings, and monitoring the agency that has temporary custody of the child.⁵⁶ The guardian ad litem is also required to “file any motions and other court papers that are in the best interests of the child.”⁵⁷

The guardian ad litem, after performing the investigation and interviewing relevant individuals, then provides a recommendation to the court.⁵⁸ This recommendation articulates the best interests of the child so the court can make a decision in the case.⁵⁹

B. Problems in the Absence of a Statewide Guardian Ad Litem Standard

Although the Ohio legislature has enacted various statutes governing the appointment of a guardian ad litem, no statewide standard previously existed to govern their appointment, responsibilities, and training.⁶⁰ Some courts throughout the state of Ohio adopted local rules clarifying their standard, but these rules were far from uniform.⁶¹ The absence of a uniform, statewide standard was problematic because nearly “16,601 complaints were filed in Ohio courts in 2000 alleging a child to be

⁵¹ See OHIO REV. CODE ANN. § 2151.281(A).

⁵² See Charles T. Cromley, Jr., Comment, “[A]s Guardian Ad Litem I’m in a Rather Difficult Position,” 24 OHIO N.U. L. REV. 567, 576 (1998).

⁵³ *Id.*

⁵⁴ See *id.*; see also OHIO REV. CODE ANN. § 2151.281(A).

⁵⁵ See OHIO REV. CODE ANN. § 2151.281(I).

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Sabrina J. v. Robbin C.*, No. L-00-1374, 2002 WL 1303148, at *3 (Ohio Ct. App. May 31, 2002).

⁵⁹ *Id.*

⁶⁰ *Ohio Guardian Ad Litem Education Program*, SUP. CT. OF OHIO, <http://www.supremecourt.ohio.gov/GAL/default.asp> (last visited Dec. 21, 2010).

⁶¹ See ELLWOOD, *supra* note 37, at 1.

dependent, neglected, and/or abused.”⁶² In most of these cases, the court appointed a guardian ad litem to represent a child who most often never appeared in court.⁶³ The Ohio Association of Magistrates (OAM)⁶⁴ agreed that the lack of a statewide standard governing guardians ad litem was problematic.⁶⁵ OAM primarily focused on the fact that county common pleas courts throughout Ohio used different criteria to determine which individuals could properly serve as a guardian ad litem.⁶⁶

An examination of a few local rules in Ohio prior to enactment of Ohio Superintendence Rule 48 shows the variations in guardian ad litem standards. Cuyahoga County required a licensed attorney in Ohio who had completed court-sponsored training.⁶⁷ Similarly, in Knox County, the local courts required a licensed attorney in Ohio who maintained professional liability insurance.⁶⁸ However, Knox County required no specific guardian ad litem training.⁶⁹ Summit County provided in-depth requirements for the roles and responsibilities of guardians ad litem but maintained no qualifications regarding who could properly serve as a guardian ad litem in local courts.⁷⁰ Ottawa County, unlike the other jurisdictions previously

⁶² *Id.*

⁶³ *Id.*

⁶⁴ Six individuals created OAM in 1989, and its purpose is to discuss and review Ohio Civil Rule 53. J. Michael Bernstein & Chuck Lawrie, *A Brief History of the Ohio Association of Magistrates*, OHIO ASS'N OF MAGISTRATES, <http://www.ohiomagistrates.org/history.html> (last visited Dec. 20, 2010). This rule grants much of the authority for Ohio Magistrates. The organization continues to monitor Rule 53 and similar rules. *Id.* OAM has become an integral part of the Ohio judicial system by establishing proper standards for magistrates throughout the state. *Id.*

⁶⁵ See Letter from Mark A. Huberman, OAM President, to Doug Stephens, Dir. of Judicial & Court Servs., Ohio Supreme Court 1 (July 2, 2004), available at <http://www.ohio-magistrates.org/comments/Comment%20on%20GAL%20Task%20Force%20Report.pdf>.

⁶⁶ *Id.*

⁶⁷ CUYAHOGA CNTY. JUV. CT. R. 17(B)(1) (2007) (preempted 2009), available at http://juvenile.cuyahogacounty.us/pdf_rules/Counsel.pdf.

⁶⁸ KNOX CNTY. JUV. CT. R. 9.02 (2007) (preempted 2009), available at <http://www.co.knox.oh.us/offices/pj/ropj.pdf>.

⁶⁹ See *id.*

⁷⁰ SUMMIT CNTY. JUV. CT. R. 9.01(B) (2008) (preempted 2009), available at <http://www.co.summit.oh.us/JuvenileCourt/JuviPDFs/Juvenile%20Court%20Local%20Rules.pdf> (stating that the guardian ad litem role is “to represent the best interest of the child” and that the guardian ad litem “must be given notice of all hearings and must be forwarded copies of any and all filings,” yet failing to provide qualifications for serving as a guardian ad litem).

mentioned, allowed for attorneys and non-attorneys to serve as guardians ad litem.⁷¹ Persons appointed as a Court Appointed Special Advocate (CASA) guardian ad litem could serve in the common pleas court so long as the individuals met certain training requirements.⁷²

These local courts also differed on the appropriate time guidelines for guardians ad litem to submit their reports to the court. Ottawa County and Knox County required the filing of the written report not less than seven days prior to the hearing.⁷³ Summit County, on the other hand, provided detailed instructions on the inclusion of information in the report and required the submission of the report not less than three days prior to the hearing.⁷⁴ Thus, uniformity in the submission of guardian ad litem reports was also lacking among the Ohio counties analyzed. This brief analysis of four Ohio counties reveals the discrepancies the OAM and GAL Standards Task Force referred to when advocating for a statewide standard. The most obvious problem in the diverse local rules is that an individual could properly serve as a guardian ad litem in one county but lack sufficient qualifications in a neighboring county.⁷⁵ The necessity for a uniform statewide standard became apparent to the Ohio Supreme Court and other judicial officials throughout the state of Ohio.⁷⁶

C. Recommendations by Ohio Judicial Officials

In order to provide an adequate statewide standard, the GAL Standards Task Force and OAM provided corresponding recommendations to the

⁷¹ OTTAWA CNTY. JUV. CT. R. 21(B)(1), (D)(5) (2008) (preempted 2009), *available at* <http://www.ottawacountyjuvenilecourt.com/forms/juvcourtlocalrules.pdf>.

⁷² *Id.* at 21(E).

⁷³ *Id.* at 21(F)(1)(f); KNOX CNTY. JUV. CT. R. 9.03(C).

⁷⁴ SUMMIT CNTY. JUV. CT. R. 9.03(B)–(C).

⁷⁵ *Compare* CUYAHOGA CNTY. JUV. CT. R. 17(B)(1) (2007) (preempted 2009), *available at* http://juvenile.cuyahogacounty.us/pdf_rules/Counsel.pdf (requiring a GAL to be a licensed attorney in Ohio, have good standing with the Supreme Court, and complete court-sponsored GAL training), *and* KNOX CNTY. JUV. CT. R. 9.02 (requiring a GAL to be a licensed attorney in Ohio, have good standing with the Supreme Court, and maintain liability insurance), *with* OTTAWA CNTY. JUV. CT. R. 21(E) (listing specific training requirements to be GAL), *and* SUMMIT CNTY. JUV. CT. R. 9.01(B) (listing no specific requirements to be a GAL).

⁷⁶ *See, e.g.*, ELLWOOD, *supra* note 37, at 1 (GAL Standards Task Force's recommendations on appropriate standards); Letter from Mark A. Huberman to Doug Stephens, *supra* note 65, at 1 (OAM's response to the Task Force's recommendations).

Ohio Supreme Court.⁷⁷ This section explores some of the specific recommendations of the GAL Standards Task Force and then addresses the general recommendations of OAM.

The GAL Standards Task Force made the following general recommendations:

The Task Force recommends that guardian ad litem duties and responsibilities be defined, that the courts establish an application and review process for individuals seeking appointment as a guardian ad litem to ensure that appointees are competent to perform guardian ad litem duties, that training for guardians ad litem be provided, and that adequate sources of funding be established for payment of guardians ad litem.⁷⁸

The GAL Standards Task Force provided additional specific recommendations. With regard to guardian ad litem services and duties, it provided eleven core duties to be performed by the guardian ad litem.⁷⁹ If the guardians ad litem do not perform any of these duties, they should articulate why the “investigation was not necessary, practicable, or safe.”⁸⁰ The Task Force also recognized that laypersons may serve as a guardian ad

⁷⁷ See generally ELLWOOD, *supra* note 37; Letter from Mark A. Huberman to Doug Stephens, *supra* note 65, at 2.

⁷⁸ ELLWOOD, *supra* note 37, at 2.

⁷⁹ See *id.* at 2–3. The Task Force split the eleven core duties into two categories: in-court duties and out-of-court duties. Out-of-court duties include:

- (a) Interview the child and observe the child with each parent, foster parent, guardian or physical custodian . . .
- (b) Review pleadings and other relevant court documents;
- (c) Review criminal, civil, educational and administrative records pertaining to the child;
- (d) Conduct home visits;
- (e) Suggest the possible necessity for psychological evaluations, mental health and/or substance abuse assessments, or other intervention;
- (f) Contact school personnel, medical and mental health providers, child protective services workers and relevant court personnel;
- (g) Explore the wishes of the child; and
- (h) Perform any other investigation necessary to make an informed recommendation regarding the best interests of the child.

Id. at 2. In-court duties include: “(a) Actively participate in all court proceedings; (b) Monitor court orders to ensure compliance; and (c) File motions, and other pleadings as appropriate under the applicable rules of procedure.” *Id.*

⁸⁰ *Id.* at 3.

litem, but instances will arise when the guardian ad litem may need to file motions or pleadings for the child.⁸¹ The Task Force recommended that such laypersons receive independent counsel in instances where filings are necessary.⁸²

As stated in *In re Baby Girl Baxter*,⁸³ an attorney may serve as appointed counsel and guardian ad litem for a child in a particular case, but the duties of each position may conflict.⁸⁴ The Task Force recognized this issue noting that attorneys serving in a dual capacity should attempt to recognize any conflicts of interest and seek appropriate aid of the court.⁸⁵

Next, the Task Force recommended minimum training requirements.⁸⁶ It advocated for a minimum of six hours of training as a prerequisite for consideration as a guardian ad litem followed by three hours of training each year after the appointment.⁸⁷

Finally, the Task Force recommended a specific standard for requiring information in guardian ad litem reports and the filing of such reports with respect to two types of proceedings: “(1) hearings to terminate parental rights; and (2) abuse, neglect, and dependency hearings.”⁸⁸ In general, it articulated that the reports include no “substantive information” with regard to current allegations.⁸⁹ The Task Force also noted that guardian ad litem reports in a proceeding involving the termination of parental rights should focus specifically on the “steps the guardian ad litem took to satisfy the applicable statutory duties.”⁹⁰

These recommendations demonstrate that the Task Force focused on minimum requirements and training to serve as a guardian ad litem, and on the content and proper filing of reports. The previous analysis of a few Ohio county local rules revealed these areas as the most problematic and diverse.⁹¹ Thus, the Task Force addressed the primary problems of the guardian ad litem standards in the absence of a statewide system.

⁸¹ *See id.* at 4.

⁸² *Id.*

⁸³ 479 N.E.2d 257 (Ohio 1985).

⁸⁴ *Id.* at 260.

⁸⁵ ELLWOOD, *supra* note 37, at 4.

⁸⁶ *Id.* at 5–6.

⁸⁷ *Id.* at 5.

⁸⁸ *Id.* at 7.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *See* discussion *supra* Part II.B.

Next, OAM responded to the Task Force's Report and made specific recommendations to the Ohio Supreme Court.⁹² OAM agreed that proper training was important in creating a statewide standard, but it also noted the financial problems experienced by many counties.⁹³ OAM suggested that the state provide the proper resources for the mandatory training but that community-based trainers would better instruct future guardians ad litem.⁹⁴ Another important issue was the use of guardian ad litem reports in juvenile proceedings.⁹⁵ As previously stated, the Task Force recommended that reports contain no substantive information regarding the allegations in the case due to "evidentiary and constitutional considerations."⁹⁶ OAM disagreed and stated that a guardian ad litem should provide a copy of the report to each party and should also be "subject to examination" at the hearing.⁹⁷ After the hearing, the court could then give the report the proper weight of evidence.⁹⁸ OAM generally agreed with all other recommendations made by the Task Force.⁹⁹

III. RECENT DEVELOPMENTS

A. *Ohio Superintendence Rule 48 In-Depth*

In response to the various recommendations, the Ohio Supreme Court adopted Ohio Superintendence Rule 48 on January 22, 2009, and the Rule became effective on March 1, 2009.¹⁰⁰ This Rule is important in the Ohio guardian ad litem system because it is the first statewide standard regarding "the appointment, responsibilities, training and reporting requirements of guardians ad litem."¹⁰¹ In general, the Rule is applicable in all domestic relations and juvenile cases where the court appoints a guardian ad litem.¹⁰² The Ohio Supreme Court divided Superintendence Rule 48 into the following categories: (1) appointment of guardian ad litem; (2) responsibilities of guardian ad litem; (3) training requirements;

⁹² See Letter from Mark A. Huberman to Doug Stephens, *supra* note 65, at 1–2.

⁹³ *Id.* at 1.

⁹⁴ *Id.*

⁹⁵ See *id.* at 1–2.

⁹⁶ ELLWOOD, *supra* note 37, at 7.

⁹⁷ Letter from Mark A. Huberman to Doug Stephens, *supra* note 65, at 2.

⁹⁸ *Id.*

⁹⁹ See *id.* at 1–2.

¹⁰⁰ *Ohio Guardian Ad Litem Education Program*, *supra* note 60.

¹⁰¹ *Id.*

¹⁰² OHIO SUP. R. 48(A) (specifying the applicability of Ohio Superintendence Rule 48).

(4) reports of guardians ad litem; and (5) responsibilities of the court.¹⁰³ This section of the article looks in-depth at the various subdivisions of Rule 48 in order to examine the specific requirements adopted by the Ohio Supreme Court.

1. Appointment of the Guardian Ad Litem

This section of Superintendence Rule 48 requires every court to issue an “Order of Appointment.”¹⁰⁴ The Order of Appointment is important because it declares whether the court appointed an individual solely as guardian ad litem or dually as guardian ad litem and attorney.¹⁰⁵ In general, an individual can serve in this dual capacity only when the court expressly orders.¹⁰⁶ In addition, no conflict between the child’s best interests and the child’s actual wishes can exist.¹⁰⁷ This distinction simply means that the individual appointed by the court will protect the best interests of the child while also advocating the child’s actual wishes.¹⁰⁸

Requiring specific appointment will allow attorneys serving in a dual capacity for the child to recognize any conflicts of interest that may arise between these two roles.¹⁰⁹ For example, if a guardian ad litem makes a recommendation to the court that is in conflict with the actual wishes of the child, the court must appoint independent counsel to represent the child.¹¹⁰ *In re Stacey S.*¹¹¹ provides a perfect example of this kind of conflict in practice. The trial court appointed a layperson to serve as guardian ad litem for six children involved in the action.¹¹² The guardian ad litem asserted that she was also serving as counsel for the children.¹¹³ The court stated that if the guardian ad litem was serving in a dual capacity, then the court would need to consider whether a conflict of interest existed.¹¹⁴

¹⁰³ *Id.* at 48(C)–(G).

¹⁰⁴ *Id.* at 48(C).

¹⁰⁵ *Id.* at 48(C)(1)(a).

¹⁰⁶ *Wilburn v. Wilburn*, 863 N.E.2d 204, 210 (Ohio Ct. App. 2006).

¹⁰⁷ *Id.*

¹⁰⁸ *See In re J.W. Jr.*, 870 N.E.2d 245, 250 (Ohio Ct. App. 2007).

¹⁰⁹ *See In re Baby Girl Baxter*, 479 N.E.2d 257, 260 (Ohio 1985) (dealing with the problems that arise when an attorney is not sure how to represent simultaneously a child’s best interests while advocating for the child’s wishes).

¹¹⁰ *In re Williams*, 805 N.E.2d 1110, 1114 (Ohio 2004).

¹¹¹ 737 N.E.2d 92 (Ohio Ct. App. 1999).

¹¹² *Id.* at 101.

¹¹³ *Id.*

¹¹⁴ *Id.*

Ultimately, the appellate court determined that the children were entitled to counsel.¹¹⁵ The guardian ad litem recommended permanent removal of the children from their parents.¹¹⁶ However, the record from the hearing revealed “that the children loved their parents and wished to return to them.”¹¹⁷ These facts demonstrate a conflict between the guardian ad litem’s recommendation and the children’s wishes. Thus, serving in a dual capacity was improper in that case.¹¹⁸

In addition, the order must also contain a statement that the appointment will continue until specified by the court and a statement that the guardian ad litem will receive notice of all hearings and proceedings and copies of all pleadings, motions, and other documents pertaining to the child.¹¹⁹ Rule 48 also mandates that the court reappoint the same individual to serve as guardian ad litem for a specific child in future cases so long as doing so is practicable.¹²⁰

2. Responsibilities of the Guardian Ad Litem

The Ohio Supreme Court also recognized that a guardian ad litem should perform certain duties to represent adequately a child’s best interests.¹²¹ First, a guardian ad litem must advocate for the best interests of a child even though the child may view the situation otherwise.¹²² When granting permanent custody, Ohio has expressly provided various factors that courts must consider to determine the child’s best interests.¹²³ Although this standard is applicable in the context of permanent custody, it proves helpful in determining a child’s best interests in general. Ohio Revised Code § 2151.41.4(D) provides the following factors:

- (a) The interaction and interrelationship of the child with the child’s parents, siblings, relatives, foster caregivers and out-of-home providers, and any other person who may significantly affect the child;

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ OHIO SUP. R. 48(C)(1)(b)–(c).

¹²⁰ *Id.* at 48(C)(2).

¹²¹ *See id.* at 48(D).

¹²² *Id.* at 48 (D)(1).

¹²³ OHIO REV. CODE ANN. § 2151.41.4(D) (West Supp. 2010).

(b) The wishes of the child, as expressed directly by the child or through the child's guardian ad litem, with due regard for the maturity of the child;

(c) The custodial history of the child, including whether the child has been in the temporary custody of one or more public children services agencies or private child placing agencies for twelve or more months of a consecutive twenty-two-month period or the child has been in the temporary custody of one or more public children services agencies or private child placing agencies for twelve or more months of a consecutive twenty-two-month period and, as described in division (D)(1) of section 2151.413 [2151.41.3] of the Revised Code, the child was previously in the temporary custody of an equivalent agency in another state;

(d) The child's need for a legally secure permanent placement and whether that type of placement can be achieved without a grant of permanent custody to the agency¹²⁴

Serving the best interests of a child was the primary role for a guardian ad litem prior to the enactment of Rule 48.¹²⁵ The Rule maintains its importance by identifying the best interests standard as one of the primary responsibilities of a guardian ad litem in representing children.¹²⁶

Guardians ad litem must also act fairly and objectively in each case because they are an officer of the court; additionally, these individuals must have no communications with the court in relation to the merits of the case.¹²⁷ Clearly, the Ohio Supreme Court realized that problems might arise when attorneys appointed as guardians ad litem involve themselves with the primary outcome of a particular case.¹²⁸ As stated previously, a guardian ad litem is not advocating for the child, but rather, is investigating the child's situation and informing the court of the child's best interests.¹²⁹

¹²⁴ *Id.*

¹²⁵ *See In re Height*, 353 N.E.2d 887, 890 (Ohio Ct. App. 1975); *see also Lovejoy v. Cuyahoga Cnty. Dep't of Human Servs.*, 602 N.E.2d 405, 407 (Ohio Ct. App. 1991).

¹²⁶ *See* OHIO SUP. R. 48(D)(1).

¹²⁷ *Id.* at 48(D)(2)–(3).

¹²⁸ *See id.* at 48(D)(7)–(10).

¹²⁹ *See, e.g., In re Baby Girl Baxter*, 479 N.E.2d 257, 260 (Ohio 1985).

Rule 48 also addresses the possible problems of a non-attorney serving as a guardian ad litem. Non-attorneys must not engage in conduct that would lead to the “unauthorized practice of law,” and if needed, must request independent counsel to file appropriate pleadings and motions in the particular case.¹³⁰

Next, guardians ad litem should properly determine if a conflict of interest exists and notify the court as soon as practicable.¹³¹ These conflicts of interest could arise from employment, business, professional, or personal contacts, and the guardian ad litem has a continuing obligation throughout the course of the proceeding to notify the court of any conflicts.¹³²

Additionally, guardians ad litem must file a compliance statement with the court identifying that they have received proper training, and the statement must include “the date, location, contents and credit hours received for any relevant training course.”¹³³

Finally, the guardian ad litem must act efficiently to represent adequately the child’s best interests.¹³⁴ Rule 48 provides certain criteria to ensure that this standard is met. First, Rule 48 requires that the guardian ad litem meet and interview the child and the child’s legal guardian.¹³⁵ Next, they must make home visits with the child and determine the child’s wishes.¹³⁶ Certain individuals may have essential knowledge of the case, and the guardian ad litem must meet and interview these persons.¹³⁷

¹³⁰ OHIO SUP. R. 48(D)(5).

¹³¹ *Id.* at 48(D)(8).

¹³² *Id.* at 48(D)(9)–(10).

¹³³ *Id.* at 48(D)(12). Ohio CASA Association offers a training course that satisfies the pre-requisite service-training requirement of Rule 48. *Frequently Asked Questions: Training FAQ*, OHIO CASA, http://www.ohiocasa.org/index.cfm?fuseaction=page&page_id=5030 (last visited Dec. 22, 2010). One class offered in 2009 was titled “Effective Communication: Message Spoken Message Heard.” OHIO CASA, EFFECTIVE COMMUNICATION: MESSAGE SPOKEN MESSAGE HEARD: AGENDA & REGISTRATION FORM (2009), available at http://www.geaugacasa.org/images/OHIO_CASA_2009_Regional_Training.pdf. The class generally focused on the importance of listening to the child’s message, helping a child advocate, “identif[ing] stress responses, learn[ing] techniques to create rapport, practice[ing] communication styles and gain[ing] a better understanding of specific interview techniques.” *Id.*

¹³⁴ OHIO SUP. R. 48(D)(16).

¹³⁵ *Id.* at 48(D)(13)(a).

¹³⁶ *Id.* at 48(D)(13)(b)–(c).

¹³⁷ *Id.* at 48(D)(13)(d).

In addition, the guardian ad litem must review any court documents pertaining to the case as well as any other criminal, civil, or administrative records pertaining to the child or the child's family.¹³⁸ The guardian ad litem must also interview any relevant school, medical, children's services, or court personnel whose knowledge is helpful for the court.¹³⁹ Finally, a psychological evaluation or substance abuse assessment may be necessary, and the guardians ad litem must recommend such evaluations and perform any other investigation necessary to properly familiarize themselves with the facts.¹⁴⁰ Thus, Rule 48 provides an established standard of duties and responsibilities necessary to allow the proper representation of the child's best interests in each case.¹⁴¹

3. Training Requirements

In response to the recommendations of the Task Force and OAM, Rule 48 requires completion of a pre-service training course and continual training each successive year.¹⁴² With regard to the pre-service training course, the Ohio Supreme Court requires a course approved by the Supreme Court of Ohio, Ohio CASA/GAL training program, or a court-appointed training course that is at least six hours long.¹⁴³ It further provided three specific courses that will automatically satisfy this requirement. First, the Ohio Network of Children's Advocacy Centers (ONCAC) offers a six-hour course called *Ohio Guardian ad Litem Training Program*.¹⁴⁴ Second, the Supreme Court of Ohio Judicial College offers its own six-hour course entitled *Ohio Guardian ad Litem Education Program Pre-Service Course*.¹⁴⁵ Finally, the Ohio CASA/GAL Association offers a thirty to forty hour pre-service training.¹⁴⁶

Individuals "must attend the full training to receive the stated hours of credit."¹⁴⁷ There is no exception in Rule 48 that allows a person who substantially completed the course to obtain the necessary credits for the

¹³⁸ *Id.* at 48(D)(13)(e)–(f).

¹³⁹ *Id.* at 48(D)(13)(g).

¹⁴⁰ *Id.* at 48(D)(13)(h)–(i).

¹⁴¹ *See id.* at 48(D)(13).

¹⁴² *Id.* at 48(E)(1).

¹⁴³ *Id.* at 48(E)(2).

¹⁴⁴ *Ohio Guardian Ad Litem Rule Frequently Asked Questions*, SUP. CT. OF OHIO, <http://www.supremecourt.ohio.gov/GAL/FAQ.asp> (last visited Dec. 22, 2010).

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

pre-service course.¹⁴⁸ The Supreme Court of Ohio Judicial College course is appealing to applicants for two reasons: the course is free to all preregistered applicants, and it satisfies CLE requirements for attorneys and CPE requirements for social workers and counselors.¹⁴⁹

Similarly, the continuing education training must be an approved course, and Rule 48 requires the course to be at least three hours long.¹⁵⁰ Each guardian ad litem must complete a three-hour continuing education course each calendar year following the year when the last course was taken.¹⁵¹ Rule 48 ensures that guardians ad litem representing children in Ohio courts stay current on the Rule and any additions or removals.¹⁵²

The Ohio Supreme Court took the Task Force's recommendations seriously in providing these rigid training requirements.¹⁵³ OAM also noted the importance of training future guardians ad litem so that they could properly represent a child.¹⁵⁴ Rule 48 further states that an individual who fails to complete the continuing training requirement may not serve as a guardian ad litem until complying with the statute.¹⁵⁵ If the time of noncompliance is less than three years, the individual need only complete a three-hour course.¹⁵⁶ However, if the time of noncompliance is longer than three years, the individual must once again complete a six-hour pre-service training course in order to serve as a guardian ad litem.¹⁵⁷

4. Reports of Guardians Ad Litem

Prior to enactment of Superintendence Rule 48, one commentator noted, "[S]ome court-appointed GALs put minimal effort into their investigations resulting in poor reports."¹⁵⁸ This is problematic because the guardian ad litem's recommendation to the court may, for example, result

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ OHIO SUP. R. 48(E)(4).

¹⁵¹ *Id.*

¹⁵² *See id.*

¹⁵³ *See* Letter from Mark A. Huberman to Doug Stephens, *supra* note 65, at 1.

¹⁵⁴ *Id.*

¹⁵⁵ OHIO SUP. R. 48(E)(6).

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ Shawn P. Hooks, *A Dramatic New Guardian Ad Litem Rule in Ohio*, OHIO FAMILY LAW BLOG (June 6, 2009), <http://www.hcmmlaw.com/blog/2009/06/06/a-dramatic-new-guardian-ad-litem-rule-in-ohio>.

in parents losing custody of their child.¹⁵⁹ The Ohio Supreme Court properly addressed this issue by requiring detailed reports under Rule 48.¹⁶⁰ In general, the report must provide all recommendations to the court and specify all actions taken by the guardians ad litem to properly perform their duties.¹⁶¹

More importantly, Rule 48 established deadlines detailing when guardians ad litem should file their reports with the court.¹⁶² In juvenile abuse, neglect, and dependency cases and actions to terminate parental rights, the guardian ad litem must file the final report at least seven days before the final dispositional hearing.¹⁶³ The same deadline applies in domestic relations cases.¹⁶⁴ If guardians ad litem in an abuse, neglect, or dependency cases choose to file an interim report, they must also file it at least seven days before the next hearing.¹⁶⁵ However, the Rule does not articulate what sanctions, if any, guardians ad litem face if they fail to submit the report within seven days of the hearing.¹⁶⁶

5. Responsibilities of the Court

The Ohio Supreme Court also found it necessary to place certain responsibilities on the court appointing the guardian ad litem.¹⁶⁷ The rationale for these responsibilities is to ensure that qualified individuals are serving as guardians ad litem and to ensure compliance with Rule 48 in general.¹⁶⁸

First, each court must create and maintain a list of guardians ad litem approved under the specific standards of Rule 48.¹⁶⁹ All common pleas courts must also establish criteria to properly distribute the workload among approved guardians ad litem and employ one individual to generally maintain all records pertaining to guardians ad litem.¹⁷⁰ In

¹⁵⁹ *Id.*

¹⁶⁰ OHIO SUP. R. 48(F).

¹⁶¹ *Id.*

¹⁶² *Id.* at 48(F)(1)(c), (F)(2).

¹⁶³ *Id.* at 48(F)(1)(c).

¹⁶⁴ *Id.* at 48(F)(2).

¹⁶⁵ *Id.* at 48(F)(1)(e)–(f).

¹⁶⁶ *See id.* (providing the time limit that the report should be filed within but not listing what will happen if the guardian fails to comply).

¹⁶⁷ OHIO SUP. R. 48(G).

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 48(G)(1).

¹⁷⁰ *Id.* at 48(G)(2)–(4).

addition, applicants must submit an application to the court detailing their qualifications and submit to a criminal and civil background check.¹⁷¹

Because compliance with the training requirements was an important aspect of Rule 48, each court must also review its files annually to ensure each guardian ad litem has complied with all Rule 48 requirements.¹⁷² Finally, the court must receive assurances from guardians ad litem that they still meet the qualifications and have attended the proper training over the last year.¹⁷³

In conclusion, Superintendence Rule 48 established a uniform standard in Ohio for governing guardians ad litem.¹⁷⁴ One commentator remarked, “I am pleased to see this statewide effort to mandate complete and thorough GAL investigations.”¹⁷⁵ He further stated, “Our justice system demands caring, compassionate and highly trained GALs who review all facts of the case before making any recommendation.”¹⁷⁶

IV. ANALYSIS

A. *Comparing Ohio Superintendence Rule 48 to the Recommendations of the GAL Standards Task Force*

The GAL Standards Task Force was formed to provide appropriate recommendations to the Ohio Supreme Court for creation of a statewide standard for governing guardians ad litem in Ohio.¹⁷⁷ Thus, its recommendations largely influenced the creation of Ohio Superintendence Rule 48 by the Ohio Supreme Court.¹⁷⁸ The first part of this analysis reviews the recommendations briefly and determines how, if at all, the Ohio Supreme Court incorporated the recommendations into Ohio Superintendence Rule 48.

The GAL Standards Task Force provided the following general recommendations to the Ohio Supreme Court: define the responsibilities and duties of a guardian ad litem; create an application and review process to ensure individuals can adequately serve as a guardian ad litem; create training programs to continually educate those individuals serving as a

¹⁷¹ *Id.* at 48(G)(5)–(6).

¹⁷² *Id.* at 48(G)(7).

¹⁷³ *Id.* at 48(G)(8).

¹⁷⁴ Hooks, *supra* note 158.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ ELLWOOD, *supra* note 37, at 1.

¹⁷⁸ *See id.*

guardian ad litem; and provide an adequate source of funding to ensure that guardians ad litem are properly compensated for their services.¹⁷⁹ Providing an adequate source of funding is not discussed in this analysis because the Task Force recommended an amendment to various sections of the Ohio Revised Code to establish special funds in order to compensate certain guardians ad litem.¹⁸⁰ The analysis now looks more closely at Rule 48 to determine whether Ohio effectively incorporated the other three recommendations into Rule 48's structure.

1. Duties and Responsibilities of Guardians Ad Litem

A major problem prior to the enactment of Superintendence Rule 48 was that the local rules in existence provided little direction and insight into the responsibilities of a guardian ad litem.¹⁸¹ As a result, the GAL Standards Task Force recommended that guardians ad litem perform eleven specific duties.¹⁸² In general, the Task Force stated that all individuals should serve in the best interest of the child performing the minimum duties unless "impracticable or inadvisable to do so."¹⁸³

It defined eight out-of-court duties that each guardian ad litem should perform.¹⁸⁴ These duties are particularly important because performance of them will familiarize the guardian ad litem with the child and the case in order to make a detailed recommendation to the court at the hearing. First, they should interview and observe the child with the parents, foster parents, guardian, or physical custodian.¹⁸⁵ In addition, the recommendation stated that one interview should take place with the child alone.¹⁸⁶ The second duty provides that each guardian ad litem should review the "pleadings and other relevant court documents."¹⁸⁷ Third, the guardian ad litem should review any administrative, educational, and criminal records with respect to the child.¹⁸⁸ Fourth, the guardian ad litem should conduct multiple home visits and fifth, should "[s]uggest the

¹⁷⁹ *Id.* at 2–12.

¹⁸⁰ *Id.* at 6–7.

¹⁸¹ *See, e.g.*, CUYAHOGA CNTY. JUV. CT. R. 17 (2007) (preempted 2009), available at http://juvenile.cuyahogacounty.us/pdf_rules/Counsel.pdf.

¹⁸² *See* ELLWOOD, *supra* note 37, at 2.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

possible necessity for psychological evaluations, mental health and/or substance abuse assessments, or other intervention.”¹⁸⁹ The sixth recommendation provides that the guardian ad litem should contact all child protective workers and court and school personnel.¹⁹⁰ The final two out-of-court duties recommended by the GAL Standards Task Force are to ascertain “the wishes of the child” and perform any other investigations in order to make an “informed recommendation” to the court.¹⁹¹

Upon careful review of Superintendence Rule 48, it is apparent that the Ohio Supreme Court considered these recommendations. The drafters of the Rule included each recommendation under the “Responsibilities of a guardian ad litem” often using the language of the GAL Standards Task Force nearly word for word.¹⁹² The Ohio Supreme Court understood the importance of ensuring that each guardian ad litem provide a well-considered recommendation to the court. At a minimum, the performance of these duties ensures that guardians ad litem have adequately familiarized themselves with the case.¹⁹³ In addition, Rule 48 allows guardians ad litem to go beyond these duties to understand the case further.¹⁹⁴

In addition to the eight out-of-court duties, the GAL Standards Task Force also recognized the importance of in-court duties. As a result, its final report provided three in-court duties for guardians ad litem to perform.¹⁹⁵ The first recommended duty was to “[a]ctively participate in all court proceedings.”¹⁹⁶ Second, the Task Force recommended that each guardian ad litem monitor compliance with all court orders.¹⁹⁷ The final recommended in-court duty was to file all motions, pleadings, and other papers necessary to the case.¹⁹⁸

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² OHIO SUP. R. 48(D). *See, e.g., id.* at 48(D)(13)(a) (“Meet with and interview the child and observe the child with each parent, foster parent, guardian or physical custodian and conduct at least one interview with the child where none of these individuals is present.”); *id.* at 48(D)(13)(f) (“Review criminal, civil, educational and administrative records pertaining to the child and, if appropriate, to the child’s family or to other parties in the case.”).

¹⁹³ *See id.* at 48(D)(13).

¹⁹⁴ *Id.* at 48(D)(13)(i).

¹⁹⁵ *See* ELLWOOD, *supra* note 37, at 2.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

With respect to these three recommendations, the Ohio Supreme Court only incorporated two into Superintendence Rule 48. Rule 48 contains no explicit requirement that the guardian ad litem monitor and ensure compliance with court orders.¹⁹⁹ Why would the Ohio Supreme Court not include this in the Rule? After all, a guardian ad litem is considered an officer of the court²⁰⁰ and will most likely be reappointed to subsequent cases involving the same child.²⁰¹ It seems appropriate for this individual to monitor and ensure compliance with court orders. This aspect is one minor flaw of Rule 48. An improved statewide standard should include this recommendation and allow the guardian ad litem to continue to serve as an officer of the court.

Superintendence Rule 48 did incorporate the recommendations of actively participating in the proceedings²⁰² and filing any motions or pleadings necessary to the case.²⁰³ However, the drafters wanted to ensure that non-attorneys would not engage in conduct that constituted an “unauthorized practice of the law.”²⁰⁴ Thus, only attorneys serving as guardians ad litem may properly file such pleadings and motions.²⁰⁵ This minor change seems necessary because it is important that non-attorneys serving as guardians ad litem stay within their proper restraints.²⁰⁶

This change raises an important issue dealing with the role of an attorney versus the role of a guardian ad litem. Superintendence Rule 48 states that if an attorney is serving in a dual capacity, “the attorney shall advocate for the child’s best interest and the child’s wishes in accord with the Rules of Professional Conduct.”²⁰⁷ If these roles conflict, the guardian ad litem should notify the court “at the earliest practical time” so that it may enter any “appropriate orders.”²⁰⁸ Although these two statements taken together reference the problem, the question of whether a conflict exists is left unanswered. When is there a conflict? If a conflict exists, should the attorney continue to serve as an attorney for the child or continue to serve as a guardian ad litem for the child? The conflict

¹⁹⁹ See OHIO SUP. R. 48(D).

²⁰⁰ *Id.* at 48(D)(3).

²⁰¹ *Id.* at 48(C)(2).

²⁰² *Id.* at 48(D)(4).

²⁰³ *Id.* at 48(D)(6).

²⁰⁴ *Id.* at 48(D)(5).

²⁰⁵ *Id.* at 48(D)(6).

²⁰⁶ See *id.* at 48(D).

²⁰⁷ *Id.* at 48(D)(7).

²⁰⁸ *Id.* at 48(D)(8).

between the role of an attorney and role of a guardian ad litem has plagued courts prior to the enactment of this Rule.²⁰⁹ The drafters' inability to create a better standard in this area is problematic.

In conclusion, Superintendence Rule 48 provides a strong starting point with regard to the duties and responsibilities of a guardian ad litem. In Ohio, guardians ad litem now have specific responsibilities, and courts have specific duties to enforce.²¹⁰ The drafters considered and incorporated nearly all of the GAL Standards Task Force's recommendations with respect to the duties and responsibilities of a guardian ad litem into Superintendence Rule 48.²¹¹ In fact, the drafters actually went beyond these recommendations to provide other duties.²¹²

The Rule is clearly better than the system in existence prior to its creation. Some counties had no rules with respect to guardians ad litem.²¹³ Even though some counties had adopted local rules, these rules were far from uniform.²¹⁴ However, Ohio should amend Rule 48 in the future to provide more direction for attorneys serving in a dual capacity. In addition, the Rule should include an explicit requirement that guardians ad litem monitor for compliance with court orders.

2. Application and Review Process for Guardians Ad Litem

Another key problem prior to the enactment of Superintendence Rule 48 was that courts kept few records pertaining to guardians ad litem.²¹⁵ There was little or no evidence of an individual's qualifications or training to serve in the role.²¹⁶ Even if an individual met the qualifications, there

²⁰⁹ See discussion *supra* Part II.A.

²¹⁰ See discussion *supra* Part III.A.

²¹¹ See discussion *supra* Part III.A.

²¹² See, e.g., OHIO SUP. R. 48(D)(2) ("A guardian ad litem shall maintain independence, objectivity and fairness as well as the appearance of fairness in dealings with parties and professionals, both in and out of the courtroom and shall have no ex parte communications with the court regarding the merits of the case."); *id.* at 48(D)(14) ("A guardian ad litem shall immediately identify himself or herself as a guardian ad litem when contacting individuals in the course of a particular case and shall inform these individuals about the guardian ad litem's role and that documents and information obtained may become part of court proceedings.").

²¹³ See *Ohio Guardian Ad Litem Education Program*, *supra* note 60.

²¹⁴ ELLWOOD, *supra* note 37, at 1.

²¹⁵ See *id.* at 12.

²¹⁶ See, e.g., SUMMIT CNTY. JUV. CT. R. 9.01(B) (2008) (preempted 2009), available at <http://www.co.summit.oh.us/JuvenileCourt/JuviPDFs/Juvenile%20Court%20Local%20Rul>

usually was no continuing requirement for additional training.²¹⁷ The failure to require such training and to record properly such information was problematic.²¹⁸

The GAL Standards Task Force also recognized the necessity of a proper application and review process for individuals seeking to become guardians ad litem. It strongly recommended placing the duty on courts to monitor the training and performance of guardians ad litem.²¹⁹ The Task Force first recommended that each court create and maintain a file for each individual applying to serve as a guardian ad litem in that court.²²⁰ In addition, the Task Force recommended that the court maintain a list of all approved guardians ad litem.²²¹ Under the recommendation, each court should review the list annually to evaluate properly the guardian ad litem's performance and to ensure that they have complied with the training requirements.²²² Finally, the Task Force recommended that guardians ad litem file a compliance report each year indicating that they have satisfied the training requirements.²²³ The Task Force also recommended that courts establish grievance procedures so that complaints about guardians ad litem could be collected and addressed by the court.²²⁴

The drafters of Ohio Superintendence Rule 48 once again incorporated these recommendations almost word for word into its structure.²²⁵ The Rule places the responsibility of monitoring the individuals serving as guardians ad litem on the courts.²²⁶ The Rule expressly requires

es.pdf; KNOX CNTY. JUV. CT. R. 9.02 (2007) (preempted 2009), *available at* <http://www.co.knox.oh.us/offices/pj/ropj.pdf>.

²¹⁷ See, e.g., CUYAHOGA CNTY. JUV. CT. R. 17(B)(1) (2007) (preempted 2009), *available at* http://juvenile.cuyahogacounty.us/pdf_rules/Counsel.pdf.

²¹⁸ See *In re Height*, 353 N.E.2d 887, 890 (Ohio Ct. App. 1975).

²¹⁹ See ELLWOOD, *supra* note 37, at 12 (recommending that the superintendence rules should aid the courts in monitoring guardians ad litem).

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.*

²²³ *Id.* (“The compliance statement shall include information detailing the date, location, contents and credit hours of any relevant training or education received by the guardian ad litem.”).

²²⁴ *Id.* at 12–13.

²²⁵ See OHIO SUP. R. 48(D)(12) (requiring applicants to submit a compliance statement to the court or designee detailing the training and education they have received); *see also id.* at 48(G) (detailing generally the court's duty to ensure that “only qualified individuals perform the duties of guardians ad litem”).

²²⁶ *See id.*

maintenance of a file for each approved guardian ad litem,²²⁷ maintenance of a list of all court-approved guardians ad litem,²²⁸ appointment of an individual to maintain the files and receive any comments or complaints,²²⁹ and an annual review of the list to determine compliance with the training and education requirements.²³⁰

Rule 48 is a great foundation for providing uniform monitoring of guardians ad litem throughout Ohio. However, there are aspects of the Rule that leave quite a bit of discretion to the individual courts. For example, each court should “[e]stablish criteria, which include all the requirements of this rule, for appointment and removal of guardians ad litem and procedures to ensure an equitable distribution of the work load among the guardians ad litem on the list.”²³¹ This requirement leaves the creation of the process open to each individual court.²³² Also, “[e]ach court shall develop a process or local rule and appoint a person for accepting and considering written comments and complaints regarding the performance of guardians ad litem practicing before that court.”²³³

These sections of the Rule provide an excellent beginning to monitoring guardians ad litem and allowing for a process of removal if the guardian ad litem has performed poorly. However, the drafters should have attempted to provide a clear process for removal and for receiving complaints. One major problem leading to the creation of this Rule was that no statewide standard existed to govern a guardian ad litem’s appointment, training, or responsibilities.²³⁴ The two aforementioned examples once again reinforce that problem. Although it is imperative that a process of removal exist, Rule 48 allows each court to create its own process.²³⁵ Thus, the process one court establishes may differ entirely from the process established in another court. Ultimately, this failure in uniformity leads right back to the initial problem. A future amendment to the Rule is essential to create one statewide standard governing the removal process for guardians ad litem in all eighty-eight counties.

²²⁷ *Id.* at 48(G)(4).

²²⁸ *Id.* at 48(G)(1).

²²⁹ *Id.* at 48(G)(3).

²³⁰ *Id.* at 48(G)(7).

²³¹ *Id.* at 48(G)(2).

²³² *See id.*

²³³ *Id.* at 48(G)(9).

²³⁴ *Ohio Guardian Ad Litem Education Program*, *supra* note 60; *see also* ELLWOOD, *supra* note 37, at 1.

²³⁵ OHIO SUP. R. 48(G)(2).

3. *Training and Education of Guardians Ad Litem*

Ensuring that a guardian ad litem adequately represents a child's best interests in court also requires adequate training. The GAL Standards Task Force recognized this priority noting, "Training is essential to ensure that guardians ad litem can perform required duties."²³⁶ While several counties offered training through CASA, this training recommended minimum standards, and the Task Force believed more training "should be encouraged and supported."²³⁷ As a result, the Task Force provided specific recommendations on its approach to enhance training requirements.²³⁸

First, it recommended that individuals complete at least six hours of training to be considered a guardian ad litem candidate.²³⁹ In addition, all guardians ad litem should continue to complete at least three hours of training each year to maintain their qualification.²⁴⁰ Second, it recommended that "[a] comprehensive statewide training program shall be made available," and the training should be available in every county at no cost.²⁴¹ Finally, the Task Force recommended a detailed list of topics that the training should include.²⁴² These topics include, along with many others, "assessing risk and safety," "stages of child development," "family dynamics," and "child abuse and neglect."²⁴³ These topics are essential in allowing individuals to understand the complex issues and various familial situations they will encounter while serving as a guardian ad litem.

A brief glimpse at Ohio Superintendence Rule 48 once again reveals that the Task Force's recommendations are apparent throughout the Rule's section on Training Requirements. As recommended in the Task Force's final report, Rule 48 requires both a pre-service training course at least six hours in length and a continuing education course each calendar year at least three hours in length.²⁴⁴ Rule 48 also goes beyond the

²³⁶ ELLWOOD, *supra* note 37, at 5.

²³⁷ *Id.*

²³⁸ *See id.* at 5–6 (providing various recommendations for training times, topics, and adoption of statewide programs in general).

²³⁹ *Id.* at 5.

²⁴⁰ *Id.*

²⁴¹ *Id.* (noting support should be sought from other organizations such as the Commission on Continuing Legal Education, the Ohio Department of Job and Family Services, the Ohio Attorney General's Office, and the Ohio CASA/GAL Association).

²⁴² *Id.* at 6.

²⁴³ *Id.*

²⁴⁴ OHIO SUP. R. 48(E)(1)–(2), (4).

recommendations of the Task Force by providing specifically what courses satisfy the pre-service training requirement and what courses satisfy the continuing training requirement.²⁴⁵ For example, an individual must take a pre-service training course provided by the Ohio Supreme Court, complete the Ohio CASA/GAL Association's pre-service training program, or complete a program with the prior approval of the court.²⁴⁶ However, the court-approved training must cover specifically defined topic areas.²⁴⁷ Thus, one can satisfy the pre-service training requirement through various programs, which is what the Task Force recommended.²⁴⁸ The Rule also provides that the continuing education course must "[b]e specifically designed for continuing education of guardians ad litem."²⁴⁹

Finally, the Rule does an excellent job of providing consequences if a guardian ad litem fails to complete the continuing education requirements. A guardian ad litem failing to meet those requirements is no longer eligible to serve as a guardian ad litem until the training requirements are completed.²⁵⁰ Specifically, if the gap since the last training is less than three years, the guardian ad litem need only complete a continuing education course; however, if the gap since the last training is more than three years, the guardian ad litem must complete a six-hour pre-service training course.²⁵¹

In conclusion, Rule 48 does include the important recommendations made by the GAL Standards Task Force as shown above. However, one problem persists. In satisfying the pre-service education requirement, a local court may approve other training so long as it covers the topics specifically provided for in the Rule.²⁵² While this requirement does allow flexibility for those individuals seeking qualification as a guardian ad

²⁴⁵ See *id.* at 48(E)(2) (listing specifically what course topics one may take in order to meet the pre-services training requirement); see also *id.* at 48(E)(5) (specifying what types of training courses will satisfy the continual training requirement).

²⁴⁶ *Id.* at 48(E)(2).

²⁴⁷ *Id.* at 48(E)(3) (topic areas include "human needs and child development," "communication and diversity," "preventing child abuse and neglect," "family and child issues," and "legal framework").

²⁴⁸ See ELLWOOD, *supra* note 37, at 5 ("The training should be free and easily accessible on a county-by-county basis.").

²⁴⁹ OHIO SUP. R. 48(E)(5)(a).

²⁵⁰ *Id.* at 48(E)(6).

²⁵¹ *Id.*

²⁵² *Id.* at 48(E)(2).

litem, the Rule provides no monitoring over courts.²⁵³ Monitoring the various county courts is important to ensure each court is approving adequate training classes. Prior to enactment of Rule 48, some counties required no training in order to qualify as a guardian ad litem.²⁵⁴ This problem could persist despite enactment of this Rule if courts are not monitored to ensure compliance. Thus, an amendment to the Rule should provide a mechanism for ensuring that court-approved training includes the topics listed in Ohio Superintendence Rule 48(E)(3).

There is perhaps an easy way to address this problem. The Rule already requires the specific appointment of a person by the court to maintain guardian ad litem files, to maintain information on training opportunities, and to receive comments and complaints on the guardians ad litem.²⁵⁵ This person could also maintain a file of programs that the court has specifically designated as satisfying the pre-services education requirement. Then, the Ohio Supreme Court could look through each county court's file to determine whether the court is approving adequate classes. This would provide the kind of oversight regarding approved classes that is currently missing.

B. Incorporation of the Ohio Association of Magistrates Recommendations into Ohio Superintendence Rule 48

OAM agreed with the GAL Standards Task Force that a standardized definition of the responsibilities and training of guardians ad litem was necessary.²⁵⁶ However, OAM provided more specific advice on two issues: training and reports.²⁵⁷ With regard to training, OAM President Mark Huberman highlighted the financial problems facing Ohio counties.²⁵⁸ As a result, OAM recommended the use of state resources to fund the training as well as the use of "community-based trainers."²⁵⁹

²⁵³ See *id.*; see also *id.* at 48(G)(7) (requiring each court to review compliance with training and education requirements but not giving any indication of how courts will be monitored).

²⁵⁴ ELLWOOD, *supra* note 37, at 1 (stating that only "some courts" had adopted local rules with regard to standards for training and practice).

²⁵⁵ OHIO SUP. R. 48(G)(3).

²⁵⁶ Letter from Mark A. Huberman to Doug Stephens, *supra* note 65, at 1.

²⁵⁷ *Id.* at 1–2.

²⁵⁸ *Id.* at 1 ("[M]andatory training requirements must take into account the fact that many jurisdictions are facing tight financial problems.").

²⁵⁹ *Id.*

These individuals are accustomed to the specific needs and challenges of the local court system.²⁶⁰

Rule 48 does require mandatory training for all guardians ad litem through a specific Ohio Supreme Court training program, Ohio CASA/GAL Association program, or a court-appointed program.²⁶¹ Offering the training at no cost will undoubtedly allow many individuals across the state of Ohio to serve as a guardian ad litem. Placing a price on these courses could deter interested persons from taking the course and ultimately qualifying as a guardian ad litem. The courses are also offered throughout the year around the state of Ohio,²⁶² which provides many opportunities to satisfy the mandatory training requirements of Rule 48. Thus, Rule 48 provides trainings at no cost and at various times and locations.

The other specific recommendation provided by OAM focused on the guardian ad litem reports. OAM disagreed with the GAL Standards Task Force on the purpose of the reports.²⁶³ The Task Force viewed the reports “as having no status as a ‘pleading’” to be used as a closing argument and not as evidence in the actual case.²⁶⁴ However, OAM recommended that the “guardian ad litem should prepare a written report and recommendation, provide a copy to each side in a reasonable amount of time prior to trial, and be subject to examination by all parties at hearing.”²⁶⁵

Once again, Rule 48 articulates specific requirements for the information that is to be included in the guardian ad litem reports.²⁶⁶ In addition, the guardian ad litem can testify in juvenile, abuse, neglect and

²⁶⁰ *Id.*

²⁶¹ OHIO SUP. R. 48(E)(2).

²⁶² See *Ohio Guardian Ad Litem Education Program: Pre-Service Course Information*, SUP. CT. OF OHIO, <http://www.supremecourt.ohio.gov/GAL/preService.asp> (last visited Dec. 27, 2010).

²⁶³ Letter from Mark A. Huberman to Doug Stephens, *supra* note 65, at 2.

²⁶⁴ *Id.*

²⁶⁵ *Id.* (providing also that after the guardian ad litem is subjected to examination, the report should be admitted into evidence and the judge can then determine its proper weight).

²⁶⁶ OHIO SUP. R. 48(F) (“The report shall detail the activities performed, hearings attended, persons interviewed, documents reviewed, experts consulted and all other relevant information considered by the guardian ad litem in reaching the guardian ad litem’s recommendations and in accomplishing the duties required by statute, by court rule, and in the court’s Order of Appointment.”).

dependency cases,²⁶⁷ but in a domestic relations proceeding involving the allocation of parental rights and responsibilities, the court should only consider the report in determining a child's best interests if a party admits the report as an exhibit.²⁶⁸ Finally, the Rule generally provides that all guardian ad litem reports be filed no less than seven days before the scheduled hearing.²⁶⁹

In conclusion, Rule 48 incorporates the few specific recommendations of OAM. These few recommendations were important in ensuring the completeness and effectiveness of the final rule. Free training programs will allow more interested individuals to serve as guardians ad litem and represent children's best interests in courts throughout Ohio. In addition, requiring more specificity with regard to the guardian ad litem reports will allow both the parties and the judge to better understand the case at hand. Allowing the guardians ad litem to testify will also subject them to questioning by the parties involved. This questioning may focus on what the guardian ad litem has witnessed but it will also ensure they are conducting sufficient visits to properly give a recommendation to the court. Using these recommendations will increase the effectiveness of Ohio Superintendence Rule 48 in providing the first statewide standard for the duties and responsibilities of guardians ad litem.

V. CONCLUSION

The state of Ohio previously offered no statewide standard for the duties and responsibilities of guardians ad litem.²⁷⁰ In response to the varying statutes existing in jurisdictions throughout the state, the Supreme Court recognized the necessity of a statewide rule.²⁷¹ The GAL Standards Task Force was integral in providing specific recommendations for the drafters of the final rule.²⁷²

²⁶⁷ *Id.* at 48(F)(1).

²⁶⁸ *Id.* at 48(F)(2).

²⁶⁹ *See id.* at 48(F)(1)(c) (requiring that final reports in juvenile abuse, neglect, and dependency cases and actions to terminate parental rights must be filed no less than seven days before the hearing); *see also id.* at 48(F)(2) (requiring that final reports in domestic relations proceedings involving allocation of parental rights and responsibilities must be filed no less than seven days before the hearing).

²⁷⁰ *See, e.g., Ohio Guardian Ad Litem Education Program, supra* note 60.

²⁷¹ *See* ELLWOOD, *supra* note 37, at 1 (noting the Ohio Supreme Court created the GAL Standards Task Force to develop a statewide standard for guardians ad litem in Ohio).

²⁷² *See id.* at 2–13.

The work of many individuals ultimately led to the adoption of Ohio Superintendence Rule 48, which is the first statewide rule governing the duties and responsibilities of guardians ad litem.²⁷³ Thus, the differing local rules in existence prior to Rule 48 now give way to one uniform standard.

The drafters of the Rule considered the multiple recommendations of both the GAL Standards Task Force and OAM. The individuals comprising both committees were highly experienced in the area of juvenile law.²⁷⁴ The incorporation of their expertise into the final rule ensured its overall effectiveness. While the Rule is clearly not perfect, it provides an excellent foundation for standardizing the guardian ad litem system in the state of Ohio. With the adoption of Ohio Superintendence Rule 48, the Ohio Supreme Court has provided a standard to increase the quality of representation of children's needs throughout Ohio.

²⁷³ See *Ohio Guardian Ad Litem Education Program*, *supra* note 60.

²⁷⁴ See ELLWOOD, *supra* note 37, at A-1 (listing the members the of GAL Standards Task Force); *The Advisory Committee on Children, Families, and the Courts*, SUP. CT. OF OHIO, [http://www.supremecourt.ohio.gov/Boards/familyCourts /GAL _roster.pdf](http://www.supremecourt.ohio.gov/Boards/familyCourts/GAL_roster.pdf) (last visited Dec. 27, 2010) (listing the 2002 to 2005 members of OAM's Advisory Committee).