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The guardian ad litem, a lucky number?

Advisory report: guaranteeing and protecting the interests and voice of children in practice

Research team
Mrs. mr. drs. N. van der Bijl
Mrs. drs. M.E. Van den Dongen
Mrs. mr. E.J.M. Vreeburg – Van der Laan BSc.

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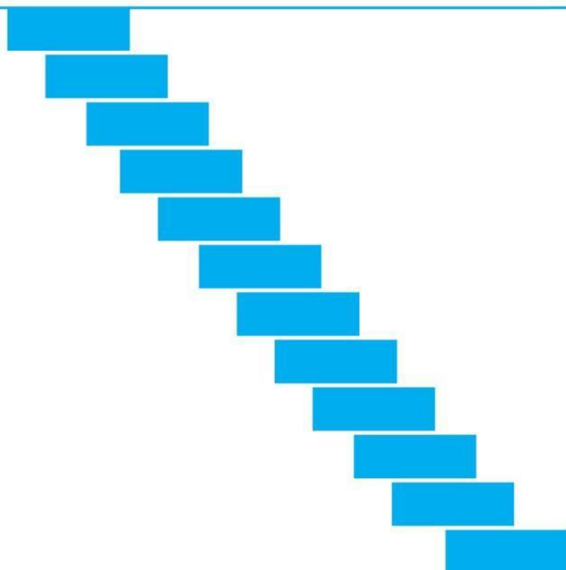

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Preface

Since the start of the Ombudsman for Children in April 2011 we have received a lot of questions on a number of specific themes. Children, parents, grandparents and professionals know where to find and approach us with problems such as access to education, school bullying, abuse and immigrant children facing the threat of deportation.

Another recurrent theme among child callers is their feeling of not being heard or taken seriously. Some of them risk being placed into out-of-home (foster) care and have the feeling that no one listens to their needs or considers their interests. Others have been in family-based foster care for years and are suddenly forced to return to their biological parents, contrary to their wishes that seem to be ignored by everybody. Then there are some who find themselves in the middle of a divorce of their parents and are angry, sad or desperate, children who have been used by both divorced parents and ex-partners, as tools in their legal struggle. Or worse even, their parents cause them to act as buffers or to function as a form of (emotional) blackmail.

Children who have managed to find us are telling chocking stories that require a solution urgently. A guardian ad litem (*bijzondere curator*) is an example of a possible solution. The guardian ad litem is appointed by the court to defend the interests of a child in situations where a parent or guardian cannot or will not do so. Many children were apparently unfamiliar with the institution of a guardian ad litem. This motivated us to do further research on this matter.

Our research has finally resulted in this report in which various aspects and perspectives regarding the practice of the guardian ad litem are discussed. Many have participated in this research study. My heartfelt thanks goes to those participating in the expert meeting of September 2011, to all participating guardians ad litem, Bureaus Jeugdzorg (youth care agencies), the William Schrikker Groep (care agency for children with mental disorders), the Leger des Heils (Salvation Army) Jeugdzorg en Reclassering (youth care and resettlement/aftercare ex-offenders) and Stichting SGJ, Christelijke Jeugdzorg (Christian Youth and Child Care), judges and courts (first instance and courts of appeal), the Raad voor Rechtsbijstand (Legal Aid Board), the Raad voor de Rechtspraak (Council for the Judiciary), the vFAS (association of family lawyers and mediators) and to all other experts who have to some extent contributed to producing this report.

All professionals and parties involved in this area are surprisingly unanimous in their belief that something should be done regarding the quality and familiarity of the guardian ad litem. Various initiatives have been taken by some of them at a local or regional level, but this has not yet resulted in a general or broad approach. With this report and its recommendations I would like to stress the importance of the guardian ad litem, placing it high on the agenda. I sincerely hope that our report will contribute to a stronger position of the guardian ad litem in the courts, youth and child care, among lawyers and other professionals who could be confronted with these matters. This should make it easier for children to have an appointed guardian ad litem, a guardian ad litem satisfying specific qualitative criteria and whose role and contributions are seen as valuable and an added plus. This way drawing a lucky number will no longer be necessary, and every guardian ad litem will prove to be a blessing or a lucky choice!

Finally, I would like to express my enormous gratitude towards all those children who are calling or writing us and towards those children whom we have interviewed while preparing this report. Thanks to your open-hearted stories, we managed to write a report like this.

Marc Dullaert,
T*he Ombudsman for Children*

1. Introduction

The Ombudsman for Children regularly receives complaints made by children who are feeling unheard. In many cases it will involve children whose parents are tied-up in a (nasty) divorce. Parents are fighting over their children. About which parent should be living with the children and how often their children may see the other parent, when that is decided. Often, the children themselves have a very clear idea on the matter, but no one cares to listen to them, because their parents are absorbed in their own struggle. This feeling of not being heard is also seen in cases involving possible or future out-of-home (custodial) placement procedures or who have been placed with a foster family and are facing a possible return to their biological parents. Besides children, parents also contact the Ombudsman for Children, having a similar complaint: no one is really focused on their child and on the child's best interests.

Children are human beings on the road to maturity. They need to be heard, and also in judicial procedures, as has been stipulated in article 12 of the Convention on the Rights of the Child. Expressing your opinion is no guarantee that your ideas are followed and realised according to your wishes. In taking these kinds of decisions other factors are also of importance. In addition, a child's own views are not always in the child's best interest.

In the Netherlands we have the legal institution or figure of the guardian ad litem (*bijzondere curator*). This guardian ad litem is appointed by the court to protect and represent the interests of a child. A guardian ad litem may be involved in paternity cases (article 1: 212 BW/Dutch Civil Code) and in cases concerning parenting and education, care or property and when there is a conflict of interests between the child and the parents or (other) guardian (article 1: 250 BW/ Dutch Civil Code). In this study, we only deal with the latter type of problems. The guardian ad litem does not operate as a lawyer in the proceedings, but he or she takes care that the interests of the child are made known and that the child feels heard. The Ombudsman for Children has found, to his surprise, that in e.g. divorce or out-of-home placement proceedings guardians ad litem play a very minor to non-existent role. When callers reporting complaints are questioned a bit further on this matter, they are often unfamiliar with the fact that a guardian ad litem can be requested. Or a guardian ad litem may have been requested, but the request was denied by the court. The Ombudsman for Children asks himself whether the best interests and the voice of children are sufficiently protected and guaranteed, particularly during stressful changes in a child's life such as, for instance, parental divorce cases and custodial care placements.

The Ombudsman for Children has talked to a judge and a guardian ad litem for an initial exploration of the role of the guardian ad litem. He subsequently organised an expert meeting with the participation of professionals from the entire field: guardians ad litem, judges, a youth care agency (Bureau Jeugdzorg), the Council for Child Protection (*Raad voor de Kinderbescherming*), het *Advies- en Klachtenbureau Jeugdzorg* (advice and complaints agency youth and child care), Defence for Children and the *Kinder- en Jongerenrechtswinkel* (legal aid services without cost for children) Amsterdam. This expert meeting produced so many questions that the Ombudsman for Children has initiated his own research study to get a clear picture of experiences regarding the guardian ad litem in practice.

This report is the result of this research study. A key question is whether the voice and interests of the child are sufficiently protected and guaranteed in current Dutch family law, in particular through the involvement of the legal institution or figure of the guardian ad litem.

In chapter two the research design of this study will be described. And in chapter three attention will be devoted to the rights of children according to international conventions, guidelines and to the position of children in the Dutch legal system. In chapters four, five and six the findings of this

research study directed towards the practice of the guardian ad litem will be described and discussed. Chapter seven contains the subsequent conclusions and finally the resulting recommendations of the Ombudsman for Children are given in chapter eight.

I am 10 years old. My mom and dad have been separated for a while, but they are still fighting over the number of times I am staying with mom or with dad. I would like to stay one week with him and the other week with her, but no one asks my opinion. My mum and dad have to go to court and I am afraid that it will decide something that I do not want. I have been told that I am too young to be heard by the judge. And I would be rather scared to tell the judge what I want. But I would still like to let him know what I feel. Would that be possible?

Anonymised fragment from an email message to the Ombudsman for Children.

2. Research design

The central question in this report is whether the interests of the child are sufficiently protected and guaranteed in practice in current Dutch family law, in particular through the guardian ad litem. Sub-questions regarding the practice of the guardian ad litem are the following:

- Is the guardian ad litem generally known?
- Do the public and others know how a request for a guardian ad litem can be made?
- Is there a general need or demand for a guardian ad litem? And when?
- How often are guardians ad litem appointed?
- How is the 'conflict of interest' criterion dealt with?
- Are there any protocols regarding the appointment and practice of the guardian ad litem and/or to what extent are they necessary?
- What is the added value of the guardian ad litem, compared to other players in the field?
- Is the age of the child a (significant) factor?
- Who may be appointed as a guardian ad litem?
- Which skills and capacities should a guardian ad litem possess?
- What is the (main) responsibility of a guardian ad litem?
- How are guardians ad litem financed?

In order to answer these questions the research team has performed a brief analysis of relevant literature and has interviewed many players in the field on the current practice of the guardian ad litem, the difficulties that come up in that respect and on options for improvement. Firstly, interviews were held with four children with prior experience with a guardian ad litem. Besides that, surveys were held among guardians ad litem. Following the provisional results of these surveys there was a discussion with guardians ad litem. In addition, a judge was interviewed and the Ombudsman for Children further talked with judges (first instance and appeal courts) from all over the Netherlands in so called focus groups (*focusgroepen*).From four courts the relevant data were requested. Finally, questions concerning their experiences with guardians ad litem were presented to all youth and child care agencies (*Bureaus Jeugdzorg*) and three national foster care organisations in the Netherlands. All these aspects are briefly explained below.

Thanks to the broad nature of this research study its outcome will produce a clear picture of the importance of the guardian ad litem in current practice and the role that could be played by this legal institution and figure in the future. When formulating his conclusions and recommendations the Ombudsman for Children has based his thoughts partially on the opinions and perspectives from practitioners and parties in the field.

2.1 Children: interviews

Finding children prepared to tell us about their experiences with a guardian ad litem is not so easy[1] Guardians ad litem are not appointed on a regular basis and furthermore it often concerns situations that are painful or difficult for those children because they are involved in a conflict with (one of) their parents or (other) guardian. The Ombudsman for Children has placed a notice on his website. In addition, *kinderrechtswinkels* (children's legal aid offices) have been asked to arrange contacts between the Ombudsman for Children and children with prior experience with a guardian ad litem (with permission from their parents). Notices were also placed in the youth paper *7Days*, on Facebook, on Twitter and on www.villapinedo.nl (chat site for children and adolescents with divorced parents).

[1] In the research study performed by the Verwey-Jonker in 2003 on the guardian ad litem and the formal access to court of minors, it also appeared difficult to find minors wanting to participate in that research study. In that study, finally 16 minors from two (junior) high schools and a children's right festival were interviewed. These minors did not have any experience with a guardian ad litem.

Finally there have been interviews with three children on their experiences with a guardian ad litem in accordance with article 1: 250 BW. In addition, one child has reported an experience with a guardian ad litem as is described in article 1: 212 BW [2]. We have included this fourth child in our research study because we were particularly interested in themes such as experiences regarding the representation by a guardian ad litem, the relation with a guardian ad litem and aspects that were remarkable and of special interest or importance, and because of the relatively small number of applications of child research participants. These four stories do not constitute a general or well-founded picture of the opinion of children regarding the guardian ad litem. But they do describe their experiences with the guardian ad litem in practice from a child's perspective and they offer a valuable addition to the research findings. Naturally, the Ombudsman for Children has also included the stories of children who reported their experiences regarding this subject by phone.

2.2 Guardians ad litem: written survey and an organised debate

There is no national list of guardians ad litem who can be appointed in accordance with article 1: 250 BW, not with the courts nor with the Raad voor Rechtsbijstand (agency for funded legal aid), het Nederlands Mediation Instituut (Netherlands Mediation Institute) and the vFAS (association of family lawyers and divorce mediators) Every court has access to certain lists between these are not generally accessible for the general public. Through the intercession of the Council of Jurisdiction (Raad voor de Rechtspraak) names of guardians ad litem have been submitted who had been or could be appointed by the participating courts in The Hague, Rotterdam, Amsterdam and Leeuwarden.[3] These guardians ad litem have first been given the opportunity to indicate whether or not they would like to be approached for this research study of the Ombudsman for Children.

Furthermore, guardians ad litem mentioned in court decisions from 2011 in www.rechtspraak.nl and who had been suggested by participants of the expert meeting in September 2011 have been approached for this research study. A notice was placed in the vFAS newsletter for members in January 2013 and guardians ad litem were called to participate in this survey.

Finally, a questionnaire on the guardian ad litem was sent to 156 people on the basis of article 1: 250 BW (see annex 3), with the request to reply within two weeks. And later on they were sent one single reminder. A total of 43 people responded by returning the completed questionnaire. For this analysis 29 questionnaires were used, among them questionnaires of four guardians ad litem with a non-legal background. De remaining questionnaires had been completed (only) from the perspective of the guardian ad litem with respect to 1: 212 BW (paternity cases). Even with this relatively meagre response we still think that we can give a rather clear picture of current practice.

The first results of the analysis have been used in order to formulate a number of theses or propositions that were presented at a regional meeting of vFAS lawyers on 12 April 2012 in Rotterdam, the Netherlands (see annex 2). A vote was held under those present regarding the challenging propositions or theses formulated by the Ombudsman for Children and they could defend or discuss their preference or choice. These contributions to this vFAS discussion was used in the further interpretation of the research outcomes.

2.3 Courts: interviews, focus groups and figures

Through the Raad voor de Rechtspraak (Council for the Judiciary) all courts[4] were approached with the request to participate in focus groups. Subsequently, we received names of judges prepared to do this and who would like to talk about their experiences with the legal institution or figure of the guardian ad litem. In order to broaden the perspective of judges regarding the legal figure of the guardian ad litem, an interview was held with one judge prior to the start of the focus groups.

[2] Article 1:212 BW provides for a guardian ad litem in paternity cases. In these cases a guardian ad litem is generally appointed. This legal variant is not included in this research study.
[3] These four courts were also involved in the 2003 research study of the Verwey-Jonker Institute.
[4] In order to improve the readability of this report we use "judges" and "courts" also in case of appellate judges and courts.

Information drawn from that interview has been used for formulating theses or propositions for the focus groups (see annex 2). Focus group meetings were held in March 2012 in the Hague, 's-Hertogenbosch and in Zwolle, the Netherlands, in which a total number of ten (first instance) and six (appellate) judges participated, from different parts of the Netherlands. The focus group meetings were held in the form of an open discussion or debate.

In addition, the courts of Amsterdam, Rotterdam, The Hague and Leeuwarden were requested to submit all court decisions (*beschikkingen)* from 2011 (anonymised) in which there was an appointment of a guardian ad litem in accordance with article 1: 250 BW, with the help of the Raad voor de Rechtspraak (Council for the Judiciary). On the basis of these court decisions we have tried to get an idea of the number of cases in which the legal figure or institution of the guardian ad litem is playing a part. These four courts were selected because they were also involved in the 2003 research study of the Verwey-Jonker Institute and this made it possible to compare, to some extent, numbers of court decisions given over a period of ten years.

2.4 Bureaus Jeugdzorg: written question round

To all fifteen Bureaus Jeugdzorg and the three national family guardianship organisations (the William Schrikker Groep, het Leger des Heils/Salvation Army, Jeugdbescherming & Reclassering and SGJ Christelijke Jeugdzorg) a questionnaire was submitted concerning their experiences with the guardian ad litem (see annex 5). Sixteen Bureaus Jeugdzorg[5] gave a (substantive) response to these questions.

[5] To improve the readability of this report the terms 'bureaus Jeugdzorg' and 'jeugdzorg', are used, but they are not only referring to the regional child and youth care agencies but also to the William Schrikker Groep, the Leger des Heils/Salvation Army, Jeugdbescherming & Reclassering and the SGJ Christelijke Jeugdzorg.

I am 14 years old. My parents were divorced years ago. After their divorce I lived with my father for a few years and I stayed with my mother for a weekend every other week. At some moment, I wanted to know what it would be like to stay with my mother more often. My father resisted this and got angry as soon as I started talking about this. We had a family guardian, but I could neither really discuss this with him. Or he would take it up with my father who would become angry again. I had the feeling that nobody listened to me or to what I wanted. At last I wrote a letter to the court on this matter, at the Kinder- en Jongerenrechtswinkel (legal advisory agency for children and adolescents), early in 2011. The judge arranged a meeting at his office.. We had a pleasant talk. After that meeting the court decided that I would stay alternating weeks with my mother and my father for a six-month period to see how things would work out. The court also appointed a guardian ad litem. I did not understand very well why this was done, but later on the guardian ad litem explained this to me: she was a lawyer and would advise the court after these six months on what I wanted and what would be in my best interest.

In the beginning I talked with the guardian ad litem every month, later on we talked less often. I regretted this, because I had the feeling that she did not really know how things were going with me, as a result of this. I did manage to tell to her precisely what I wanted and she explained this to the court after those six months. She did not repeat exactly what I had told her, but she made clear what I wanted. That made me feel good because mom and dad could not get angry with me, this way. In the end the judge decided that the arrangement would stay as it had been during those six months, one week with my father, the other week with my mother. I was very happy about this. I want to grade my guardian ad litem with a 7 (B plus). She did listen to me, but things did not really change because of this guardian ad litem. I had expected before that she would be just like a good family guardian who would listen to me and would not just do whatever my parents wanted. But in the end, the guardian ad litem is someone who can express the things I want at hearings of the court and that really is something special. Since the court hearing I have only talked to her one, on the phone. She told me that I could always call her, but I do not think that I will do this easily. She still is a bit of a stranger to me, someone just passing by.

It would be better if the family guardian and also the parents would listen more closely to the child; I am the only one knowing how I feel and what I want. It has nothing to do really with who is right and I do not have to get what I want all the time, as long as people are listening to me and not just to my parents. It would also be nice if it would not be necessary to go to court in order to let know what you want; it would be a good idea if there were someone for a child who can tell the parents what their child wants, without having to see a judge. Someone standing between a family guardian and a judge.

3. The voice and interests of the child

> *"What is your favorite food?"*
> *"Spaghetti is my favorite."*
> *"You have told your mother this,, but you still do not get spaghetti every night. Hasn't your mother listened to you?" "Sure she has, but I don't like it."*
> *"I understand how you feel, but listening is not the same as doing things your way, because eating spaghetti every day isn't good for you."*[6]

The guardian ad litem represents the interests of children and – in that context – also their voice. Children have the right to be heard and the right to have their interests taken into account. This right follows from the Convention on the Rights of the Child and also from other international and national sources of law. In this chapter these legal sources are discussed. First of all, there is the UN Convention on the Rights of the Child (UNCRC). Then there will be a brief discussion of the rights of children on the basis of the European Convention on Human Rights (ECHR), *the Guidelines of the Committee of Ministers of the Council of Europe on child friendly justice* and the European Convention on the Rights of the Child (ECRC). Finally, the position of children in Dutch family law and in particular the legal institution and figure of the guardian ad litem will be discussed.

These rights and the guardian ad litem have been extensively discussed in literature and there are many different opinions and perspectives regarding this subject.[7] This chapter gives a brief sketch of the legal framework, as an introduction to this research study and its findings regarding everyday practice.

3.1 Convention on the Rights of the Child

> *Article 12:*
> *1. States that are Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and the maturity of the child.*
> *2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.*

Article 12 CR (O) C deals with the right of children to be heard. It gives to children capable of forming their own views the right to give their opinion in all matters that concern them and in all proceedings pertaining to them. The opinion of children can be communicated directly or through a representative (to the court). Their views should be seriously considered and duly weighed. According to the CR (O) C this right to be heard is not dependent on age limits.

[6] Account of an interview between an ombudsman worker of the Ombudsman for Children and a minor calling with a complaint that he or she was not heard.
[7] In 2011 at least three (final) theses were also written on the guardian ad litem: "De bijzondere curator ex 1:250 BW: een adequate toegang tot de rechter?" by M.M.C. Limbeek, "Wie neemt het kind bij de hand?" by L. de Pooter and "Een stem voor de minderjarige in en buiten de rechtszaal" by S. Rebel. These theses give a good overview of literature, jurisprudence, and, to a certain extent, (everyday) practice.

Article 12 CRC is one of the most important clauses of the CR (O) C. Within the Netherlands it has direct effect or is immediately applicable. The *Committee on the Rights of the Child* (CRC) has given a further explanation and commentary on this article in G*eneral Comment* 12. From this, the following can be concluded, among other things.

- The right to give his or her opinion cannot be limited, in principle and this should be made possible to the greatest extent possible by the States. For this reason, States should not have as depart from the starting principle that children cannot form and express their views, but, on the contrary, they should adhere to the basic principle that a child has the opportunity to do so. A child should not be forced to prove this first;
- Article 12 CRC does not mention age limits and the CRC encourages States not to do include age limits in their national legislation;
- The child should be free either to express his or her opinion or to keep his or her views to himself; it concerns a right not a duty;
- Children should not be questioned or heard more often than is necessary or required;
- The CRC regards "all matters that concern the child" in a broad sense; not just with respect to the themes and subjects mentioned in the CRC, but with respect to all subjects and themes that may affect those children they should be heard and in all procedures and proceedings that concern them;
- Just hearing a child is, therefore, not enough; a serious effort must be made to really listen to the child and weigh his or her interests. The extent to which an opinion or view is considered valuable cannot just depend on the age of the child, but this should be based on the maturity of the child;
- If a child wants to express his or her opinion, he or she can do this him/herself or through a representative. This could be the parent, but in case of a (possible) conflict of interests this should be a third party who will only defend the (interests of the) child. The State can organise this in a manner appropriate to its national laws and system, but it cannot restrict this right.

The above does not imply that the wishes of the child should always be carried out, but it does mean that a child should be seriously heard and listened to. Depending on the maturity of the child, the views of the child should be taken into account to a greater or lesser extent. This certainly applies to judicial proceedings (initiated by other parties) that affect the child and in proceedings or procedures in which children are separated from (one of) their parents. The CRC does not stipulate exactly that there should be a general and immediate access to court and the law for children, but the commentary in *General Comment* seems to be encouraging such an interpretation as much as possible.

Article 9 section 2 CRC[8] further stipulates that in situations where children live separately from (one of) their parents, all those involved should have the opportunity to participate in the proceedings and express their views on the matter. Therefore, this is also the case for children.

In addition, articles 5 and 18 CRC are relevant in this context. On the basis of these articles the parents are primarily responsible for their children's upbringing, education and care. They must give priority to the interests of their children and they must provide supervision and guidance in a manner appropriate for the developmental capacities of their child. Therefore, a gradually strengthening of capacities and skills should be taken into consideration and, as a result, the same is true for the capacity of the child to form his or her own views.

The articles mentioned above provide an interpretation of the interests of the child as stated in article 3 CRC. With every decision, these interests should be systematically weighed and balanced and be the first consideration within the case at hand. The State must guarantee the child's protection and care when his or her parents fail do to this in a sufficient manner. In this context it is important that states are obliged to guarantee children the possibility to realise their rights, according to article 4 CRC.

[8] All articles mentioned in this report have been fully included in the annex.

3.2 Other international sources

European Convention on Human Rights

Article 6 ECHR, giving everyone access to court and a fair trial, applies to children as well and is considered to have direct effect or immediate applicability. Article 6 does not just give guarantees within proceedings that have been started but it also concerns the right to start proceedings. This right can be restricted in case of minors, but this may not negatively affect the essence of the right.[9] On the basis of the ECHR, minors, therefore, should have either immediate or indirect access to court, thus through a representative.

Guidelines of the Committee of Ministers of the Council or Europe on child friendly justice

The *Guidelines on child friendly justice* have been formulated by the Council of Ministers of the Council of Europe and apply to the Netherlands. In these guidelines it is stated, among other things, that children have a right to receive all relevant information, to have access to court and must be heard. In all cases or proceedings concerning them, they must be able to give their views. Their views and opinions must be weighed in an appropriate manner. In addition, children are entitled to seek and get their own legal advice, assistance and representation. These representatives of children must possess specific skills concerning the way to deal with children. They are not required to indicate what is in the best interest of the child, but they are required to get to know the views and opinions of the child and to defend them. In order to communicate his or her interests, the child can approach his parents or be appointed a special representative, when his or her parents cannot represent the child, in case of a conflict or clash of interests.

European Convention on the Rights of the Child

The ECRC has come into force on 1 July 2000, but it could not be ratified by the Netherlands and therefore it is not (yet) applicable at the moment. The convention will be briefly mentioned here, because it gives children several rights and possibilities regarding their position in family law. On top of that, there is the possibility that it will be ratified in the future. The contents of the treaty are very similar to the previously mentioned *guidelines on child-friendly justice.* Pursuant to article 3 of this convention children have a right to all information relevant for their case, and this includes information on the consequences of an actions that are, or are not, in compliance with their wishes and decisions. Furthermore, children have the right to be consulted and have their views heard by the court. Pursuant to articles 4 and 9, children have the right to their own representation. According to article 2 and the commentary on the convention, this can be a natural person, such as a lawyer, but it can also be a legal person, such as the Council for Child Protection.

3.3 The situation in the Netherlands

Parents and guardians are the legal representatives of the child (art. 1: 253i and 1: 337 BW), also in judicial proceedings (art. 1:245 BW). Children are considered to be an incompetent party in proceedings, in principle. Over time, a very mixed situation has developed whereby children have become fully or partially competent parties in proceedings, the so called formal and informal access to court. A formal access to court is e.g. a request to terminate a court supervision order (art. 1: 256 section 4 BW), the annulment of decisions of family guardians (art. 1: 259 section 1, 1: 260 BW), the full/partial withdrawal of an authorisation custodial placement order (art. 1: 263 section 4 BW) and changes to visitation rights within the framework of a family (court) supervision order (art. 1: 263b BW). In all these cases the child must be at least twelve years old. Only in case of a closed setting custodial placement authorisation, children under twelve can appear in court without the need for a representative (art. 29a section 2 *Wet op de jeugdzorg*). The informal access to court is meant for e.g. specific child visitation or information arrangements (art. 1: 377a and 377b BW), changes to parental custody rights (art. 1: 253a BW) and visitation arrangements (article 1: 377e BW).

[9] This was determined in, among others, EHRM 21 February 1975, Series A vol 18 (Golder vs United Kingdom).

These informal types of court access are open to children of twelve years and older and to children younger than twelve who are considered capable of having a reasonable idea of their interests. Finally, in jurisprudence, it has already been decided that children also have an informal access to court with respect to changes to their primary place of residence.[10]

In addition, children twelve years of age and older have the right to be heard. The court will generally summon or call them up to be heard in cases that consider them (article 809 Burgerlijke Rechtsvordering or Rv). Children younger than twelve years of age do not have such a right, but they may be called by the court.[11]

A very mixed picture in any case, both with respect to court access as with respect to age limits. This is confusing and not very desirable, as can be concluded from relevant literature.[12] In addition, in both criminal and administrative law, age limits are determined and set differently. In administrative law a minor child has an independent access to court when he or she is capable of making a reasonable assessment of his or her interests while the minor child in criminal law will have the same procedural rights or powers as an adult.

As early as in 1988, the *Raad voor Jeugdbeleid* (Council for Child and Youth Policy) recommended to improve the access to court through, among others, a separate or individual access to court.[13] The Verweij-Jonker Institute performed a research study in 2003 regarding the legal position of minors and it recommended the adoption of a general access to court and suggested a generally accessible and available standard or model.[14] The Dutch government did not follow this advice. The Minister of Justice at the time, Donner, stated that access to court was sufficiently guaranteed by the current system, since the option of parents representing their child was considered appropriate and, if necessary, a guardian ad litem could be appointed.[15]

Since our Minister states that the current system is functioning as it should and the guardian ad litem is an effective solution, this evokes questions such as: How can we see and define this legal figure? And how does it function in practice? We will consider the first question below. The second question gave rise to this research study and will be discussed in the following chapters.

3.4 The guardian ad litem ex 1: 250 BW

The legal figure or institution of the guardian ad litem is dealt with in article 1: 250 BW. Initially, this article was meant for property issues. In 1995 the scope of the article was expanded to include issues relating to care and upbringing. In 2009 the wording of the relevant text in the BW was modified in connection with the *Wet bevordering voortgezet ouderschap en zorgvuldige echtscheiding* of 27 November 2008. Since then, every court dealing with a case may appoint a guardian ad litem. The reasons for such an appointment have not been adapted or changed in the text of the act. Since 1 March 2009, the article is worded as follows (translated):

> *When in a case regarding the care and upbringing or the property of a minor, the interests of the parents having parental custody rights or one of them or of the guardian or both guardians are contrary to those of the minor, the court (section kanton in property cases concerning the minor, unless another court section is already involved) will appoint either on its own initiative or on request of an interested party a guardian ad litem to represent the minor, whether within or outside of the court proceedings, should this be necessary, in the minor's best interest, taking into account the nature of this conflict or clash of interests.*

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[10] See among others, the decision of the court of Alkmaar of 16 February 2011, LJN: BQ1141 and the decision of the court of Maastricht of 15 July 2011, LJN: BR2068.
[11] See also the Dutch Supreme Court decision of 24 January 2003, NJ 2003, 198.
[12] See, among others, as early as in 2004 M. de Bruijn-Lückers, 'De minderjarige als volwaardige procespartij?!' *Meesterlijk groot voor de kleintjes. Opstellen aangeboden aan prof. Mr. J.E. Doek ter gelegenheid van zijn emeritaat*, K. Blankman and M.R. Bruning (eds), 2004.
[13] Raad voor het Jeugdbeleid, *Jeugd met recht: een perspektief voor de rechtspositie van minderjarigen*, 1988.
[14] Steketee, M.J., A.M. Overgaag and K.D. Linnemann, *Minderjarige als procespartij?* Verwey-Jonker Institute, February 2003.
[15] Kamerstukken II, 2003-2004, 29 200 VI, no. 116.

The key elements of the current article are: 'affected or concerned party' ('belanghebbende'), 'conflict of interests' ('belangenstrijd') and 'in/out of court or (extra) judicial' ('in en buiten rechte').

Party concerned (belanghebbende): requesting a guardian ad litem

In article 798 Rv (Dutch Code of Civil Procedure) the party concerned (or affected, belanghebbende) is defined as: *the person whose rights and duties are directly involved in the case at hand.* This means that someone is to be considered as the party concerned, or affected, if his or her rights or duties are immediately and directly affected. The concerned party is, first of all, the minor him or herself.[16] In court, the minor can request for a guardian ad litem. This can be done, by the minor, if sufficiently competent, by way of a formal petition (*verzoekschrift procedure*).[17] The minor can also write a letter to the court and by way of this informal method of court access, try to realise such an appointment by the judge, on the court's own initiative.[18] Considering the above, a recent court decision can be considered remarkable: in that case a minor requested a guardian ad litem but his action or request was considered inadmissible because – in brief – he did not have a formal access to court and he was represented in and out of court by (special) legal representatives or by the Council for Child Protection.[19]

The minor is not the only a party or person able to request for a guardian ad litem. Others as well may do so, such as the (lawyer of the) (grand) parents or the foster parents of a minor. A brother or sister cannot do this.[20] This is not a matter of course and may be subject to review in the future; a brother or sister can, in fact, be genuinely affected by a decision on a minor, such as in case of an out- of- home (custodial) placement of a minor.[21]

Finally, the appointment of a guardian ad litem can also be requested by the court itself, with the judge deciding that there should be someone to communicate just the interests of the child within the proceedings.

In many cases, there may be the need for a guardian ad litem, as long as this concerns property or the minor's care, upbringing and education. With care, upbringing and education is implied care and responsibility for the mental and physical wellbeing and the safety of the child as well as furthering the development of the child's personality (article 1: 247 BW)? With the legislative changes (*wetswijziging*) of 1 March 2009, explicit mention is made of a situation in which a child has become an procedural object used by both parents in divorce proceedings.[22] Furthermore, other relevant examples may concern situations regarding visitation rights, parental custody rights, the child's primary place of residence, court supervision and guardianship, (open) out- of- home placement, medical conflicts with respect to, for instance, vaccinations, education and work. The continuation of placement in a (network) foster family may produce a situation in which there may be the need to appoint a guardian ad litem.[23]

Considering the above, questions of interest that come up are the extent to which concerned parties in practice are informed on the existence of the guardian ad litem, situations requiring a guardian ad litem and to what degree circumstances are recognised in which

[16] Kamerstukken II, 1992-1993, 23012, nr. 3.
[17] Hoge Raad (Dutch Supreme Court) 4 February 2005, NJ 2005/422.
[18] L.W.M. Hendriks, 'De bijzondere curator: het bijzonder curatorschap in de praktijk', *UCER 5 - Actuele ontwikkelingen in het familierecht*, 2011.
[19] Rechtbank (court of first instance in) Alkmaar 21 December 2011, LJN: BW0361.
[20] HR 21 May 2010, NJ 2010, 397.
[21] See among others also C. Forder, 'Is de oudste broer belanghebbende in de kinderbeschermingsprocedures met betrekking tot zijn broertjes of zusjes?', *Nederlands Juristenblad*, 2011-21.
[22] Kamerstukken II, 30145, no. 6 and Kamerstukken I, 30145, E.
[23] Nieuwenhuis, J.H., C.J.J.M. Stolker and W.L. Valk, *Burgerlijk Wetboek Tekst & Commentaar,* artikel 1:250 BW and article 1:377a BW and prof. mr. P. Vlaardingerbroek et al, *Het hedendaagse personen- en familierecht*, Kluwer, Deventer 2011. Also: an overview of recent decisions in 'Waar staat de bijzondere curator in het huidige rechtsbestel inmiddels?', I.J. Pieters, *FJR 2012/36 and more in particular in* bijzonder over pleegzorgsituaties in 'Juridische mogelijkheden voor pleegouders en het pleegkind', M. Kramer*, Pleegzorg in perspectief* (eds. P.M. van den Bergh and A.M. Weterings), 2012.

a guardian ad litem could be practical or valuable. These and other questions will be addressed in chapter four.

Conflict of interests: reasons for the appointment

In order to have a guardian ad litem appointed there must be some sort of conflict of interests between the parents with legal parental custody or authority or one of them or the guardian or both guardians and the interests of the minor regarding the care, education and upbringing of the minor or with respect to his or her property. The conflict must be of such a nature that the appointment of a guardian ad litem really is *necessary*. In jurisprudence it has furthermore been decided that it should concern a *concrete and essential* conflict with respect to upbringing, education and care of the minor. General disputes on parenting or educational issues are not meant to be solved by a guardian ad litem. The guardian ad litem does not operate as a mentor for the general protection and furthering of (immaterial) interests. But it may concern both a conflict between the child and his or her parent(s)/guardian(s) as well as between the child and a third party in which the parents refuse to represent the child.[24]

In both jurisprudence and relevant literature there seems to be a rather mixed picture with regard to the definition of an essential clash of interests on the care, upbringing and education in which the appointment of a guardian ad litem is (really) necessary. In addition, it is not clear whether there may be clashing interests regarding just one of the parents if both have legal parental custody. Furthermore, it follows from literature that a guardian ad litem appears to have been appointed very infrequently.[25] The appointment of a guardian ad litem is a very far-reaching measure because it may partially diminish parental powers and touches upon family life. Therefore, the privacy of the child's lawful representative(s) should be respected as much as possible. And needless legal solutions and proceedings regarding family affairs and situations should be prevented as much as possible.[26]

There are no rules and regulations or protocols for courts on the appointment of a guardian ad litem (in the Netherlands). Who may be appointed as a guardian ad litem is not stipulated anywhere. Theoretically, anyone may become a guardian ad litem.[27] In literature, however, lawyers, (ortho)pedagogues, social workers and psychologists are mentioned as professionals having been appointed as guardians ad litem.[28] But family and other third parties may also operate as a guardian ad litem.

Considering the above, a number of relevant questions come up: in case the court decides to such an appointment in practice: when can we speak of clashing interests? And what type of person is appointed by the court, what is his or her background? Furthermore, the legislative changes of 2009, enabling every court and judge to appoint a guardian ad litem, should facilitate the appointment and therefore cause an increase of these appointments.[29] We may ask ourselves whether this is true in practice and how often guardians ad litem are appointed in the Netherlands. Another question that comes up in that respect is whether the intended role of guardians ad litem in nasty divorce proceedings, such as the case where parents fail to produce an *ouderschapsplan* (parental agreement on issues regarding there minor children with respect to alimony, education, medical treatment, primary residence, visitation rights, parental custody) is realised in practice. In chapter five we will deal with these questions in greater detail.

In and out of court; duties of the guardian ad litem

[24] See e.g. the Dutch Supreme Court dec.of 4 February 2005, NJ 2005/422 and J.H.M. ter Haar in: J.H. Nieuwenhuis, C.J.J.M. Stolker and W.L. Valk, *Burgerlijk Wetboek Tekst & Commentaar,* art.1:250 BW and KamerstukkenII, 1992-1993,no.3 &. 5.

[25] J.H.M. ter Haar in: Steketee, M.J., A.M. Overgaag and K.D. Linnemann, *Minderjarige als procespartij?,* Verwey-Jonker Institute, February 2003, Kamerstukken II, 30145, no. 6, see for additional information and figures the following chapter 5.

[26] Nieuwenhuis, J.H., C.J.J.M. Stolker and W.L. Valk, *Burgerlijk Wetboek Tekst & Commentaar,* article 1:250 BW, but also Court of Groningen, 30 November 2010, LJN BO7050.

[27] Kamerstukken II, 2005-2006, 30 145, no. 6.

[28] See, among others, L.W.M. Hendriks in 'De bijzondere curator: het bijzonder curatorschap in de praktijk' *UCER 5 – Actuele ontwikkelingen in het familierecht*, 2011.

[29] Kamerstukken II, 2005-2006, 30145, no. 6.

It is the duty or responsibility of a guardian ad litem to represent a minor in and out of court, in judicial and extra-judicial affairs. This means that he has a responsibility in legal proceedings, but also in legal out-of-court matters, even the consultation of parties or the court or mediation efforts between parties.[30] In Dutch law no specific criteria are mentioned that apply to (the work of) the guardian ad litem. Nor has this been stipulated elsewhere. And no specific educational standards have been laid down for the guardian ad litem. According to the former Minister of Justices Donner there was no need for this in practice.[31]

As has been discussed before, anyone can become a guardian ad litem. We may ask ourselves how the activities of the guardian ad litem are being financed. Dutch legislation states that the *Wet op de Rechtsbijstand* (government funded legal aid act) applies to guardians ad litem.[32] According to this act, remuneration takes place on the basis of a so called *toevoeging* (government subsidy for social/'pro bono' lawyers) To be eligible for a toevoeging and payment by the Raad voor Rechtsbijstand there should be a registration with the Raad voor Rechtsbijstand. The list of registered professionals include lawyers, mediators and others with whom the Raad has concluded an agreement.[33] Other experts, or e.g. an uncle, aunt or neighbour will not be registered. In case a guardian ad litem is appointed out of this group, there will be no arrangement regarding payment of fees or costs. Furthermore, when we approached the Raad voor Rechtsbijstand, location Amsterdam, we discovered that in this case only guardians ad litem who were lawyers could be financed through a toevoeging.
In all these cases the court can decide to realise a payment from the national budget.[34]

In the Wet of de Rechtsbijstand no specific clauses are included concerning the (height of the) fee for the work of a (registered) guardian ad litem. The website of the Raad voor Rechtsbijstand does not give any information on this subject. All the information on the website (www.rvr.org) is geared to the situation of lawyers and mediators and the fee for the guardian ad litem is dependent on that situation. The fee is a fixed amount dependent on a number of points attached to specific cases and activities.[35] In order to receive a toevoeging from the Raad, it is therefore necessary to give a description of the circumstances and activities as well as a description of the (legal) interest behind the appointment.[36] Apart from that, it follows from article 6 section 1 sub d and article 8 sub c of the *Besluit eigen bijdrage rechtsbijstand* (directive own contribution legal aid) that children do not have to pay a contribution in case of the appointment of a guardian ad litem. The only situation mentioned in this article is a conflict with the parent(s) and not with the guardian mentioned in article 1: 250 BW.

Therefore, the financing of the guardian ad litem is not explicitly regulated and this may cause some discussion. Because of this, there was a dispute in 2011 between the Raad voor Rechtsbijstand (Amsterdam) and a guardian ad litem regarding the payment, or not, of specific activities of the guardian ad litem. Initially this case was submitted to the court but ultimately no decision was given in this case, because the Raad voor Rechtsbijstand and the guardian ad litem finally came to an agreement. As a result of this case, new policy on this subject is currently being prepared, on the premise that a toevoeging will only be given voor concrete activities. The work can be of a broader nature than merely within the context of legal proceedings, such as consultation and mediation, but it should not turn into a kind of mediation or social work en must be linked to the assigned task.

[30] These different responsibilities and tasks are comprised in the terms 'in and buiten rechte' (judicial and extrajudicial), but they are also recognised as such by, among others, L.W.M.Hendriks in 'De bijzondere curator: het bijzonder curatorschap in de praktijk', *UCER 5 – Actuele ontwikkelingen in het familierecht*, 2011. Mediation is also explicitly mentioned as a responsibility in e.g. the context of the realisation of visitation arrangements, by prof. mr. P. Vlaardingerbroek and others in *Het hedendaagse personen- en familierecht*, Kluwer, Deventer 2011.
[31] Kamerstukken II, 2005-2006, 30145, no. 6.
[32] Kamerstukken II, 2006/2007, 30146, no. 6.
[33] Article 13 en 33b Wet op de Rechtsbijstand, WO 30 145 *Handelingen I* 2008/2009, no. 8.
[34] See, among others, Court of Appeal, The Hague, 17 December 2008, LJN BH2764.
[35] In the annex of the Regulation legal aid compensation 2000 (Besluit Vergoedingen Rechtbijstand) the points system is included. Divorce proceedings get 10 points, while proceedings concerning parental custody and visitation arrangements have received 7 points. In the annex no special mention is made of the work of the guardian ad litem. The point total is multiplied with the basic fee that is determined annually, in order to pay for the toevoegingen. In January 2012 this basic fee is set at € 106,23.
[36] See, among other things, article 24 Wet op de Rechtsbijstand.

Therefore, it is in the interest of the Raad van Rechtsbijstand that the court indicate clearly for which concrete issue an appointment of a guardian ad litem is necessary.[37]

Considering the above, the question arises to what extent the financing of the guardian ad litem poses specific problems in practice. Another question that may come up is whether there should, in fact not be any educational requirements for the position of the guardian ad litem, and which qualities or capacities the guardian ad litem should possess, whether a guardian ad litem will receive clear and separately defined tasks or responsibilities and whether there is any supervision and control regarding the performance of those tasks and responsibilities. These and other questions are addressed in chapter six.

I am 13 years old. I live with my grandparents because things did not work out at home. I would like to stay with my grandparents, but my family guardian did not agree. Last year my grandparents called the Ombudsman for Children and asked what I could do. He told them that I could write a letter to the court (judge) to let the court know what I want. And I did. I was invited to see the judge to tell my story. I was alone with the judge and the guy who writes everything down. The judge listened very well to my story.
Later on, my grandparents told me that the court had appointed a guardian ad litem for my case. The guardian ad litem was a lawyer.
I did not like this guardian ad litem one bit and I was quite unhappy with him. He was a very posh guy and was wearing very smart clothes. I visited him at his office. I did not like him and I did not trust him at all. If he had liked soccer, we at least could have had something to talk about. I only spoke to him twice. The first time he explained to me what would happen. He asked me all kinds of things and he let me tell my story. The second time he had already spoken to my grandparents and my parents, and he was totally on my parents' side. He had already thought out what should be done. The guardian ad litem told me that he would be there for me, but it did not feel that way. I thought it annoying that he had talked with others about me. He did listen, but then he twisted everything I told him. In spite of this, he did tell the court that I could best stay with my grandparents. And that was what I hoped for. He did not tell me beforehand that this would be his recommendation to the court and I did not read his report. My grandparents told me what the report was about and they only received this report 20 minutes prior to the court hearing. I was not present at the hearing: I could but the guardian ad litem told me that I did not have to come and then I told him that I would not go to the hearing with him.
Since the court session I have not seen the guardian ad litem again. I did not really mind. I did not like him after all and I was glad that he left. That's why I would give the guardian ad litem a very low grade, an F. A good guardian ad litem really listens to a child and makes sure that the child can be him or herself.My guardian ad litem is similar to my family guardian and all other social workers or therapists.

[37] Information received through the involved guardian ad litem and the Raad voor Rechtsbijstand, Amsterdam.

4. The request and demand for a guardian ad litem

"It is not about getting what I want, as long as I have the feeling that I am heard"[38]

The central theme of this chapter is the request and demand or need for a guardian ad litem. Which situations are calling for a guardian ad litem in practice? And to what extent is his existence and the possibility to have him appointed in proceedings generally known by those who may be confronted with this option? First the experiences and interests of the children, guardians ad litem, judges and child and youth care agencies are discussed. Then the different perspectives will be analyzed.

4.1 Children

The children who were interviewed[39] initially did not know that a guardian ad litem existed. This matches the picture that could be drawn on the basis of the questions, signs, complaints that are presented to the Ombudsman for Children, when callers are informed by his staff on the guardian ad litem, this is generally new to children.

Among the children there was therefore, in itself, no desire to have a guardian ad litem. Three out of four children did feel the need for someone who listened to them and went to look for someone who could provide that to them. One inquired with the lawyer of one of the parent whether this was possible and got to know about the guardian ad litem and asked the court for such an appointment through a lawyer. Later on she had her own lawyer next to this guardian ad litem. Two others wrote a letter to the *kinderrechter* (juvenile court) and managed to get a guardian ad litem, after a talk with the judge, even though they had not requested this themselves. One of them furthermore indicated that it is “pretty tough to go to court and that it would be better if that would not be necessary and that there would be a less extreme solution in case you feel that you are not listened to.” This child had a family guardian, but this was not enough for her. The fourth child whom we interviewed did not start looking for a good listener or representative. The guardian ad litem was appointed in connection with the nature of the legal proceedings at hand (determination of paternity).

In those situations in which a guardian ad litem was appointed it concerned the child’s primary residence and visitation arrangements with the other parent, in two cases. In one case it concerned the continuation of a so called *netwerkplaatsing* (out-of-home- placement of the child in his or her own social network) and visitation arrangements with the biological parents. In the fourth case it concerned the determination of paternity.

4.2 Guardians ad litem

The guardians ad litem were given a written survey including, among others, questions on what they considered to be important bottlenecks in requests for a guardian ad litem. Based on their responses it became apparent that children are unaware *that* they can ask for a guardian ad litem. In addition, there are no alternative options when their request is denied by the court. Furthermore, judges, parents and family guardians are insufficiently informed on the possibility of appointing a guardian ad litem, which is also seen as an important problem. In addition, guardians ad litem feel that these parties or litigants do not have a clear idea when an appointment of a guardian ad litem could be in the best interest of a child. It is also remarkable that lawyer respondents do not experience any serious problems regarding the question whether lawyers are well informed with respect to the possibility of the guardian ad litem and are recognising situations suitable for a guardian ad litem appointment, while three out of four non-lawyer respondents do consider this to be a serious problem.

[38] The quotations at the beginning of chapters 4, 5 and 6 are all from one of the children that were interviewed.
[39] To improve the readability of this report we consistently use the term ‘children’, in accordance with the CRC, but naturally this includes everyone under 18.

Next to the list that was presented including problematic aspects, the guardians ad litem could indicate themselves where they thought problems were occurring. The guardians ad litem stress the fact that children find it difficult to do something about their situation. Children also fail to use the informal access to court as often as they could, and children under twelve and especially children aged five and younger, are not able to request a guardian ad litem in practice. In addition, mention is made of a problem of very different kind e.g. the administrative hassle connected to the appointment of a guardian ad litem.

In order to assess the frequency and quantity of guardian ad litem appointments we furthermore asked them to indicate in what type of cases they were appointed as guardians ad litem. On the basis of 29 analyzed surveys, the following overview has been made:

Schedule 1: cases with guardian ad litem appointments according to the survey, N=29

	Only in these types of cases	Together with other types of cases	Total number of respondents appointed as a guardian ad litem in these types of cases
divorce (e.g. residence, care, parenting, education, visitation arrangements)	7	9	16
out- of- home placement, open setting	2	6	8
out-of-home placement, closed setting	1	6	7
court supervision/guardianship	0	7	7
educational matters (e.g. selection of school/university/training program)	0	2	2
property issues	0	3	3
other, namely……	2	0	2
do not know/no answer/no experience	5		

The survey responses show that in these cases the appointment matches the need observed by the guardians ad litem. Several guardians ad litem add the remark (in the commentary) that there may well be a need or demand for the appointment of a guardian ad litem in foster care situations. Two guardians ad litem indicate that foster children and foster parents are in a weak position for requesting a guardian ad litem in cases where there is a replacement with the parents. With respect to the Bureaus Jeugdzorg (child and youth care agencies) it has been noted, in practice, that the interests of the parents often get priority by a child and youth care agency. The family guardian has a relatively strong and powerful position and in those cases there may be the need for a guardian ad litem as a protective measure.

Considering the explicit function of the guardian ad litem with the introduction of the *ouderschapsplannen* (arrangements between parents on their minor children prior to the start of divorce proceedings) in 2009, the survey included specific questions on the part played by the guardian ad litem in divorce proceedings. The reactions to the propositions included in the survey show that guardians ad litem believe that they can be of critical importance in divorce proceedings and that they should have a greater involvement in those cases. It mostly concerns problems that come up after the divorce, such as the observance of visitation arrangements and their modifications, but he is also considered valuable in the drawing up of an ouderschapsplan. However, at the moment this is still very uncommon. The comments made by a few guardians ad litem to their responses

particularly show that they regard the responsibility of the guardian ad litem primarily as someone representing the interests of children and someone communicating their wishes and needs. This is effective in two different ways. First of all, the wishes of the children will not be the object of a separate conflict. Secondly, parents will sooner realise what the consequences will be of their ouderschapsplan for both the children as well as for themselves. With regard to this role of the guardian ad litem, one of the respondents did remark that this is only an option when children are able to formulate their own thoughts and opinions, be it very rudimentary. And other respondents also see a greater role for mediators under these circumstances. In short: a guardian ad litem does not have to be involved in every case. This was confirmed in the vFAS meeting or conference. The role of the guardian ad litem would be to discover the own, authentic opinion of the child and to communicate this to the parents, or to be a listening partner of the child in (ugly) divorces. Still, a mediator could do the same, at times. Furthermore, a divorce should not be made into something stressful and difficult, when parents are perfectly able to arrange matters themselves.

The responses of the guardians ad litem regarding the demand, need and request for a guardian ad litem are quite consistent. It is not surprising, therefore, that virtually everyone (largely) agrees with the proposition: ‘the need for a guardian ad litem is much greater that is reflected in the number of appointments’. A possible solution that is mentioned first is that there should be a greater general knowledge regarding the guardian ad litem. Since things that are unfamiliar or unknown to us will not be used (effectively). For children and parents, this can be done through PR and information activities, leaflets or brochures via schools, libraries, *Kinder- en Jongerenrechtswinkels* (child and youth legal aid offices) and agencies that are planning to send a letter to a child or parent (such as the court, Bureau Jeugdzorg, etc.). More attention should be devoted to this legal figure in the training and the continuing education and publications directed towards judges, lawyers and child/youth care workers. Besides that, mention is made of the fact that barriers (that may be) experienced by children should be taken away and that a request for a guardian ad litem should not be denied to easily. Finally, according to some it should be possible for a child to approach a lawyer directly and immediately without the need to go to court first, in order to get a guardian ad litem appointed: if every child would have his or her own lawyer, there would no longer be the need for a guardian ad litem. This idea is not shared by everyone, others do see a special role for the guardian ad litem, either next or instead of a lawyer. We will discuss this further in chapter five.

4.3 Judges

Within the judicial profession, the legal figure or institution of the guardian ad litem is generally known. Whether this contributes to appointments will be discussed in chapter five. Regarding its familiarity among children, parents, lawyers and Kinder- en Jongerenrechtswinkels, judges indicate that this should be improved considerably. The information flow to these parties should be more effective, using, for instance, leaflets and social media. In addition, the legal notion or figure of the guardian ad litem should be distinguished more clearly from other parties in operating in the same field, such as the Bureau Jeugdzorg (child and youth care agency) and the Council for Child Protection; more clarity on this subject could be helpful in determining the need for a guardian ad litem or another professional. Furthermore, some judges believe that a guardian ad litem should also be appointed more frequently on the judge’s own initiative and request, because children often to not recognise such a need themselves. When asked why this does not happen more frequently they fail to give a clear answer.

On the other hand, the ‘need of a child’ for a guardian ad litem quite often is, in fact, the need of one of the parents, in order to add a partner to his or her side, or to have a lawyer, without the need to have an (expensive) lawyer and pay the (costly) lawyer’s fees. According to the judges the guardian ad litem is only an option when this is necessary with respect to the interests of the child and not as a tool serving the interests of the parent(s). The danger and fear that it is used wrongly and for the wrong reasons makes it more difficult to ascertain the necessity of a guardian ad litem.

When children need of a guardian ad litem, they can communicate this by way of a letter to the court. This is an informal access to court. Some courts register all letters, others do not. But the court will always respond when receiving a letter, either by inviting the children for an interview or by answering their letter in writing. The regular procedure in these matters differs between the courts and will depend on the individual case of the child. A letter will, in any case be considered as a possible expression of the needs of the child, which should therefore be taken seriously. The complaint uttered to the Ombudsman for Children that children never receive a reply to their letter, is not recognised by the judges. This may concern letters that never reach them and this is way they cannot say anything on the subject.

Various judges express their concern with respect to the fact that children sometimes go to court hearings with their own lawyer. Within the section of family and youth law a child cannot have a separate lawyer, except in out-of-home placements in a closed setting *(uithuisplaatsingen, gesloten setting*). In case a child needs legal assistance, a guardian ad litem must be appointed. The arrival of a lawyer who has not been appointed as a guardian ad litem gives rise to uncertain situations in a matter which is already rather stressful for the child. Some judges allow the presence of such a lawyer, although he or she does not have a formal role and responsibility in the proceedings or case, others will decide to appoint this lawyer as a guardian ad litem and then there are others who refuse to accept the presence of the lawyer to the closed (door) hearing.

On top of that, judges are expressing their concern in focus groups on the jungle of possible and impossible ways for children to give their opinion and to defend their own interests, using an informal or formal access to court, the guardian ad litem and at times no form of court access at all. What is or is not possible or permissible is often unclear to legal professionals, let alone for a child in need of defence (in court). Judges find this unacceptable. However, a general access to court is not automatically considered an immediate solution, every request of a child will, in that case, lead to new proceedings, while a legal solution is not always in the child's best interest. One judge suggested an intermediary option, an easily accessible service where children can get advice on all their (legal) questions and which may refer them to a court, whether or not accompanied by a guardian ad litem. This idea got a lot of support.

Judges do see an increase in the number of requests for a guardian ad litem, especially over the last six months. Whether or not this has anything to do with a growing need or rather with increased familiarity with this legal concept – possible as a result of the (announced) research study by the Ombudsman for Children – is not clear. One of the participating judges indicated too that he or she "was incited by the focus group to appoint a guardian ad litem more frequently, without such a request by one of the parties".

Regarding the question in which situations there may be a need for a guardian ad litem, the interviews with the judges show a very varied picture: parental authority and custody, visitation, primary residence, court supervision and guardianship, medical issues, education. As long as it has something to do with the care and responsibilities of parents for their children. It does show that visitation and parental authority and custody are seen as the most prevalent issues, in which a guardian ad litem may be of importance. At present no need is seen for the involvement of the guardian ad litem in the drawing up of ouderschapsplannen (contracts of divorcing parents regarding their parental responsibilities), without mentioning a clear reason for this. In a number of appointments no increase is observed since the introduction of the ouderschapsplan in 2009. This variety of situations is also reflected in the court decisions that have been received from the courts of Rotterdam, Amsterdam, The Hague and Leeuwarden.[40] In these decisions other problems were addressed that involved foster care and there was one case dealing with visitation rights of the grandparents.

[40] See on this subject, e.g. chapter five.

4.4 Youth Care Agencies

From the replies of the *Bureaus Jeugdzorg* (youth care agencies) to our questions it can be concluded that within the Bureaus Jeugdzorg there is no general familiarity with the legal concept of the guardian ad litem. The legal departments are usually informed on this subject, but the family guardians performing the court supervision in practice (*ondertoezichtstelling*), to a considerably lesser extent. Their experience is therefore very limited[41]. This does not imply that there is no need for a guardian ad litem.

In response to the research questions the Bureaus Jeugdzorg indicate different situations that may produce the need for a guardian ad litem, even next to a family guardian. This way, examples are given in which competence or tools of child and youth care are inadequate, the child should be able to start proceedings him or herself (such as in cases where parents approach journalists, put videos and information of children on the internet or do not meet their financial responsibilities regarding schooling and transport costs, e.g. for a bike), when parents and family guardians agree, but the child absolutely disagrees. It may also involve situations in which a child has a (slight) mental handicap and/or has difficulty forming his or her own opinion. Apart from that, situations could occur in which parents are no longer able to communicate the interests of their child in, for instance, (ugly) divorce cases or because they refuse the possibility of appeal out of principle, out of resistance against all actions of the family guardian or because they are, to the contrary, totally indifferent to the fate of the child. These situations were mentioned several times. Other, less frequent examples in which there may be a role for the guardian ad litem are: in case a parent and child disagree on educational or school choices, if the parent being with exclusive parental custody and authority rights dies or in case a child wants to have visitation arrangements with the grandparents.

Finally, various experiences have been mentioned in which parents or foster parents request a guardian ad litem. Those requests are hardly ever honoured because this really concerns a disturbed relation between the (foster) parents and child and youth care and the guardian ad litem was not meant for situations such as these. Different child and youth care organisations agree with this, but they also see situations in which a guardian ad litem can be or provide a solution, because the child is in a difficult position: through the struggle between parents and foster parents (and child and youth care) he or she is no longer capable of determining his or her wants and needs. This could come up in cases involving the question of a child's primary place of residence.

The need for a guardian ad litem arises in the situations described above because the guardian ad litem may take over certain tasks from the family guardian. The guardian ad litem has certain powers which a family guardian does not have. For instance, a guardian ad litem can prevent an unwanted or needless involvement of the family guardian in a divorce battle enabling the family guardian to perform the essential tasks belonging to a family guardianship. The guardian ad litem can also represent the interests of the child in case there is a conflict involving child and youth care as well or if this may be the case later on or if child and youth care is seen as partial by concerned parties. A Bureau Jeugdzorg mentioned the example of a family guardian being able to represent certain interests of the child but not all of them and this might well become the responsibility of the guardian ad litem.

Despite the fact that in responses to questions of the Ombudsman for Children situations may be indicated in which a guardian ad litem may serve a need, only very few requests come from the family guardians themselves. In some youth and child care organisations this has occurred several times over the last three years, but for some organisations their last experience with a guardian ad litem was years ago and most Bureaus Jeugdzorg mentioned just one case in the last three years. In situations where child and youth care asks for a guardian ad litem, this request is honoured in the majority of cases, but not always. This poses serious difficulties, because, as is indicated 'we do not ask for a guardian ad litem for nothing'.

[41] Formally, it concerns family guardianship staff, but we have adopted the most common terminology.

Finally, a number of Bureaus Jeugdzorg point out that sometimes lawyers present themselves who have not been appointed as a guardian ad litem. The manner in which lawyers have gotten involved in these cases, is often not clear en it seems to have originated with the lawyers of the parents. This development causes some concern among the Bureaus Jeugdzorg.

4.5 Analysis

Familiarity with the guardian ad litem

The most recognisable pattern in the previous sections is the lack of common familiarity with the legal figure and existence of the guardian ad litem and situations in which he or she might provide a solution. It is remarkable that parties may occasionally point to each other. The solution for this lack of general knowledge on this legal institution would be more publicity in the direction of children and parents, according to guardians ad litem and judges, and a greater focus on this topic in (post)educational programs of professionals. According to judges, there should be clearer boundaries between the guardian ad litem and other parties operating in the same field, such as Bureau Jeugdzorg and the Raad voor de Council for Child Protection, so that it becomes more apparent when a guardian ad litem might serve a particular need.

Next to that, professionals observe other problems for the children themselves. Judges indicate that it might be difficult for children to acknowledge when they might need a guardian ad litem and where they might go and that (the danger of) misuse by the parents of this legal option might make it more difficult for judges to get a clear picture of such a need. Guardians ad litem list a few practical difficulties such as the absence of the option to appeal a denial of a request for a guardian ad litem through the informal access to court and high barriers for the child. These difficulties seen by professionals are reflected in the stories of the children.

The need and demand for a guardian ad litem

Situations in which the need for a guardian ad litem can arise vary greatly. Visitation and parental authority in divorce cases are mentioned most often, but also court supervisions/family guardianships, out-of-home placements, education and medical situations are listed. Guardians ad litem are very rarely appointed in connection with ouderschapsplannen, this is confirmed by both guardians ad litem and judges. Guardians ad litem do see that they might have a role in this sense. In addition, there may be situations between a child and a family guardian in which there is a need for the appointment of a guardian ad litem. Finally, the guardians ad litem themselves added that also with foster parents and foster children there may be a need for a guardian ad litem,especially when foster parents disagree with the decision of youth and child care concerning the replacement with the parents. Youth and child care recognises this situation, in the sense that there were experiences with foster parents requesting for a guardian ad litem. Youth and child care can imagine that there may be situations in which the appointment can offer solutions. Yet this should be primarily done in cases in which the child is in a difficult situation, feels cornered or in which the foster parents feel that they are insufficiently heard.

The situations described above are not uncommon in the Netherlands. Based on the Kinderrechtenmonitor (Child rights monitor) of May 2012 from the Ombudsman for Children the following figures can be given over 2010[42]:

Schedule 2: number of situations in which a guardian ad litem could play a part

Number of divorces with minor children	19.628
Number of minors involved in divorces	32.678
Number of children/youths with a court supervision or care order	50.671
Number of current court supervisions/family guardianships on 31 December 2010	32.565
Number of court orders regarding custodial placement (authority) (*machtiging uhp)*	08.609
Number of extension of care (authority) orders	10.409
Number of minors involved in foster care	24.150
Number of children living with foster parents on 1 January 2010	15.206

Only in part of these cases will the child be in a difficult position and be in need of a guardian ad litem, but it does show that in a considerable number of situations a guardian ad litem might be necessary.

Apart from that, an interesting development can currently be observed regarding legal assistance from a lawyer. In Dutch family law, a child does not have the right his or her own lawyer, with the exception of a few situations such as a closed (setting) out-of-home (custodial) placement. The child is represented by the parents, who can engage a lawyer, and otherwise by a guardian ad litem. Among a group of guardians ad litem there seems to have developed a preference, in practice, to be appointed as a separate lawyer for the child instead of arranging to be appointed as guardians ad litem. One of the interviewed children had in fact both types of assistance. The Raad voor Rechtsbijstand (Legal Aid Board) also pays for the work done by such a lawyer. Child and youth care has witnessed this development with some concern. This practice also meets some resistance from judges, causing uncomfortable situations during court hearings. This seems to be a very undesirable development for the children concerned, but it might be the result of a need for representation or assistance when this is not provided for.

Informal court access

Finally, from the side of guardians ad litem it has been indicated that children use the informal access to court option insufficiently. This is an interesting remark in the light of what was presented in the interview with the judges, namely that letters from children are an important source in determining the needs of children. Should the informal access to court route be used more intensively, this could contribute to a clear picture among judges of the needs of children. In addition, the observation that the informal access to court route is used insufficiently might be in agreement with the concerns uttered from the side of the judiciary on the chaos of different court access options for children. These have become so varied and unconnected, that we can ask ourselves whether children really know their (informal) way to the courts or the guardian ad litem.

[42] See for more information on these figures and the comments made in the Kinderrechtenmonitor 2012.

I had a guardian ad litem when I was 13 years old. My mother wished to have a (legal) determination of fatherhood or parentage. I had never seen that guy before.
The guardian ad litem was requested by the lawyer of my mother. The guardian ad litem was a lawyer. The whole thing was rather upsetting. My mother told me that I should talk to this lady and that was it. I found it very difficult to answer all questions of the guardian ad litem and I did not really understand all that was going on. The guardian ad litem managed to win my trust and knew how to comfort me. That was really nice.
The guardian ad litem had written a report for the court. And she spoke during the hearing as my representative. I appreciated that a lot, because I did not have to say anything myself. It was already quite tough to see my father after all these years. I agreed with what was said by the guardian ad litem and I recognised my own words in her story.
Finally fatherhood was determined. After the decision I did not talk to the guardian ad litem again. She did not explain the decision to me and did not ask me how I felt about the whole thing. It was all a bit quick and impersonal. I experienced a certain distance. I would do that differently myself. A good guardian ad litem should show some concern, warmth, is doing the job with enough passion. And a good guardian ad litem should be a good listener and be able to discover whatever the child really wants: do I hear the voice of the child or rather the voice of the mother? The guardian ad litem must be able to determine what will be in the best interest of the child. And he or she does not use legal terminology.
With all this, the preparation for the guardian ad litem could have been better and the aftercare by the guardian ad litem could have been a little more personal. I would like to grade the guardian ad litem with a B, because I did find it very special that I had the chance to give my opinion through the guardian ad litem and this was done very well by the guardian ad litem.

5. The appointment of a guardian ad litem

"He came out of nowhere; it was a bit upsetting to me"

This chapter is dedicated to the appointment of a guardian ad litem in practice. Attention will be given to the situations in which there are clashing interests to the extent that a guardian ad litem is appointed or should be appointed. It will be discussed whether the age of the children is a factor in the appointment of a guardian ad litem, or rather the existence, or not, of a lawyer or family guardian for the child. Another interesting aspect is the relation between the views of the child and the (best) interests of the child. The question who may be appointed as a guardian ad litem and whether there is a general policy in this respect in the Netherlands will also be addressed. In our discussion of experiences and interests of the children, guardians ad litem, judges and Bureaus Jeugdzorg and in analysis of the different perspectives, all these issues will be covered. But prior to this we ask ourselves the following question: how often is a guardian ad litem appointed?

5.1 Facts and figures; research at four courts

Data

The feeling among judges, guardians ad litem and the Bureaus Jeugdzorg is that the guardian ad litem is not appointed on a very frequent basis. This matches findings in literature and the very small number of relevant published decisions in www.rechtspraak.nl. Clear figures or data on the appointment of guardians ad litem are missing however. When further enquiring with the Raad voor de Rechtspraak and the courts it appeared that this is not registered. From the systems that are used, it can, with some difficulty, be retrieved how many guardians ad litem are appointed in general, but this includes all types of guardians ad litem. Since guardians ad litem are frequently appointed in paternity cases and often on the initiative of the court, these figures are not in line with actual numbers and therefore they are not relevant.

The Kinder- en Jongerenrechtswinkel in Amsterdam is recording how often they help children in their request for a guardian ad litem and the number of times these requests are honoured. In 2011 they had filed such a request nine times, together with the children involved. Of this total of nine, three requests were honoured and six requests were denied.

In 2003 the Verwey-Jonker Institute had done an attempt in its research study to collect the data concerning the number of requests for a guardian ad litem.[43] The institute finally examined files at four courts: Rotterdam, The Hague, Amsterdam and Leeuwarden. This research pointed out that in a three year period (1999-2001) twenty such requests were submitted. In consultation with the Raad voor de Rechtspraak guardian ad litem appointment decisions from 2011 were collected from these four courts, for the purpose of this research study. The information that was sent shows that in 2011 there was a total of 29 cases concerning the appointment of a guardian ad litem.[44] Furthermore, a survey among guardians ad litem showed that these 29 professionals together were involved in 88 cases in which they were appointed as a guardian ad litem. When a distinction is made between the courts, for the purpose of both this study and the study of the Verwey-Jonker institute- and also the figures from the 2011 survey – the following overview is produced:

[43] Steketee, M.J., A.M. Overgaag and K.D. Linnemann, *Minderjarige als procespartij?*, Verwey-Jonker Instituut, February 2003, Kamerstukken II, 30145, no. 6.

[44] A total of 50 decisions were received, but they did not all relate to (a request for the) appointment of a guardian ad litem ex article 1:250 BW. This only involved 29 cases.

Schedule 3: meta-overview of guardian ad litem appointment requests from three sources

	Requests In court 2011[45]	Appointments in court 2011[46]	Requests in court 1999-2001[47]	Number of cases in which survey respondents appeared as a guardian ad litem			
				2009	**2010**	**2011**	**total[48]**
Rotterdam	1	1	unknown				
Den Haag	24	11	5				
Amsterdam	1	0	10				
L-warden	3	3	5				
Total	**29**	**15**	**20**	**40**	**43**	**88**	**182**

From this limited set of data no definite conclusions can be drawn. In the Verwey-Jonker research mention is made of cases in which a guardian ad litem was *requested.* It is not clear whether appointments on the request of the court itself have been included in these figures. Furthermore, several participants of the vFAS conference in April 2012 with guardians ad litem from the court districts of Rotterdam and Dordrecht said that they themselves had requested a guardian ad litem in 2011, and this is not consistent with the data obtained through the Rotterdam court (namely just one case in 2011). However, these figures do show that at these courts there certainly have been more cases concerning the appointment of a guardian ad litem in one year (2011) than in the whole 1999-2001 period. This alone could be an indication for a slight increase. The 88 reported cases in the survey that there is at least a slight increase in the use of this legal tool. On the other hand, the total number of (reported) cases remains small, in any case this is true for the courts of Amsterdam, Rotterdam and Leeuwarden. In addition, these figures reflect considerable differences between these four courts.

When examining these figures, an additional comment should be made. On the basis of the interviews with guardians ad litem and judges the following can be concluded. Guardians ad litem are generally much more frequently appointed on the court's own initiative, on the basis of article 1:212 BW: in those cases they are defending a child in paternity cases. As soon as paternity or fatherhood is determined, questions concerning visitation and to a lesser extent on the child's primary residence often come up. It happens that an ex 1: 212 BW appointed guardian ad litem subsequently gives legal advice on these aspects too, while they really fall outside of the scope of article 1: 212 BW, but are covered, instead, by article 1: 250 BW. It is not clear how often this occurs, but since its existence has been reported by different parties, this is an indication that these cases are not very exceptional. This could affect the value of the figures and experiences with respect to 1: 250 BW appointments that have been provided, to some extent.

Rulings

An analysis of the 29 court decisions shows that there was not a single case in which a guardian ad litem is requested on the child's own initiative. There have been seven cases in which a child did such a request by way of an informal court access option, such as in cases regarding changes to a visitation arrangement, and in which the court then decided to appoint a guardian ad litem on its own initiative. In such a case the assignment to the guardian ad litem will be: 'to investigate whether the dispute can be solved out of court or whether the request will be uphold, in which case the guardian ad litem will be able to submit the request on behalf of the minor'. In two cases, the children involved were under twelve, in the remaining cases they were older than twelve. The performed analysis furthermore shows that appointments of a guardian ad litem on the initiative of the court are the most common, with the remark that this can also take place as the result of an informal access to court option. A total of ten out of fifteen appointments had been on the court's own initiative. In addition, in four instances there was an a guardian ad litem appointment at the request of a lawyer (who was to appointed to be the guardian ad litem in all these cases)

[45] Reported by the courts to the Ombudsman for Children.
[46] Reported by the courts to Ombudsman for Children.
[47] Steketee et al (2003).
[48] One guardian ad litem indicated that he had 11 cases in the period 2009-2011 without distinguishing between years.

and once at the request of the foster parents. With the appointment a referral to a situation ex article 1: 250 BW is always made, but this is not always explained. In one case the parents had, in fact, drafted a visitation arrangement, but then the judge wondered whether this arrangement and its realisation would be in the best interest of the children. In another situation it is described that there initially was a conflict between the parents, but that this was having deeply affecting the children. In a third case mother and child were on opposite sides regarding a custodial care order. In each case in which the parents requested the appointment of a guardian ad litem (seven instances), their request was denied. Apart from that, three requests by a lawyer and three foster parent requests were also denied.

Reasons for not appointing a guardian ad litem, according to the court decisions, are the age of the child (old enough to give his or her own views), the fact that de Council for Child Protection and/or a family guardian is already involved, the absence of a conflict between the child and the parents but rather between both parents, the family guardian had promised to arrange a confidential advisor exclusively operating on behalf of the child, possible procedural delays as a result of such an appointment, and that it would be undesirable to force another expert on a child who is not in favour of getting a guardian ad litem. In the case of foster parents it was generally indicated that it did not concern a dispute between the child and the parent, but rather a dispute between parent and child on one side and the foster parents on the other. It was reported that this is not the purpose of the guardian ad litem. In one of the requests the lawyer requested simultaneously the appointment of himself as a lawyer in relation to a closed custodial care order and the appointment of himself as a guardian ad litem for all out- of-court activities. The court did not agree with this.

The age of the involved children varied between pre-birth (a guardian ad litem was appointed for an unborn child) up to seventeen years of age. However, the majority of children was ten years or older. In six of the court decisions the age of the child was, in fact, anonymised.

A consistent pattern cannot be observed regarding the situations in which a request for an appointment of a guardian ad litem is honoured or denied or when there is such an appointment on the court's own initiative.

5.2 Children

The four children who were interviewed were all older than twelve. In two cases a lawyer of one of the parents requested a guardian ad litem for or on behalf of the children. One of them described this as follows: "He came out of nowhere". In two other cases the children submitted their wish to the judge through an informal court access route and the court decided then to appoint a guardian ad litem on its own initiative. This appointment was a complete surprise to the children; they wanted to tell their stories to the judge and they got a guardian ad litem. They did find the interview with the judge very pleasant and they believed that the judge had listened very well to their story. One child was in the extraordinary situation of having both a guardian ad litem and a lawyer. For her, the advantage of having her own lawyer was that she had been able to choose this lawyer herself and had not just been confronted with one, like in case of the guardian ad litem. "You never know for sure whether things work out and if it suits you", said one child.

5.3 Guardians ad litem

Number of appointments

As has been discussed above, those guardians ad litem participating in the survey were appointed a total of 88 times in the past three years. Most of them were only appointed only once or a just a few times per year. This is in line with the picture that they are appointed rather infrequently. The survey and the outcome of the vFAS conference further show that no great increase in appointments has occurred since the introduction of the ouderschapsplan in 2009, not for these plans nor in general.

The list with noted problems surrounding the appointment indicates that there are three issues that are essential in that respect. These are: a too strict interpretation of clashing interests of the court, hearing the child by the court and the absence of a nationwide appointment policy.

Clashing interests criterion

Guardians ad litem find it problematic that judges may give too strict an interpretation of the requirement 'clash of interests between child and parent'. Also many 'own' weaknesses surrounding the guardian ad litem observed by the guardians ad litem themselves can be classified under this heading**.** During the vFAS conference it was noted that the key issue is or should be whether the child is caught in a conflict between the child and one or two parents. This can also be true when the child is only experiencing a conflict with (just) one of the parents with parental custody or authority. The age of child can be of importance in these matters; in case of a younger child, you could argue that the parent who is not opposing the child should assist the child in these cases. With an older child, a guardian ad litem will be necessary, because the child experiences the conflict and feels caught between his or her parents. In addition, judges would give too much priority to the rights of parents and would not easily assume that between a parent and a child there may be a clash of interests. It is not surprising therefore, that requests for a guardian ad litem often result in a court supervision order instead of an appointment. Finally, in this context it is interesting that at times there may be no conflict of views between the parents and the child but with the family guardian or the foster parent(s) instead. According to some guardians ad litem, the appointment of a guardian ad litem should also be an option in these matters.

Hearing of a child by the courts

Another problem experienced by kinderrechters (juvenile court judges) is that if they are allowed to hear them themselves (starting at twelve or younger if the children are considered mature enough), judges are inclined to think that the guardian ad litem will not contribute anything positive. Guardians ad litem however, say that hearing a child is a something that requires special training and that judges are not always capable of this. Judges would possess too little psychological developmental knowledge. And the court hearing setting also causes extra tension for the children - such as the trip to the court, long waiting times, sometimes in the presence of their parents and then the need to tell your story to someone dressed up like a penguin – causing their story to be told less convincingly than was intended. Added to that, judges often hear a child only once, while the situation may change for the child in the meantime and while this one hearing may have an enormous impact on the case.

Generally children are called up to appear for a court hearing when they are twelve years or older (article 809 Rv/Dutch code of civil procedure). With respect to this age barrier two propositions have been presented: "for children under twelve there should always be appointed a guardian ad litem" and "for children older than twelve there should always be an appointed guardian ad litem" The responses of the guardians ad litem give a mixed picture and vary with respect to both propositions from totally agreeing to totally not agreeing. One guardian ad litem made the explanatory comment that all children who are caught in a conflict with their parent(s) deserve the help of a guardian ad litem, irrespective of their age. Another guardian ad litem indicated that children aged twelve and older will take too much responsibility for the proceedings and that for them a guardian ad litem is more appropriate, for that reason. At the vFAS conference the proposition was presented that children older than twelve can give their opinion themselves and will not need a guardian ad litem. All those present disagreed with this thesis.

The absence of a national appointment policy

A final important bottleneck that was identified on the basis of the presented list concerned the absence of a national policy framework to be used by judges. There is nothing like a protocol for the appointment of a guardian ad litem.

Other difficult aspects

The guardians ad litem themselves have also stressed the importance of certain points. First of all, mention was made of the fact that judges feel uneasy about appointing a psychologist or pedagogue as a guardian ad litem instead of a lawyer. On the other hand, guardians ad litem believe that family members should not be appointed. The guardian ad litem should, in fact, be independent, objective and impartial regarding the situation of the child. This is not always the case with family members. Secondly, the guardian ad litem is a professional, an expert, experienced as an advocate. He can provide the child with insight into the situation and will for that reason be accepted more easily by the child. Furthermore, it has been reported that some judges do appoint the guardian ad litem, but only for formal reasons. They do not attach much importance to the position or the advice of the guardian ad litem, and will sometimes pass the guardian ad litem during court hearings. The last point that is mentioned is that when a lawyer already acquainted with the child, asks for an appointment or when (foster) parents themselves suggest someone for this post, this request is often ignored. The reasoning of the court would then be that this person may not be impartial.

Added value next to other parties

Finally it is noted by guardians ad litem that judges are inclined to think that a guardian ad litem has no added value compared to a family guardian or a lawyer. Guardians ad litem do recognise that they are of additional importance when compared to a family guardian. With the proposition “A guardian ad litem has no added value when there is a family guardian”, participants either agreed totally or not at all. During the vFAS conference the picture that resulted from the survey was confirmed: a guardian ad litem can function, to the contrary, very well next to a family guardian. Arguments in favour of this opinion are that family guardians often interpret the (best) interests of a child in their own way and there may be a struggle for power between the family guardian and the parents. At times, the family guardians themselves will ask for a guardian ad litem, for instance when they fail to find a solution, like in ugly divorce situations. It was also noted that the Council for Child Protection departs from a conflict evasion strategy, in which the Council often believes it better to temporarily freeze visitation contacts with the other parent to prevent the development of a loyalty problem with the child. In that case a guardian ad litem can then ascertain what the child wants and what is in the best interest of the child. Finally there can- as was mentioned before – sometimes be a conflict between the child and the family guardian and in those cases a guardian ad litem could be appointed.

What is true for the guardian ad litem, next to a family guardian, is also true for a guardian next to or in the place of a lawyer. The majority of guardians ad litem disagreed or disagreed enormously with the opinion “If every child would get a lawyer, a guardian ad litem would not be necessary”. And with the idea: “Representing the interests of a child is not the same as listening to the opinions of the child. Therefore, a guardian ad litem always is valuable, compared to a lawyer” most agreed or agreed to a great extent. At the vFAS conference the proposition was presented, subsequently: “A lawyer will follow the views of the child, a guardian ad litem the (best) interests of the child”. All those present disagreed; this proposition would not do justice to lawyers, because a good lawyer (and also a good guardian ad litem) will focus on both aspects. A good lawyer or guardian ad litem knows the views of the child, but if he has another opinion than the child on his or her best interest, he should be able to explain this in a comprehensible manner. Then children will accept this, is shown by experience. One of the guardians ad litem mentioned an importance difference between a lawyer and a guardian ad litem, the responsibility of a guardian ad litem is greater, because the child cannot change guardians ad litem, but it can look for another lawyer, if the advice of the lawyer does not suit him.

Possible solutions

Considering the above, the requirement 'clash of interests' is applied too strictly on one hand, according guardians ad litem, and on the other hand judges see too little added value in the guardian ad litem next to a family guardian and/or a lawyer or the option of hearing the child by the court. Guardians ad litem do recognise their special importance and worth, especially because judges do not have the skills nor the time to arrange an effective hearing of the child and the fact that their interests can, at times, be insufficiently protected by the Bureaus Jeugdzorg. With a foster care placement as well, there may be a role for the guardian ad litem. Age does not seem to be an important factor with respect to the question whether a guardian ad litem is needed; with older children as well, a guardian ad litem can be a valuable addition.

A solution presented for the problems that were identified is the adoption of the following starting point: "appoint unless". Conflicts with family guardians should also be a reason for an appointment of a guardian ad litem. Exceptions to this principle could be an evident 'improper use' or when an appointment would present an inacceptable delay in the proceedings. As an alternative solution it has been suggested that judges should have extra training with regard to knowledge and skills on child contacts, but also regarding situations calling for the appointment of a guardian ad litem. Model guidelines could be set up assisting judges in their decision on an appointment. Judges should also receive professional training on the possibility of appointing a psychologist or a pedagogue as a guardian ad litem. These kinds of cases could all be included in a protocol. Its absence was, therefore, seen as an essential problem.

5.4 Judges

Clash of interests criterion

The appointment by the court often takes place at the request of an interested or concerned party or on the court's own initiative. In chapter four it was shown that requests may be a hidden request for the representation of the interests of the father or the mother and that there may not be any clash of interests between the parent(s) and the child. Interviews with the judges have shown that this may cause a reserved attitude in dealing with these requests. One of the judges did comment: "The best appointments are usually those that are done on the initiative of the court". This opinion was shared by others. Apart from that, judges realise that a guardian ad litem is appointed only rarely. This is caused by a great number of factors, but what is generally reflected is: there is a general unfamiliarity with this legal figure, contributing to its unpopularity.

In which situations may there be a clash of interests appropriate for the appointment of a guardian ad litem, whether or not this is done at the request of the court or that of an interested or concerned party? The interviews with the judges show that the requirement of 1: 250 BW is rather strict and that is should be interpreted strictly according to the Dutch Supreme Court, but that judges believe that it should not be dealt with too strictly, in practice. The best interests of the child should be given priority, also in case of the application of the article 1:250 BW requirement. Within a focus group it has been discussed that it should not have to concern a conflict in all cases, but that the key question is whether a child finds him or herself in a difficult position, if it is stuck in the middle (*klem zit*). If that is the case and when it concerns a concrete issue which needs to be decided, then a guardian ad litem should be appointed. Elsewhere, the following addition was made: a guardian ad litem can be appointed in case of conflicting interests without there being a real conflict. In another focus group it was mentioned that a guardian ad litem can also be used to investigate whether there are any frictions and the factual situation and life of the child. This could also be done when both parents agree. Further it was mentioned that a guardian ad litem can be appointed to protect the child from being involved in a legal battle. In doing so, a guardian ad litem can hear a child several times in an out-of-court setting, without the need to report anything to the parents, being able to communicate the opinion of the child without there being a direct link with the opinion of this particular child. The judge, on the other hand, will only hear a child only once during a juvenile hearing session or during a regular sessions and will have to summarise the contents in an effective manner towards the parents.

The focus groups reflected that this must ultimately involve a conflict concerning the child or affecting the child: a guardian ad litem is not just meant for conflicts between parents. Judges agree that there needs to be no conflict with both parents; a guardian ad litem can also be appointed in case of a conflict with just one parent. On the other hand it was reported in one of the three focus groups that the appointment of a guardian ad litem should not take place too easily, in case of a conflict, it may have an adverse effect and care should be taken not to have a too legal and limited view of the position of the child in that situation.

Finally it was put forward that at times guardians ad litem are appointed when a child has a conflict with a family guardian. Judges realise that the law does not provide for this situation, in a formal sense, but they do consider this to be in the best interest of the child, at times. Other judges are more careful in this respect; not particularly because of legal restraints but primarily not to offend *Bureau Jeugdzorg*. An appointment of a guardian ad litem next to a family guardian could soon be seen as an expression of distrust.

Age limit

For the appointment of a guardian ad litem the age of the child is not important, in itself, as can be concluded from the interviews with the judges. But reality is more complicated than that. At one court a guardian ad litem is not appointed in principle if the child is twelve or older, because the child will be able to formulate his or her own opinion. At another court, to the contrary, this is done, because giving an opinion is not the same as being able to defend your own interests. Among children under twelve the guardian ad litem represents both the views as well as the interests of the child. Other judges let the appointment depend on the oral skills and the maturity of the child and then there are others who do appoint a guardian ad litem and assume that the guardian ad litem will adjust the nature of his activities to the oral capacities and maturity of the child. The role of the guardian ad litem will then change with the age of the child, in practice. In two focus groups it was suggested that the age limit of twelve should not be regarded too strictly. Children of eleven or ten may also be very capable of expressing their own opinion. This age limit could be lowered or there should be a maturity instead of an age requirement. Apart from that, it was remarked that children of twelve and older should get more opportunities themselves through formal and informal access to court options and that this would mean that an appointment of a guardian ad litem would not only be an additional or complementary option. There seems to be a general feeling that with younger children, the guardian ad litem will be more important, because the child cannot at all express or communicate his or her wishes, wants and best interests, making such an appointment a more natural and logical step to take.

The added value de guardian ad litem lies in the fact that he can weigh the interests of the child and communicate them to other parties, before anything else. `He is more than the voice of the child`. This is also a crucial difference, when compared to a lawyer, although some judges indicate that good juvenile law lawyers also include the interests and not just the voice of the child. However, children´s lawyers do not enjoy a high status in family law and therefore they are not allowed to say or do anything unless they have been appointed as a guardian ad litem.

Hearing a child

The judge can hear the child him or herself, in order to get to know the child´s views. Judges are trained to do this, but it has been said that this training really is not adequate. Furthermore, there is too little time and the previously stated argument that judges should give a relevant, brief legal summary of the hearing, informing the parents may lead to uncomfortable situations and a moral dilemma for the judges in question. Apart from that, children and parents should be better informed regarding the fact that being heard does not imply that their stories will be considered conclusive and true, that their requests will be honoured. And that children have the right to give their opinion, not the duty to do so, therefore they may choose not to come to the hearing.

Individuals who may be appointed

There are differences between various Dutch courts regarding the question who can be appointed as a guardian ad litem. In most courts there are lists with names, but only in some courts these lists include forensic mediators, pedagogues and psychologists. In addition, some courts work through the entire list, top to bottom, without making distinctions between those included and in some courts guardians ad litem are selected according to their suitability for the specific case at hand. More than once, concern was expressed on the absence of a national protocol regarding appointment criteria and minimal requirements and quality standards for the guardian ad litem. The absence of quality standards and requirements may result in a preference for the Council for Child Protection guaranteeing certain minimum quality standards, instead of for a (unknown) guardian ad litem. The Council also examines deeper causes and parties are more or less forced to cooperate with such an investigation. The Council has an added value expecially in court districts where no guardians ad litem with a pedagogical or psychological background are available. But on the other hand it is true that the guardian ad litem, contrary to the Bureau Jeugdzorg and the Council for Child Protection, is not tied to specific frameworks and protocols determining the format of these reports. This way, they can acquire a helicopter view, regard the child in a direct and pure light, are not bothered by waiting lists, so it can be prevented that the child gets stuck in the machinery of youth care (without good reason) if such a form of care was not involved before. For that reason, the task description of the guardian ad litem is usually worded rather broadly, so that the guardian ad litem can do what is required under the circumstances. The Council and the family guardian, on the other hand, regard the child in a rather specific, professional or therapeutic perspective, while the guardian ad litem takes a broader view of the case, according to the judges. With respect to family members operating as a guardian ad litem, this was not excluded, but only one example was produced by the focus groups in which an uncle was appointed as a guardian ad litem, in a conflict concerning education.

Appointment procedure

Besides the grounds for appointing a guardian ad litem, the decision making process and the procedures taken may also differ between the courts. Some judges always prefer hearing the child first if age and capacities make this at all possible. Other judges decide to such an appointment without hearing the child. And there are others who also hear the parents first before deciding. In order to increase the uniformity in appointment decisions, the court of Haarlem had formulated its own policy in this respect. The court of Alkmaar has indicated the intention to follow this example, and in Rotterdam as well, efforts are done to come to a court policy on this matter.

Possible solutions

With regard to these problematic aspects and issues that need our attention, judges have a number of suggestions for improvement of this situation. The legal notion of the guardian ad litem is a necessary option and tool which should be used more often. The view that a general access to court does not bring a solution in all cases is broadly shared: it may lead to all kinds of proceedings that are not as much in the best interests of the children involved but most of all in those of their parents. The task description formulated by the judge for the guardian ad litem could be improved, in order to make a clear distinction between these tasks and those of other related professionals in the field and to make the guardian ad litem accountable as well. Also, the period of time for which the guardian ad litem is appointed, with a clear end date of his responsibilities and tasks could be indicated in greater detail. On the other hand there still is a preference for giving the guardian ad litem enough space, so that the interests of the child can be best defended and protected.
Apart from the guardian ad litem, it has been put forward that the age limit of twelve should be abolished in order to genuinely do justice to the rights and (best) interests of children.According to the judges the requirement should be the maturity of the child. In connection to this, there should be a discussion regarding the question on the extent to which a child can express him or herself freely during a court hearing and which parts should be included in the summarised version given to the

parents. If this freedom of expression is too much restricted or if the duty to summarise and report to the parents is becoming too heavy and strict, this might produce additional responsibilities for the guardian ad litem.

5.5 Bureaus Jeugdzorg

Clash or conflict of interests criterion

As was shown in chapter four, Bureau Jeugdzorg may feel a need for a guardian ad litem, next to a family guardian. The guardian ad litem can prevent the family guardian from getting too much engaged in proceedings or conflicts or represent the interests of the child in case of a conflict involving Bureau Jeugdzorg. A guardian ad litem can also represent an added value in those cases, but the Bureau staff is not always of fully aware that these options exist. But a clear demarcation between the tasks of the guardian ad litem and those of the family guardian is needed and juvenile court judges may have a role to play in this respect. The judge could include the task in the appointment decision.

Individuals who may be appointed

With respect to the background of the guardian ad litem, it has been remarked that it should depend on the situation for which he or she is appointed; if it concerns a legal representation, in court, and visitation arrangements, the appointment of a lawyer would be most logical, but if it concerns questions or advice on the development of the child, the placement in foster care etc., a pedagogue or psychologist might be better, because these professionals will have more insight into the perception and development of the child. Still, with the appointment of a lawyer a few critical comments can be made. When this professional operates as a guardian ad litem, he or she must have another mindset than when at work as a lawyer. At times, children are more in need of a legal representative in court and then you automatically end up with a lawyer, but a guardian ad litem must be focused on the interests of the child and not on 'winning' the case. Appointments of family members are not encouraged: this can cause tension in family relationships or it may influence the child. This will generally not benefit the minor. There is a clear preference for a neutral and independent professional. There is some experience with situations in which parents themselves suggest someone for the position of guardian ad litem. This is not always followed by the court or it will appoint someone else if the parents fail to agree on this matter.

5.6 Analysis

Number of appointments

The legal concept of the guardian ad litem is a conscious choice of the legislator to guarantee the access to court to children. In practice, however, there is no registration and administration regarding this legal figure and that any data that are produced are not reliable. Without reliable figures, the use of the guardian ad litem cannot be properly monitored, neither can the legislator give a founded opinion on the adequacy of this particular legal option. The general feeling among guardians ad litem and judges is that the guardian ad litem is not used very often. This is reflected in the figures, to the extent that they were received from the four participating courts.

Clash of interests criterion

An appointment is possible in a reel and concrete conflict in which there are opposing interests. According to the guardians ad litem this criterion is applied too strictly and therefore many situations asking for the appointment of a guardian ad litem are not considered as a situation to which 1: 250 BW is applicable. Judges also indicate that it is a strict criterion, but that it is not treated as such in practice. To what degree they are dealing with this criterion in a more flexible or less strict way does not become entirely clear.

When the reasons for appointing, or decisions not to do so, are examined, there seems to be a very mixed picture, at first sight, resulting from the stories of the children, the surveys and the focus groups.

The same is true for the information received from Bureau Jeugdzorg. Among the children involved their most essential need seems to be expressing their own views, because they feel not heard. Guardians ad litem, judges and youth and child care are giving a variety of arguments for determining whether or not there is a clash of interests and whether or not an appointment could take place.

A further analysis shows that an indication for an appointment may be, according to judges, that a child might be in a tough position, between conflicting interests, or that there is such a possibility. This is more or less matching the view of guardians ad litem to appoint not only when there is a conflict or dispute, but mainly when I child gets caught in the middle between his or her parents (and/or youth and child care). The guardians ad litem take this much further and would like to see an "appointment unless". From the side of youth care as well, it is indicated that the crucial question to be answered is whether a child is caught in the middle. With respect to all these perspectives, a large number of comments and conditional statements have been made (a too legalistic approach of the situation, improper use of this option, delaying factors, parents should solve their own child's problems), but in the end, there seems to be a general idea that it should concern interests of the child that are threatened or (negatively) affected. This can also be the case when there is no real conflict but rather a conflict of interest, or a dispute between the parents affecting the child or that *prevents* the parents from representing and defending the interests of the child appropriately and adequately. This is a rather broad interpretation of article 1: 250 BW and it may even be broader than is permitted through the wording of the article.

Finally there seems to be more or less general agreement with respect to conflicts between the child and one parent, both parents having shared parental custody, and on conflicts between the child and youth care. By the guardians ad litem, and also by various judges and different youth and child care organisations, it has been indicated that one of these conflicts can constitute a reason for the appointment of a guardian ad litem, in certain cases. In as much this concerns conflicts between a child and a family guardian this was briefly discussed in chapter four. Judges with objections to this, will do so, in some cases, primarily because they do not want to offend youth care agencies. There is no formal basis for such an appointment, since the text of the article does not include family guardians, but it evidently does fulfill a need.

Hearing of a child

Judges believe that they could perfectly manage to hear the children themselves, but the guardians ad litem clearly do not share their opinion on this matter. They indicate that judges lack the pedagogical and developmental-psychological knowledge, experience and skills and they lack the time for this during the court hearing. These points of concern were also mentioned by judges, but only as points of improvement. In addition, some judges mentioned that they had difficulty with their obligation to provide the parents with a neutral and factual summary of the child (juvenile) hearing afterwards. Two children who were interviewed were first heard by the judge before the appointment of the guardian ad litem: they both referred to the interview as a nice talk and felt that they were really listened to.

Age limit

Both judges and the guardians ad litem believe that the age limit of twelve for the hearing of a child should not be applied too strictly or that it should, in fact, be replaced by the 'maturity' criterion. Opinions differ with regard to the question whether the age of a child matters for the appointment of a guardian ad litem. Some judges and guardians, judges believe that they will be able to hear them themselves, while guardians ad litem believe that these older children should have their own lawyer. Others think, to the contrary, that a guardian ad litem would represent an added value for children aged twelve and older, because in that case the children can very well express their own opinion while the guardian ad litem can represent and defend their interests. The filling in of the role of the guardian ad litem, therefore, seems to change with the age and maturity of the child. With a younger child it will be

mostly an advisory role and with a more advanced age and maturity of the child this will move in the direction of mediation and procedural activities, such as starting proceedings. The extent to which a guardian ad litem is determinative, can then be less pronounced.

Child's interests and views

By judges as well as guardians ad litem a clear distinction is made between the interests of the child and the child's own opinion. The child can give his or her own opinion, depending on age and maturity, and the juvenile judge can therefore carry out the hearing of the child himself. Judges and guardians ad litem mutually and within their own group disagree on the question whether children aged twelve and older can defend their own interests and whether there still may be a role left for the guardian ad litem in this respect. The majority of guardians ad litem believe that there is such a role, although some argue for the engagement of a lawyer, as was mentioned in chapter four. The explanation of that role given by guardians ad litem strongly resembles the role of the guardian ad litem, with the difference that the lawyer can be freely chosen while the guardian ad litem can only be appointed by the court. Among the judges there are a few supporters of the use of a guardian ad litem for children older than twelve, but there are others who do not believe he can make a positive contribution.

Those responsible for appointments

Judges, guardians ad litem and the Bureau Jeugdzorg are not in favour of appointing a family member for the post of guardian ad litem. A neutral and professional party is preferred by everyone. A lawyer in case of legal questions and possible legal proceedings and in other cases behavioural scientists such as pedagogues or psychologists. This is interesting, because on some court lists there appears to be an absence of pedagogues and psychologists; they are limited to the appointment of lawyers – or they opt for the Council for Child Protection instead of a guardian ad litem. Apart from that, concern has been expressed by both the judiciary and Bureau Jeugdzorg regarding the appointment of lawyers as guardians ad litem: judges want to prevent a too limited legalistic perspective becoming dominant, and Bureau Jeugdzorg indicates that a lawyer performing the tasks of a guardian ad litem should be focused on other things than on 'winning' a case. Judges have reported that only a guardian ad litem can participate in a court hearing, this is not the case for a lawyer engaged by the child, unless he or she is appointed as a guardian ad litem.

Whoever is appointed is a delicate matter: a child cannot decide to take another guardian ad litem and this results in a great responsibility, as is confirmed by a guardian ad litem. This contrasts sharply with the fact that come courts simply work through a list, without an individualised approach or selection process. Furthermore, in case parents or lawyers come up with a name of guardian ad litem, this is not always followed by the court. This has been observed by both the guardians ad litem and Bureau Jeugdzorg. The reason for this could be that these parties are considered partial, also because it is not always clear which party took the initiative or made the choice for the professional in question. Guardians ad litem, however, note that the suggested lawyer might already have a relationship of trust with the child.

Appointment and guardian ad litem protocols

The interviews with judges reflect great differences within the Netherlands in the manner, approach and appointment of guardians ad litem. There is also uncertainty regarding the content and end of the assignment of the guardian ad litem. The absence of an appointment protocol is seen as a problem, but it is now being tackled at a lower, local level. But with respect to the capacities and skills of guardians ad litem a protocol would be desirable; the absence of such a protocol will cause some judges to prefer the Council for Child Protection, because this will ensure that certain quality standards are set.

My parents were divorced when I was 4 years old. Afterwards, I lived with my mother for several years. A few years ago the court decided that I should go and live with my father. I did not agree with this..
I wanted my own lawyer. Through my mother's lawyer I heard of the guardian ad litem. I had not heard about this before. The lawyer of my mother requested a guardian ad litem for me and the court arranged an appointment. This was a year and a half ago. I was fifteen then. .
The guardian ad litem did not repeat and argue exactly what I wanted. Therefore I asked her why I could not have my own lawyer. She did not object to this, also because she represented my interests and a lawyer my views. She gave me a few names. I then contacted someone I found sympathetic. And this lawyer agreed to do my case.
It was rather pleasant to have both of them. The guardian ad litem has to keep an eye on the interests of the child and may disagree with the child. You have to be more careful when expressing your opinion. The guardian ad litem is more neutral. This guardian ad litem supported mediation and stressed the need for contact with my father, but I did not want this. But I did manage to tell her my entire story. She was kind, open, and explained all the options and the proceedings very well, while we were having a cup of hot chocolate. A lawyer will express the opinion of the child and say what the child wants. A good lawyer will only argue in favour of the child. With this lawyer I could talk more freely and think out a strategy together, such as the options we were having and their consequences regarding the goals to be attained, strategic remarks to make.. It is better not to say: "I do not want to see my father ever again", but rather "At this moment I do not feel the need to see my father. I do not know things will be in the future." The guardian ad litem also spoke to the family guardian, the Council for Child Protection and at times with my parents as well. I did not always like this. The lawyer did not do this and when she planned to talk to someone, she would always inform me beforehand. On top of that, you can choose your own lawyer and change lawyers if your lawyer is not good enough, but a guardian ad litem is someone you simply get and you are stuck with him or her. It was nice to have both a lawyer and a guardian ad litem. Each had their own duties and responsibilities. And I could always call someone whenever I had any questions.

The guardian ad litem wrote a letter to the judge, advising the court. I did not read this letter. The guardian ad litem also accompanied me to the hearing to give advice and to respond to the statements made by others. The lawyer forwarded my letters to the court and made written pleadings. She involved me in the preparations of the oral pleadings and showed me the written version beforehand..
At the last court hearing it was decided that I could live with my mother. This was what I wanted. Since that court hearing I have not had any contact with the guardian ad litem. Afterwards, we did discuss the hearing once by phone, to round things up. This was OK, more or less, but it would have been nice if we would have had another real meeting together.
I would grade the guardian ad litem with a B plus or A, the lawyer gets an A plus. A good guardian ad litem is someone you can trust right away and will represent your interests, but I rather have my own lawyer because he is there just for media would want every child to have a separate lawyer or a guardian ad litem or both, also in visitation cases.

6. The performance of tasks by the guardian ad litem

"While we were having a cup of hot chocolate"

After the request for a guardian ad litem is made and after his concrete appointment, the guardian ad litem goes to work. In this chapter we will focus on his performance of this task. In doing so, we will discuss how children felt about his performance, what went well and what could be improved. Next to that, we are addressing the question whether the primary task of the guardian ad litem consists of consultation, mediation or litigation, the situation concerning quality (standards) and schooling of guardians ad litem, supervision of the guardian ad litem and the financing or funding of their activities. After describing the experiences and interests of children, guardians ad litem, judges and youth care agencies, we will conclude by giving an analysis of the matter.

6.1 Children

The experiences of children with guardians ad litem are very varied. Because the children we interviewed were able to express their experiences so beautifully and have clearly indicated what they believed to be positive and not so positive, their experiences have been described quite extensively below. All their stories have been fully included elsewhere in this report.

One child told us:

> "The guardian ad litem gained my confidence and comforted me. She spoke with me a few times and made a report. At the hearing she spoke on my behalf: I had the chance to say something myself, but I chose to let the guardian ad litem tell my story. I agreed with what she said and I recognised my own words or thoughts in her report. What I did not like so much was that I was badly prepared for what a guardian ad litem really is and does. She could have showed a bit more concern. After the court hearing she did not explain the decision to me nor did she ask me how I thought about the hearing. It was all a bit impersonal and factual and I would do that differently. I grade her with a B."

Another child told us:

> "The guardian ad litem listened very well to me, she was welcoming, kind and explained everything very well, while we were having a cup of hot chocolate. I could always call her and ask her questions. Every time something was planned, we had a conversation. She wrote a letter to the court. I also saw her written advice. At the hearing she explained her report and responded to what others said. We have not seen each other since the hearing nor did we have a final talk, but we have talked on the phone once afterwards. I regretted this a bit, but I can always call her should something come up. What I did not like so much was that she was repeatedly saying that mediation and such were very important, but I did not wanted this. She also contacted others and my parents for information. I did not like that. And you cannot choose your own guardian ad litem. Luckily I had a good one, but if you do not, you are stuck with it. I grade her with a B plus or A minus, because in the end she will not stick to my views and she did not always express my own opinions and wishes."

A third child told us:

> "I was not happy with my guardian ad litem. He was a posh guy with very smart clothes. I went to see him at his office. I did not like him and I did not trust him. If he had liked soccer, then we could have had something to talk about. I only spoke him twice. The first time he told me what would happen. He asked me all kinds of questions and I could tell my story. The second time he had, meanwhile, talked to my granddad, grandma and my parents and then he was all on the side of my parents. He had already decided what should happen. The guardian ad

litem said that he was there for me, but it did not feel that way. I also found it annoying that he had talked about me with other people. He listened to me but then he changed everything that I had told him. He has written a report, but I did not see this. He spoke on my behalf at the hearing: I did not feel like coming. Since the hearing we have not seen each other again and I did not mind this at all. I want to grade him with an F, because I did not trust him."

The fourth child told us:

> "I only spoke the guardian ad litem a few times, at the start and slightly more at the end. She really listened to my story. She let me know what her advice at the hearing would be. She did not make a written a report and I liked this because then my father could not read it; he would only get mad. The guardian ad litem could express very well what I wanted without saying that it came from me. She did not tell my father what I had told her. I appreciated that. I regretted that we did not talk as much after a while: I got the idea that she did not have a clear picture of how things were going because of that. And I did not notice any real changes because of her, except that she could tell my story at the hearing. This was nice, but I had expected that she would be more like a good family guardian. After the hearing we did not speak each other again, just by phone. This was not necessary, really. I can always call her, but I do not know if I will. I did find her rather distant and businesslike. I grade her with a B, because she did listen but it was not quite what I expected."

These are just four opinions and experiences, but the things these children find important are quite similar. A good guardian ad litem is someone you can really trust, comforts you, shows real concern, is a good listener and does not use difficult words or phrases. The guardian ad litem also tries to discover what you really want and will show you that he is really there for you. It would be a good idea if it were clear when you get a guardian ad litem and why. A child commented that every child should have the right to have a guardian ad litem or a lawyer. Both would really be nice, because then the guardian ad litem could represent your interests and your lawyer could present your views. A final talk may also be nice. Unpleasant personal qualities are a distant attitude and not enough personal concern or commitment. Some also had difficulty with the fact that the guardian ad litem talked to others. For one of the children it was very difficult to accept that the guardian ad litem, after a discussion with them, was totally on the side of the parents, in his perception.

6.2 Guardians ad litem

Quality

The survey shows that there are several bottlenecks regarding the performance of tasks. The most important problems are in the area of (assuring the) quality of the guardian ad litem: there are no professional training options. However, some guardians ad litem indicate that meeting quality standards is a necessary but not a decisive condition for their appointment. What is most important, in the end, is how the guardian ad litem is doing his work in practice and the court should be free to weigh in its decision whether this particular guardian ad litem will defend and protect the interests of this particular child. In addition, there is the problem that there is no control on the quality of the work. Many guardians ad litem believe that there is a role for the court in this respect, because it will have an idea of the performance or functioning of the guardian ad litem.

Financing

Another important problem is the way the activities of the guardian ad litem is financed. The financing of 'out-of-court' activities is seen as problematic by both lawyers and professionals outside the legal field. Only non-legal professionals consider the financing or funding of guardians ad litem without a registration with the Raad voor Rechtsbijstand (Legal Aid Board) as a problem.

Furthermore, a number of problems are identified with respect to the financing through the Raad voor Rechtsbijstand. A guardian ad litem said that he had heard from the Raad that there will only be a form or financial compensation in case of proceedings. Also, the Raad would be in the middle of a budget cut operation and therefore, lawyers are not always appointed as guardians ad litem, just to cut back on expenses. In addition to that, court dues (*griffierechten*) are also a bottleneck. If a child wants to start formal proceedings with his guardian ad litem, these court dues (griffierechten) need to be paid. It is not regulated who should pay them. It might happen that guardians ad litem end up paying for these costs themselves.

Definition of responsibilities

Guardians ad litem mention other difficulties, apart from this. Sometimes it is unclear where the activities of the guardian ad litem end. Furthermore, it is mentioned that a guardian ad litem can have an advisory role, but that it depends on the judge how this advice is used by the court. The judge can certainly ignore it. The absence of a clear definition of responsibilities of the guardian ad litem is generally not regarded as a problem. One guardian ad litem indicates that with an appointment it might not be clear in what manner the guardian ad litem could best assist the child and it, therefore, a broad job description might not be a problem. Another guardian ad litem stresses the fact that, at times, it is not sure what his responsibilities should be when a second lawyer is appointed, such as in case of a closed setting out-of-home placement or custodial care order. The guardians ad litem outside the legal profession further mention that that they have regularly received a (concrete) research assignment from the court. The advantage of well-defined responsibilities is that it serves as a mandate and that this prevents the guardian ad litem from having to explain to others why he is performing certain activities.

Guardians ad litem have been asked about the nature of the activities for which they were appointed. About two thirds of them has advised the court. About half of them has also represented children and slightly less than half of them has engaged in mediation on behalf of the child. The fact that a guardian ad litem can act as a mediator has been seen as an added plus. However, those outside the legal profession do not share this view: they are more inclined to think that the mediation phase is no longer relevant the moment a guardian ad litem is appointed. One guardian ad litem, however, states in his commentary that the appointment of a guardian ad litem might imply that proceedings have started but that even at this stage the guardian ad litem can make a significant contribution regarding mediation and other useful efforts. Another guardian ad litem does make the remark that often children are no longer open to mediation, because too much has happened already. At the vFAS conference it was clear that most participants regard mediation work as their most important responsibility, followed by consultation and going to court. A good guardian ad litem will try to prevent that parties will engage in further proceedings. Therefore, they did not regard the appointment of a guardian ad litem as an unnecessary step in additional legal actions: proceedings have often been started already and the guardian ad litem can still try to find an out- of- court solution for the problem.

Skills

A closer look at the skills of a guardian ad litem shows that the ability to develop a good relationship with the child is of great importance in the work of a guardian ad litem. A good guardian ad litem gives attention to the child and must be able to explain things, as could be concluded from the vFAS conference. With respect to the proposition that this relationship ends when the court produces its decision, there was no general consensus. Half of the respondents agreed, arguing that the guardian is not a social worker. The other half disagreed, arguing that a guardian ad litem should still make sure whether the decision has been understood and accepted by the child and that it can be enormously comforting to the child if the child knows that he or she may always call the guardian ad litem.

Register
Finally participants were asked questions regarding the absence of a national register of guardians ad litem. This is not considered to be very problematic. The guardians ad litem who commented on this aspect have made clear that they see this national register as the result of the setting of qualifying and educational standards. Guardians ad litem who meet those qualification requirements can be included in the register. Some guardians ad litem believe this to be a responsibility for a future professional association of guardians ad litem. This professional organisation could also take care of extra professional training programs, consultation with the courts and with *kinderrechtswinkels* (legal services for children).

6.3 Judges

Experienced bottlenecks
The success and contributions of a guardian ad litem depend on the quality of his or her work, according to the judges. In order to be a good guardian ad litem more is needed than just legal expertise. Judges mention several other skills. It concerns social and communicative skills, experience, effort, contacts but also knowledge of child and developmental psychology and orthopedagogics. A guardian ad litem should not have a fighter's mentality, but should have an active attitude, be child friendly and approachable, have a feeling for children and have a neutral attitude towards the parents. The guardian ad litem must have and take the time he needs – contrary to the judge at the hearing. In response to our questions it was indicated that the guardian ad litem operates as the vanguard of a child and should therefore have the skills and capacities to fulfill these expectations. Next to the skills and capacities mentioned above, the quality standards are related to the role of the guardian ad litem. In case of a more procedural role more legal expertise is required than in case of an advisory role or a role as mediator. However, some knowledge of juvenile law is expected from all guardians ad litem. The guardian ad litem should also be a good match for the child and the case at hand. Judges unanimously indicate that not all guardians ad litem are suitable for their task, but that at the moment there are no national quality or educational requirements for the guardian ad litem. Only in case of two or three courts preparations are made to formulate policies and guidelines on this matter.

Furthermore, experience and knowledge should also be retained and passed on to a greater extent than is happening at the moment. There should also be more certainty regarding the definition and purpose and nature of the guardian ad litem, according to the judges.

Judges also draw attention to a third problem that was already mentioned by the guardians ad litem, the financing of activities of the guardian ad litem. Financing is a bottleneck for lawyers who work as a guardian ad litem and perform out-of-court activities, but to a greater extent for non-legal professionals not included on the list of the Raad voor Rechtsbijstand. In a court case between the Raad voor Rechtsbijstand and a lawyer-guardian ad litem there will be a court decision in 2012 concerning the question whether the Raad should subsidise certain out-of-court activities. For those outside the legal profession there are certain temporary solutions such as a form of state aid or compensation *('vergoeding uit staatskas')*: a payment through the court.

Finally, the extent of supervision on the performance of the activities causes some concern among judges: if a guardian ad litem does not fulfill his responsibilities adequately, there is no legal basis or procedure to tackle this. The court can only discuss this with the departmental court secretary or with the Raad voor Rechtsbijstand.

Possible solutions
Possible solutions proposed to problematic aspects and points of concern described above, largely similar to those indicated by the guardians ad litem, are firstly a national protocol for guardians ad litem. This could include quality and educational standards and requirements. It is expected that if these criteria are more transparent and comprehensible, judges will produce a greater number of positive appointment

decisions. However, a number of judges have said that these quality standards should not make it impossible for others to be appointed, like the next door neighbour. While this does not happen often, it should remain an option when it is in the child's best interest.

In addition, there should be a national list of guardians ad litem. This will produce a better overview and it can be used by smaller courts when a suitable guardian ad litem, with for instance one pedagogical form of expertise, cannot be found in the court district in question, but in another district. The guardians ad litem should also organise themselves, so that knowledge and experience can be exchanged.

Furthermore, there should be more supervision and control regarding guardians ad litem, either through the courts, or through a professional association. The supervision could be organised better, if a more definite job description and end (date) of the activities would be included in the court appointment decision.

Finally, but not less important, it was indicated that (government) financing or funding should be arranged more adequately. It should be possible to appoint a guardian ad litem appropriate for the child in question, without this being solely dependent on his or her inclusion on a list of the Raad voor Rechtsbijstand.

6.4 Bureaus Jeugdzorg

The experience within the bureaus jeugdzorg (youth care agencies) with guardians ad litem has been rather limited, but their relevant experience has been neutral or positive in general. Just two bureaus jeugdzorg have had only extremely negative experiences. It is usually very pleasant for the children, according to the bureaus jeugdzorg, because they see the guardian ad litem as someone who is there just for them, like the lawyer for mom and dad. Positive experiences are the result of the fact that the guardian ad litem will take over part of the work from the family guardian, preventing the family guardian from getting too much involved in legal proceedings. A neutral person can also break through an impasse and his or her advice will be accepted more readily than from the 'enemy-child and youth care'. Apart from that, a good mutual cooperation and coordination and consultation with the family guardian is also considered important. A good mutual definition and demarcation of responsibilities between the guardian ad litem and the family guardian is essential. And it is also important that a guardian ad litem will get in touch with the family guardian to let him or her know that he has been appointed and to make arrangements on how to proceed from there. A family guardian described, in this light, that she heard by accident that a guardian ad litem had been appointed. The guardian ad litem had failed to contact her as well as the foster parents. The advisory report was, as a consequence, rather one-sided. After a conversation with the family guardian, the guardian ad litem did proceed to change the report. It would have been only natural when the guardian ad litem had taken the initiative to get in touch.

Negative experiences appear to be related to the way the guardian ad litem sees his job and the performance of his obligations. Reference has been made to situations in which expertise regarding care and input of the guardian ad litem leaves much to be desired, when the guardian did not take his work very seriously or was even regarded as partial. Apart from that, the Bureau Jeugdzorg considers it a nuisance that a guardian ad litem has two short interviews with a child – or even less- and then comes up with a rather definite position in the case that is not in line with the position of the family guardian who has seen the child much more often. A different point of view of the guardian ad litem can be acceptable to the family guardians, but then it should be a well-founded opinion. Furthermore, some Bureaus Jeugdzorg indicate that some guardians ad litem tend to forget the purpose of a court supervision order (*ots)* or family guardianship and fail to cooperate, but instead are starting proceedings immediately. Finally, the end result may be disappointing: the expectations regarding a guardian ad litem can be unrealistically high, also with the Bureaus Jeugdzorg.
Youth and child care has also stressed the point that too much disagreement between a guardian ad litem and a family guardian or a failure to consult each other, may have an adverse effect on the assistance provided by counselors, social workers or therapists. This is not in the best interest of the child.

From the side of child and youth care it is seen that most children will need a guardian ad litem in connection to legal proceedings and that a logical consequence would be to choose a lawyer as a guardian ad litem. But a good guardian ad litem will not only possess legal expertise but also expertise regarding the developmental phases of children, family systems theory and pedagogics. Furthermore, it is mentioned several times that a guardian ad litem must be able to connect to the parents, in order to make discussion or exchange possible and must not participate in the struggle (between the parents and/or youth and child care).

6.5 Analysis

Skills

According to the children, a good guardian ad litem is someone you can trust, shows concern, listens carefully to your story, discovers what you really want and he will be there for you. Guardians ad litem, judges and youth care agencies agree with this in the end. They will have additional personal qualities like developmental psychological expertise and family systems theory, neutrality/objectivity, an active attitude, without having a fighter's mentality, possess of maturity, wisdom and experience. A guardian ad litem must be able to look beneath the opinion of the child. Youth and child care agencies further state that it is important that a guardian ad litem cooperates and consults with the family guardian.

Quality and educational standards

There is existing a more or less general consensus regarding the standards and requirements that apply to a guardian ad litem. That they are not always fulfilled in practice, causes concern to all parties involved. As was mentioned when discussing the appointment issue, some courts are working with lists that are worked through from top to bottom. This is not in line with the wish to appoint the right guardian ad litem, matching the child and the type of case. Guardians ad litem as well as judges suggest the need for a protocol with quality and educational standards. Both professions also mention the need for a national registration of guardians ad litem and the establishment of a professional association, so that expertise and experience can be exchanged. However, both types of professionals call attention to the fact that quality standards should not determine everything, yet they word it differently: it should still be possible to appoint a guardian ad litem if this is in the child's best interest.

Assignment

In chapter five judges stated that the appointment of a guardian ad litem should not lead to a too limited and legal perspective of the case. When questioned on the way they regarded their responsibilities, they responded that they really did not consider court actions to be the most important aspect of their position: mediation, advice and consultation are the most essential, starting proceedings will come next only if the first type of activities do not have any effect. Apart from that, some guardians ad litem mention that there is uncertainty regarding the status of the advice that they present to the court; a judge can simply ignore it. Judges indicate that a good guardian ad litem would have added value, while a bad one would not. These outcomes may represent both sides of the same coin and may also be related to the concern that guardians ad litem may appear to be appointed solely for formal reasons, as was discussed in chapter five. The role of the guardian ad litem could become more definite with a specific description of the assignment for each appointment decision. Such a description is often missing at the moment. In general, guardians ad litem do not consider this to be a problem. It can also be the result of the fact that, at the time of the appointment, the specific needs of the child are not yet entirely clear and the guardian ad litem may need enough space to perform his work properly. On the other hand, guardians ad litem indicate that at times they are not sure when their work or assignment is finished. A more precise description of their obligations may furthermore produce a better definition of responsibilities with regard to other professionals and parties operating in the same field, such as youth and child care professionals. There is a need for this within youth and child care agencies and it may contribute to a closer and smoother form of cooperation. A more adequate description of the work and activities may also facilitate a greater supervision and

control on the performance of the work, according to the judges; such a form of supervision and control hardly exists at the moment and this worries both judges and guardians ad litem. Supervision could be realised through a professional association of guardians ad litem.

Funding and financing

Both judges and guardians ad litem consider financing or funding to be an important bottleneck. For lawyers acting as a guardian ad litem or experts such as mediators registered with the Raad voor Rechtsbijstand, the financing of their activities has been more or less regulated: out-of-court activities will sometimes pose a problem. Guardians ad litem that are not registered with the Raad voor Rechtsbijstand and do not meet the requirements set by the Raad, cannot receive a financial compensation through the Raad. A solution will be a form of (incidental) state funding, which will generally mean that the costs will be paid by the court. They all agree that there should be a sound regulation for all guardians ad litem including all their activities. This should also apply to court dues (griffierechten) for proceedings started on behalf of the children: at present it is not clear who is responsible for the payment of these court dues, and therefore some guardians ad litem decide to pay them themselves.

7. Summary and conclusions

The central research question in this study is whether the voice and interests of the child are sufficiently protected and guaranteed in current Dutch family law, in particular through the legal figure of the guardian ad litem. We have looked at the need and demand for the guardian ad litem, his appointment and the performance of the obligations and responsibilities of the guardian ad litem, in practice.

7.1 Demand

Obscurity

The general public and others are not at all familiar with the existence of the guardian ad litem and situations in which he or she should provide a solution or answer. According to estimates from guardians ad litem and judges, children, parents and family guardians are in particular unfamiliar with the guardian ad litem. Apart from that, guardians ad litem believe that judges are not (enough) informed and do not recognise situations in which the interests of the child are served by the appointment of a guardian ad litem, and judges believe that not all lawyers know the procedure (for instance by arranging a toevoeging / financed compensation as a laywer instead of as a guardian ad litem).

Situations

Guardians ad litem are mostly appointed in cases concerning visitation and parental custody in divorce cases, supervision or custodial care orders. They believe they have may be perform a positive role in drafting *ouderschapsplannen* (parental agreements on child related matters), but they are hardly every appointed in these situations, like in conflicts between a child and a family guardian, or in foster care situations.

Informal court access

Children do not use the informal access to court, but considering the great number of formal and informal court access options, judges do not find this very surprising. According to the guardians ad litem, children are experiencing high barriers, preventing them to get into action and no appeal is possible against appointment refusals. In addition, it has been pointed out that there is a jungle of court access alternatives, which leads to uncertaintly and obscurity, also with respect to the guardian ad litem. Finally, a request for a guardian ad litem through a formal access to court will imply that it will not be possible to appeal a negative decision. This is seen as a deficiency in the system.

7.2 Appointment

Data

The number of requests for the appointment of guardians ad litem ex art. 1: 250 BW is not recorded by the courts. The general feeling is that the guardian ad litem is not appointed on a regular basis. This could, perhaps, be concluded from the data collected for this research study, yet also that the number of appointments has increased in 2011 and over the last ten years. The number of appointments is, in any case, very limited when compared to the great number of situations in which a guardian ad litem might be desirable.

Clash of interest criterion

No clear and consistent pattern can be discovered regarding cases in which guardian ad litem appointment requests are honoured or turned down. Appointments are possible in case of a clash of interests. Guardians ad litem believe that this criterion is applied too strictly. Judges indicate that it is a strict criterion, but that, in practice, it is applied in a more flexible manner. A number of judges mentioned

that it should rather be centered on the question whether a child is in a problematic situation and feels caught, whether it involves conflicts with/ between parents and with the family guardian. Guardians ad litem and Bureau Jeugdzorg share this view.

Added value

The added value of the guardian ad litem lies in the fact that he or she can stand above parties and their case and weigh and report the interests of the child. A child may express his or her own opinion, and the court can, in principle, hear children itself, when children are sufficiently capable of doing so.

Age limit

When children are heard, the age limit of 12 should not be applied too strictly, but, instead, this should depend on the 'maturity' of the child. Guardians ad litem believe that judges are not always capable of hearing children as they should, as a result of lacking skills, expertise, experience and time, gut judges do not share this view. Not all judges are convinced of the added value of a guardian ad litem for children aged 12 and older.

Those who can be appointed

The background of the guardian ad litem to be appointed (lawyer, psychologist or pedagogue) should match the issue for which an appointment is taking place, according to all those involved. Currently, this is not always the case, because some courts do not have these professionals included on their list of potential candidates. Judges, guardians ad litem as well as youth care agencies are not in favour of appointing family members as guardians ad litem, because this puts a strain on family relationships, negatively affecting the child.

Protocols and quality standards

Nationally, there are great differences regarding the selection of individuals being appointed as guardians ad litem and the quality standards that are applied. This might cause judges to opt for the alternative provided by the Council for Child Protection, because this implies that certain quality standards are fulfilled. A protocol containing quality and educational standards is necessary, according to guardians ad litem, just as a national registration and professional association realising and organising the exchange of expertise and experience in this area.

7.3 Performance

Capacities and personal qualities

According to children a good guardian ad litem is someone you can trust, who expresses concern, listens closely to your story, discovers what you really want and who is there just for you. Guardians ad litem, judges and Bureau Jeugdzorg agree with this and further mention knowledge of developmental psychology and family systems theory, objectivity and impartiality, an active approach, wisdom and a willingness to consult with the family guardian.

Assignment

At present, guardians ad litem are often appointed without receiving a clear assignment from the court. This creates enough space to do whatever is necessary, but at the same time it is unclear when the activities end and this way, no control or supervision is possible. The absence of control and supervision regarding the work, causes some concern to both judges and guardians ad litem.

Financing

The financing or funding of the activities of the guardian ad litem should be improved. There should also be an arrangement regarding the payment of court fees for proceedings started on behalf of

children. Lawyers functioning as a guardian ad litem or experts such as mediators included on the list of the Raad voor Rechtsbijstand, out-of-court activities may present a problem. Guardians ad litem not registered with the Raad voor Rechtsbijstand because they do not meet the criteria for registration, are not able to get any form of financial compensated through this Raad, at present.

7.4 Conclusion : the voice and interests of the child in practice

Considering the conclusions summarised above the practice of the guardian ad litem appears to show a great number of defects and hiatuses. The Ombudsman for Children is very concerned about the fact that too little information is availabe on the number of guardians ad litem and their appointments, that the legal notion is not known among children, parents but also among professionals, and there is a lot of discussion regarding situations and conflicts in which a guardian ad litem could or should be appointed. Because of that, children who are seriously in trouble or caught in the middle, have to do without the help and support of someone who can represent their interests and be their voice. Another matter of concern to the Ombudsman for Children is that, contrary to what was stated by the former Minister of Justice Donner, there really is a need for appointment and quality protocols, but that they fail to get realised, it seems. Their absence can result in inequality before the law, legal insecurity and incertainty and this is even more urgent now that children cannot appeal negative appointment decisions through the informal court access option, and children cannot change guardians ad litem in case they feel to meet their expectations.

The right of children to be heard and the right to participate in proceedings concerning the separation of children and their parents and express their own opinion, as is covered by articles 12 and 9 section 2 CRC, is insufficiently guaranteed. In principle, a child will only be heard when aged 12 or older. Until then, a child can only give his or her views through his or her parents, but they are not always capable to represent the views of their child. And even when children get older, it may be difficult, scary or difficult for the child to form and, even more, express his or her own opinion. The guardian ad litem could provide a solution for this problem, but the guardian ad litem has not been appointed readily up to today and the practice of the guardian ad litem holds numerous difficulties.

Quite a few of the things discussed above are not in line with the position of the Committee on the Rights of the Child that there should not, in principle, be a set age limit and that children should not have to prove that they are capable of giving their opinion. Therefore, children under twelve should have the opportunity to express their views more easily. Furthermore, all children not capable – for whatever reason – to form and express their thoughts (freely) should be helped with this, so that their views can be taken into account.

Next to that, the current situation does not do justice to the right of children to have their interest communicated effectively. This is primarily the responsibility of the parents, but sometimes parents refuse to do this or are lacking the required skills. There may also be situations in which they refuse to defend the interests of their children. In those cases it is insufficiently guaranteed that the interests of the children are are adequately taken into account when making a decision, contrary to what is prescribed by article 3 CRC. Next to that, based on article 9 section 2 CRC, children should be admitted as litigants in proceedings, in situations where they are or will be separated from their parents. In case their parents can not or will not do so, they are entitled to court representation. In these cases as well, a guardian ad litem may offer a solution, but this option is not chosen very readily or often and it will not always be an answer to this problem as a result of the shortcomings in the current system described above.

Because of the current system, situations often come up that are not in accordance with the CRC or the *Guidelines on Child Friendly Justice*. Nor are the requirements and standards in the ECCR fulfilled. A logical question that arises after these findings is whether it would not be better to change to another system so that compliance with articles 3, 9 and 12 CRC can be assured. A general access to court, with or without a gate(keeper), might be a way to put an end to all the different court access alternatives and (im)possibilities,

characterising the current situation. Today's practice is, in fact, producing legal unequalitiy and uncertainty. It may happen that lawyers arrange a *toevoeging* (form of funded legal aid) and operate as legal representatives in court for children, without there being a lawful basis for this. Naturally, this meets resistance from the courts but it also leads to undesirable situations for the child when there is discussion on the mandate of this lawyer.

However, some time ago (in 2003[49]) the Dutch legislator has indicated its refusal to further examine the possibilities of a general access to court, but rather its wish to make a conscious choice for a concretisation of article 12 CRC by way of the guardian ad litem. The Ombudsman for Children believes that this must, in that case, result in an effective securing of the rights included in articles 3,9 and 12 through the guardian ad litem in accordance with article 1: 250 BW in practice, by the legislator. Since a good organisation and set-up of the guardian ad litem, he can have an added value for the child in relation to other players in the field. And what will be needed to realise this?

In the most ideal situation, the added or extra value will be the fact that the guardian ad litem, with a clear view of the situation, can weigh the broad interests of the child, discovering and defining the child's interests and his or her voice and express this effectively and clearly, according to the Ombudsman for Children. He has the time, space, knowledge and expertise to do this. In his work he is not bound by the interests of other parties, protocols or other limitations. This does not imply that the guardian ad litem should not consult with other parties who are involved. In fact he will do just that: the guardian ad litem must be focused on collecting all relevant information for all the parties involved and, before anything else, on a de-escalation of the conflict or situation and on the bringing together of parties whenever possible and in the child's best interests. The guardian ad litem can be a positive contribution regardless of the age of the child, the child's maturity and own skills. This way, the guardian ad litem can provide answers in case of a serious dispute or conflict, whereby the term 'conflict' should be broadly interpreted, in order to genuinely do justice to the rights and interests of a child.

The guardian ad litem is not a social worker nor is he a confidential advisor. In order to engage a guardian ad litem there should be a concrete situation resulting from a concrete problem, despite the fact that such a situation may have existed for some time. For structural long-term and/or family assistance or coaching there are several designated agencies such as youth care agencies and confidential advisors can be reached through, for instance, the Advies- en Klachtenbureau Jeugdzorg en Zorgbelang (consultation and complaints agency youth care and care services).

The guardian ad litem can therefore contribute to the protection and realisation of the rights of children, on the condition that this legal figure and institution is well regulated and defined and this is not the case at the moment, as is shown by this research study. Getting a guardian ad litem has become dependent on chance. And children can only hope for a lucky number.

[49] Kamerstukken II, 2003/2004, 29 200 IV no. 116, p. 3

8. Recommendations

The voice and interests of children should be sufficiently guaranteed in current Dutch family law, in order to realise the principles of the CRC. At present, that is not yet the case. Therefore, the Ombudsman for Children is recommends the following changes to be made:

1. **Broad interpretation of article 1: 250 BW and/or a less strict wording**
   It is recommended that the Minister of Safety and Justice (Veiligheid en Justitie) examines in consultation with the Raad voor de Rechtspraak (Council for the Judiciary) whether the current wording of article 1: 250 BW is such that it can protect the interests of children in the broadest sense. Based on this article, a guardian ad litem should be appointed, if so desired and needed, in every situation in which a child may end up in a difficult situation and gets caught in the middle or when there is such a threat. It will concern situations like a parental divorce, court supervision order or family guardianship, custodial care order or out-of-home placement, but also medical issues, educational affairs or foster care, as long as it concerns the care, upbringing and education of children who are caught in a difficult situation, between those involved. This includes not just *conflicts* of interests between the child and parents/guardians, but also when parents can or will not sufficiently understand and communicate the interests of the child, or when this can be doubted. Furthermore, this may also be the case when there is a conflict between the child and one of the parents, while both parents have parental custody, as is covered by article 1: 253a BW, or between the child and a third party, like a family guardian and the parents are not capable of (effectively) representing the interests of the child.
   The current phrasing of the article may do when a very extensive interpretation of this article is supported by different parties. If not, then it is recommended to change the text. A possible new wording may be the following:

   > *When in issues regarding the care or upbringing of the minor, or his or her property, the interests of the parents having parental custody or one of them – even in cases of shared parental custody – or of the guardian or both of them, are or could be contrary to those of the minor, or when there is a situation in which the parent(s) or guardian(s) are not capable to represent and defend the interests of the minor effectively and adequately, the court will then appoint a guardian ad litem to represent the minor in and out of court, in property cases regarding the minor this will be done by the kanton department of the court or by a judge of a court where another case has already been submitted, if this is considered in the best interest of the minor, at the request of a concerned party or on the court's own initiative.*

   A broader interpretation and/or wording will prevent parents (or their parents on their behalf) from opting for the engagement of lawyer. This is an option not covered by the Dutch legal system and which has quite regularly been causing very unpleasant and uncomfortable situations at court hearings.

2. **More general information and knowledge**
   The minister of Safety and Justice advised to strive towards a greater public knowledge and spread of information among members of the general public and professionals on the existence of the guardian ad litem. This can be done through the publication of leaflets and spreading them among Kinder- en Jongerenrechtswinkels, Juridische Loketten, courts (first instance and of appeal), mediators, the bar, the AKJ, Zorgbelang and youth and child care, but also, for instance, in libraries and with de Centra voor Jeugd en Gezin and Jeugd-GGZ. In addition, information on this subject should be made more accessible through the websites of,

among others, the judiciary, the Dutch Bar Association (Nederlandse Orde van Advocaten), vFAS (Association of family lawyers and mediators), NMI (Mediation Institute Netherlands), the Ministry of Safely and Justice and the Raad voor Rechtsbijstand (Legal Aid Board).
Apart from that, in professional training programs of juvenile court judges there should be a greater focus on the legal figure of the guardian ad litem, both in the education of judges as in general professional training and continuing education programs. There should be a role for the SSR or Studiecentrum Rechtspleging (Training/Educational Center Judiciary).
Finally, this legal tool and notion should be a subject deserving attention in regional or national consultation and meetings of the judiciary, the bar, youth and child care agencies. Relevant experiences regarding this subject should be exchanged within the own profession, but surely between different professions as well, in order to come to a wider knowledge and more general information and use of the guardian ad litem.

3. **Informal access to court**
It is also recommended to promote a greater familiarity with informal access to court options among children, since this route is the best way for judges to get a clear picture of the needs of children. The informal access to court can be brought to the attention of the greater public, in the same manner. Next to that, Kinder- en Jongerenrechtswinkels can help children with writing a letter to the court. To prevent letters from getting lost, a special post box should be opened at the courts. Because every child deserves an answer. Children must be informed that, in practice, a reply to their letter may come in the form of the appointment of a guardian ad litem, contrary to their expectations, instead of an immediate court decision. It should further be examined whether it would not be desirable to make an appeal possible to negative appointment decisions through an informal access to court option and to what extent this problem, as it has been identified, could be addressed and solved.

4. **Maturity instead of an age limit?**
The minister of Safety and Justice is furthermore advised to examine whether the 12 year age limit in family law should rather be replaced by the criterion ‘the maturity of the child’. Children should be able to express their own opinion, wherever possible. The role of the guardian ad litem can then be adapted to the child’s maturity and the extent to which the child can and will express his or her views to the court.

5. **Quality standards guardians ad litem**
It is recommended that quality standards and requirements are set by the Raad voor Rechtsbijstand, in consultation with the Raad voor de Rechtspraak, the Dutch Bar Association and/or the vFAS (Dutch association of family lawyers), standards that need to be fulfilled by guardians ad litem. In that context, explicit attention should be given to other than just legal skills and to guardians ad litem with a non-legal background. Apparently, a careful first step has been taken in the direction of such a protocol, as came up when inquiries were made with the Raad voor Rechtsbijstand and the Raad voor de Rechtspraak, but this has not been brought any further. The project has stagnated waiting on the preparation, the introduction and positive reception of the protocol "*Toevoeging jeugdstrafzaken en taken met betrekking tot machtiging uithuisplaatsing gesloten inrichting*" (“Legal aid funding juvenile criminal cases regarding closed setting care orders”). We have not gotten the opportunity to get a look at the draft version of the protocol regarding the guardian ad litem. All parties are being called up to realise the protocol on the guardian ad litem as soon as possible – without this being dependent on other protocols – and use the recommendations from this report when preparing and drafting it, assuring its quality.

Furthermore, it is recommended to set up a professional training program for guardians ad litem, in which the legal aspects of the work are covered but surely also the non-legal aspects as well as the way to deal with children. In addition, there should be a professional association of guardians ad litem. Within such an organisation quality standards should be set and protected through the exchange of expertise and experience. This professional association could also initiate and realise the registration of guardians ad litem. The Dutch Bar Association and vFAS could participate in this effort. Individual guardians ad litem have already indicated that they wish to go ahead with this project, under the condition that they are supported with some enthousiasm.

Yet it needs to be remarked that the protocol and the registered list should be the starting point, but that in certain situations there should be the possibility of making exceptions, should this be in the child's best interest. Ultimately, even the child's next door neighbour should be able to get appointed as a guardian ad litem if this best suits the interests of the child.

6. Appointment protocol for the courts

The Ombudsman for Children strongly suggests the Raad voor de Rechtspraak and *the Landelijk Overleg van Voorzitters Familie- en Jeugdrecht* (national group judges-secretaries family law court departments) to set up guidelines on article 1: 250 BW. These could include a broad interpretation of the term 'conflict or clash of interest(s), as has been expressed under recommendation 1. Through guidelines or a protocol a greater uniformity and clarity can be produced regarding guardian ad litem appointment request procedures and deadlines or their beginning or ending terms (whether or not through an informal court access route). Regarding such a protocol experiences in this respect of the courts in Haarlem, Alkmaar and Rotterdam could serve as an inspiring example, having already started with such a project, in the absence of a national policy.

7. Definition of the assignment

The judiciary is advised to let the wording of the assignment to the guardian ad litem be as clear and concrete as possible. This will contribute to a good definition of his role set off against other players in the field and to a greater clarity regarding his obligations and responsibilities and with respect to the end of the assignment. Naturally, the guardian ad litem is not a social worker. There can also be more attention for the various fields of expertise or capacities of a guardian ad litem in connection to the age and maturity of a child. Finally, a clear definition of his assignment will enable the judge to organise a form of supervision and control on the work done by the guardian ad litem. However, this does not imply that with the start of an appointment it should already be entirely clear which activities will be performed by the guardian ad litem and for what purpose. The task 'defence of interests regarding care and parenting' can be considered too broad, but the description 'defence or representation of interests regarding the drafting of a visitation arrangement with the father/mother' is quite a bit more specific, without it being too absolute and defining for the work of the guardian ad litem.

In this context it would be advisable that the different agencies and professional organisations in the field of youth care move to request a guardian ad litem, with the option of using a clearly defined assignment. This way, it will be clear to all parties in what respect there is a need for a guardian ad litem, next to, for instance, a family guardian or a care supervision institution. *Jeugdzorg Nederland* is advised to cooperate and consult with all (representatives of) youth care agencies and draft guidelines, if necessary, regarding the type of situations and cases for which the involvement of a guardian ad litem should be considered.

8. **In and out of court funding**

The funding or financing of all guardians ad litem should be regulated properly. This will imply: not just the funding of lawyers and mediators and funding which is not just limited to procedural activities. For this purpose, the Raad voor Rechtsbijstand and the minister of Safety and Justice are called. The arrangements should be tailored to guardians ad litem – and not just to lawyers as is the case at present – and to take into account the special nature of the work of the guardian ad litem. This will mean that also activities in the area of consultation and mediation should be applicable for this type of funding. A clear definition of responsibilities is also relevant in this case because it may a principal factor in funding. In this context we would like to cite the example of the Raad voor Rechtsbijstand in Amsterdam that is currently busy with policy development in this area.

9. **Ending own contributions or court fees**

In the *Besluit eigen bijdrage rechtsbijstand* (decision own contribution state financed legal aid) it is determined that a minor does not have to pay an *eigen bijdrage* (contribution) in conflicts with his or her parents. This regulation should be the same for similar conflicts with the family guardian, in connection with article 1: 250 BW. It is recommended to modify the Besluit in this respect. In addition it is advised to end the own contribution obligations for minors starting proceedings, with a guardian ad litem. The possible objection that parents might try to start proceedings without needing to pay any costs, should not be a barrier. With the appointment of a guardian ad litem it has already been assessed whether the appointment really is in the best interest of the child. If the request satisfies these criteria, the child should not be confronted with additional financial barriers in his or her way to court. The informal court access option is, furthermore, without any cost, and it would be logical to harmonise both types of access to court. The minister of Safety and Justice is asked to adapt relevant legislation accordingly.

10. **Figures tell it all**

In order to collect quantitative and also more qualitative data on the employment and functioning of the guardian ad litem, some kind of registration is essential. It is recommended to have the Raad voor Rechtsbijstand record the frequency of guardian ad litem toevoegingen (legal aid subsidies) for appointments ex article 1: 250 BW. In addition, it would be desirable when first instance courts and courts of appeal would record the number of appointment requests and the number of (on the court's own initiative) appointments. Finally, a national registration system for all guardians ad litem in the Netherlands is suggested. Such a registration effort will contribute towards a greater certainty and transparency regarding the number of guardians ad litem and any particular fields of expertise they have and it could be a valuable source of information for smaller court districts in which there is too little choice in specialised guardians ad litem. In the absence of a professional association of guardians ad litem this might involve future participation of the Dutch Bar Association. The minister of Safety and Justice is finally advised to research within a two-year period the state of affairs concerning the guardian ad litem: the situation concerning the frequency of appointments, (greater) certainty and transparency regarding his or her role, the arrangement of (better) funding, etc.

11. **Trust each other's expertise**

To all parties who are or could be involved with a guardian ad litem the following recommendation is made: trust each other's and one's own expertise. The guardian ad litem is there to operate in the child's best interest and he or she has a separate responsibility next to those of other professionals and organisations in the field. All these parties may strengthen and support each other and create a careful system of checks and balances around a child, so that his or her voice and interests are optimally served. This trust may be increased with the implementation of the recommendations given above.

The right to be heard and give your opinion does not imply that a child's wishes will always be honoured. But it does imply that the opinion of a child is seriously taken into account when preparing and drafting court decisions that may affect the lives of children. Next to that, the interests of a child should be expressed and communicated. The obligation to let interests and views of their child be known and heard is primarily the responsibility of the parents. In case they are not able to do so or refuse to do this, and the recommendations described in this report are followed, a guardian ad litem will really be a lucky number.

Bijlagen

Bijlage 1: Achtergrond

Hieronder volgt de integrale tekst van alle artikelen en bepalingen die in het rapport genoemd worden.

Verdrag inzake de Rechten van het Kind

Artikel 3
1. Bij alle maatregelen betreffende kinderen, ongeacht of deze worden genomen door openbare of particuliere instellingen voor maatschappelijk welzijn of door rechterlijke instanties, bestuurlijke autoriteiten of wetgevende lichamen, vormen de belangen van het kind de eerste overweging.
2. De Staten die partij zijn, verbinden zich ertoe het kind te verzekeren van de bescherming en de zorg die nodig zijn voor zijn of haar welzijn, rekening houdend met de rechten en plichten van zijn of haar ouders, wettige voogden of anderen die wettelijk verantwoordelijk voor het kind zijn, en nemen hiertoe alle passende wettelijke en bestuurlijke maatregelen.
3. De Staten die partij zijn, waarborgen dat de instellingen, diensten en voorzieningen die verantwoordelijk zijn voor de zorg voor of de bescherming van kinderen voldoen aan de door de bevoegde autoriteiten vastgestelde normen, met name ten aanzien van de veiligheid, de gezondheid, het aantal personeelsleden en hun geschiktheid, alsmede bevoegd toezicht.

Artikel 4
De Staten die partij zijn, nemen alle passende wettelijke, bestuurlijke en andere maatregelen om de in dit Verdrag erkende rechten te verwezenlijken. Ten aanzien van economische, sociale en culturele rechten nemen de Staten die partij zijn deze maatregelen in de ruimste mate waarin de hun ter beschikking staande middelen dit toelaten en, indien nodig, in het kader van internationale samenwerking.

Artikel 5
De Staten die partij zijn, eerbiedigen de verantwoordelijkheden, rechten en plichten van de ouders of, indien van toepassing, van de leden van de familie in ruimere zin of de gemeenschap al naar gelang het plaatselijk gebruik, van wettige voogden of anderen die wettelijk verantwoordelijk zijn voor het kind, voor het voorzien in passende leiding en begeleiding bij de uitoefening door het kind van de in dit Verdrag erkende rechten, op een wijze die verenigbaar is met de zich ontwikkelende vermogens van het kind.

Artikel 9
1. De Staten die partij zijn, waarborgen dat een kind niet wordt gescheiden van zijn of haar ouders tegen hun wil, tenzij de bevoegde autoriteiten, onder voorbehoud van de mogelijkheid van rechterlijke toetsing, in overeenstemming met het toepasselijke recht en de toepasselijke procedures, beslissen dat deze scheiding noodzakelijk is in het belang van het kind. Een dergelijke beslissing kan noodzakelijk zijn in een bepaald geval, zoals wanneer er sprake is van misbruik of verwaarlozing van het kind door de ouders, of wanneer de ouders gescheiden leven en er een beslissing moet worden genomen ten aanzien van de verblijfplaats van het kind.
2. In procedures ingevolge het eerste lid van dit artikel dienen alle betrokken partijen de gelegenheid te krijgen aan de procedures deel te nemen en hun standpunten naar voren te brengen.
3. De Staten die partij zijn, eerbiedigen het recht van het kind dat van een ouder of beide ouders is gescheiden, op regelmatige basis persoonlijke betrekkingen en rechtstreeks contact met beide ouders te onderhouden, tenzij dit in strijd is met het belang van het kind.
4. Indien een dergelijke scheiding voortvloeit uit een maatregel genomen door een Staat die partij is, zoals de inhechtenisneming, gevangenneming, verbanning, deportatie, of uit een maatregel het overlijden ten gevolge hebbend (met inbegrip van overlijden, door welke oorzaak ook, terwijl de

betrokkene door de Staat in bewaring wordt gehouden) van één ouder of beide ouders of van het kind, verstrekt die Staat, op verzoek, aan de ouders, aan het kind of, indien van toepassing, aan een ander familielid van het kind de noodzakelijke inlichtingen over waar het afwezige lid van het gezin zich bevindt of waar de afwezige leden van het gezin zich bevinden, tenzij het verstrekken van die inlichtingen het welzijn van het kind zou schaden. De Staten die partij zijn, waarborgen voorts dat het indienen van een dergelijk verzoek op zich geen nadelige gevolgen heeft voor de betrokkene(n).

Artikel 12
1. De Staten die partij zijn, verzekeren het kind dat in staat is zijn of haar eigen mening te vormen, het recht die mening vrijelijk te uiten in alle aangelegenheden die het kind betreffen, waarbij aan de mening van het kind passend belang wordt gehecht in overeenstemming met zijn of haar leeftijd en rijpheid.
2. Hiertoe wordt het kind met name in de gelegenheid gesteld te worden gehoord in iedere gerechtelijke en bestuurlijke procedure die het kind betreft, hetzij rechtstreeks, hetzij door tussenkomst van een vertegenwoordiger of een daarvoor geschikte instelling, op een wijze die verenigbaar is met de procedureregels van het nationale recht.

Artikel 18
1. De Staten die partij zijn, doen alles wat in hun vermogen ligt om de erkenning te verzekeren van het beginsel dat beide ouders de gezamenlijke verantwoordelijkheid dragen voor de opvoeding en de ontwikkeling van het kind. Ouders of, al naar gelang het geval, wettige voogden, hebben de eerste verantwoordelijkheid voor de opvoeding en de ontwikkeling van het kind. Het belang van het kind is hun allereerste zorg.
2. Om de toepassing van de in dit Verdrag genoemde rechten te waarborgen en te bevorderen, verlenen de Staten die partij zijn passende bijstand aan ouders en wettige voogden bij de uitoefening van hun verantwoordelijkheden die de opvoeding van het kind betreffen, en waarborgen zij de ontwikkeling van instellingen, voorzieningen en diensten voor kinderzorg.
3. De Staten die partij zijn, nemen alle passende maatregelen om te waarborgen dat kinderen van werkende ouders recht hebben op gebruikmaking van diensten en voorzieningen voor kinderzorg waarvoor zij in aanmerking komen.

Europees Verdrag inzake de Rechten van de Mens

Artikel 1
Verplichting tot eerbiediging van de rechten van de mens De Hoge Verdragsluitende Partijen verzekeren een ieder die ressorteert onder haar rechtsmacht de rechten en vrijheden die zijn vastgesteld in de Eerste Titel van dit Verdrag.

Artikel 6
Recht op een eerlijk proces
1. Bij het vaststellen van zijn burgerlijke rechten en verplichtingen of bij het bepalen van de gegrondheid van een tegen hem ingestelde vervolging heeft een ieder recht op een eerlijke en openbare behandeling van zijn zaak, binnen een redelijke termijn, door een onafhankelijk en onpartijdig gerecht dat bij de wet is ingesteld. De uitspraak moet in het openbaar worden gewezen maar de toegang tot de rechtszaal kan aan de pers en het publiek worden ontzegd, gedurende de gehele terechtzitting of een deel daarvan, in het belang van de goede zeden, van de openbare orde of nationale veiligheid in een democratische samenleving, wanneer de belangen van minderjarigen of de bescherming van het privé leven van procespartijen dit eisen of, in die mate als door de rechter onder bijzondere omstandigheden strikt noodzakelijk wordt geoordeeld, wanneer de openbaarheid de belangen van een behoorlijke rechtspleging zou schaden.

2. Een ieder tegen wie een vervolging is ingesteld, wordt voor onschuldig gehouden totdat zijn schuld in rechte is komen vast te staan.
3. Een ieder tegen wie een vervolging is ingesteld, heeft in het bijzonder de volgende rechten:
(a) onverwijld, in een taal die hij verstaat en in bijzonderheden, op de hoogte te worden gesteld van de aard en de reden van de tegen hem ingebrachte beschuldiging;
(b) te beschikken over de tijd en faciliteiten die nodig zijn voor de voorbereiding van zijn verdediging;
(c) zich zelf te verdedigen of daarbij de bijstand te hebben van een raadsman naar eigen keuze of, indien hij niet over voldoende middelen beschikt om een raadsman te bekostigen, kosteloos door een toegevoegd advocaat te kunnen worden bijgestaan, indien de belangen van een
behoorlijke rechtspleging dit eisen;
(d) de getuigen à charge te ondervragen of te doen ondervragen en het oproepen en de ondervraging van getuigen à décharge te doen geschieden onder dezelfde voorwaarden als het geval is met de getuigen à charge;
(e) zich kosteloos te doen bijstaan door een tolk, indien hij de taal die ter terechtzitting wordt gebezigd niet verstaat of niet spreekt.

European convention on the exercise of children's rights
Europees Verdrag inzake de Rechten van het Kind

Article 2 – Definitions
For the purposes of this Convention:
a. the term "judicial authority" means a court or an administrative authority having equivalent powers;
b. the term "holders of parental responsibilities" means parents and other persons or bodies entitled to exercise some or all parental responsibilities;
c. the term "representative" means a person, such as a lawyer, or a body appointed to act before a judicial authority on behalf of a child;
d. the term "relevant information" means information which is appropriate to the age and understanding of the child, and which will be given to enable the child to exercise his or her rights fully unless the provision of such information were contrary to the welfare of the child.

Article 3 – Right to be informed and to express his or her views in proceedings
A child considered by internal law as having sufficient understanding, in the case of proceedings before a judicial authority affecting him or her, shall be granted, and shall be entitled to request, the following rights:
a. to receive all relevant information;
b. to be consulted and express his or her views;
c. to be informed of the possible consequences of compliance with these views and the possible consequences of any decision.

Article 4 – Right to apply for the appointment of a special representative
1. Subject to Article 9, the child shall have the right to apply, in person or through other persons or bodies, for a special representative in proceedings before a judicial authority affecting the child where internal law precludes the holders of parental responsibilities from representing the child as a result of a conflict of interest with the latter.
2. States are free to limit the right in paragraph 1 to children who are considered by internal law to have sufficient understanding.

Article 9 – Appointment of a representative
1. In proceedings affecting a child where, by internal law, the holders of parental responsibilities are precluded from representing the child as a result of a conflict of interest between them and the child,

the judicial authority shall have the power to appoint a special representative for the child in those proceedings.
2. Parties shall consider providing that, in proceedings affecting a child, the judicial authority shall have the power to appoint a separate representative, in appropriate cases a lawyer, to represent the child.

Burgerlijk Wetboek, Boek 1

Artikel 245
1. Minderjarigen staan onder gezag.
2. Onder gezag wordt verstaan ouderlijk gezag dan wel voogdij.
3. Ouderlijk gezag wordt door de ouders gezamenlijk of door één ouder uitgeoefend. Voogdij wordt door een ander dan een ouder uitgeoefend.
4. Het gezag heeft betrekking op de persoon van de minderjarige, het bewind over zijn vermogen en zijn vertegenwoordiging in burgerlijke handelingen, zowel in als buiten rechte.
5. Het gezag van de ouder die dit krachtens artikel 253sa of krachtens een rechterlijke beslissing overeenkomstig artikel 253t samen met een ander dan een ouder uitoefent, wordt aangemerkt als ouderlijk gezag dat door ouders gezamenlijk wordt uitgeoefend, tenzij uit een wettelijke bepaling het tegendeel voortvloeit.

Artikel 247
1. Het ouderlijk gezag omvat de plicht en het recht van de ouder zijn minderjarig kind te verzorgen en op te voeden.
2. Onder verzorging en opvoeding worden mede verstaan de zorg en de verantwoordelijkheid voor het geestelijk en lichamelijk welzijn en de veiligheid van het kind alsmede het bevorderen van de ontwikkeling van zijn persoonlijkheid. In de verzorging en opvoeding van het kind passen de ouders geen geestelijk of lichamelijk geweld of enige andere vernederende behandeling toe.
3. Het ouderlijk gezag omvat mede de verplichting van de ouder om de ontwikkeling van de banden van zijn kind met de andere ouder te bevorderen.
4.Een kind over wie de ouders gezamenlijk het gezag uitoefenen, behoudt na ontbinding van het huwelijk anders dan door de dood of na scheiding van tafel en bed, na het beëindigen van het geregistreerd partnerschap, of na het beëindigen van de samenleving indien een aantekening als bedoeld in artikel 252, eerste lid, is geplaatst, recht op een gelijkwaardige verzorging en opvoeding door beide ouders.
5.Ouders kunnen ter uitvoering van het vierde lid in een overeenkomst of ouderschapsplan rekening houden met praktische belemmeringen die ontstaan in verband met de ontbinding van het huwelijk anders dan door de dood of na scheiding van tafel en bed, het beëindigen van het geregistreerd partnerschap, of het beëindigen van de samenleving indien een aantekening als bedoeld in artikel 252, eerste lid, is geplaatst, echter uitsluitend voor zover en zolang de desbetreffende belemmeringen bestaan.

Artikel 250
Wanneer in aangelegenheden betreffende diens verzorging en opvoeding, dan wel het vermogen van de minderjarige, de belangen van de met het gezag belaste ouders of een van hen dan wel van de voogd of de beide voogden in strijd zijn met die van de minderjarige, benoemt de rechtbank, danwel, indien het een aangelegenheid inzake het vermogen van de minderjarige betreft, de kantonrechter, of, indien de zaak reeds aanhangig is, de desbetreffende rechter, indien hij dit in het belang van de minderjarige noodzakelijk acht, daarbij in het bijzonder de aard van deze belangenstrijd in aanmerking genomen, op verzoek van een belanghebbende of ambtshalve een bijzondere curator om de minderjarige ter zake, zowel in als buiten rechte, te vertegenwoordigen.

Artikel 253a

1.In geval van gezamenlijke uitoefening van het gezag kunnen geschillen hieromtrent op verzoek van de ouders of van een van hen aan de rechtbank worden voorgelegd. De rechtbank neemt een zodanige beslissing als haar in het belang van het kind wenselijk voorkomt.
2.De rechtbank kan eveneens op verzoek van de ouders of een van hen een regeling vaststellen inzake de uitoefening van het ouderlijk gezag. Deze regeling kan omvatten:
a. een toedeling aan ieder der ouders van de zorg- en opvoedingstaken, alsmede en uitsluitend indien het belang van het kind dit vereist, een tijdelijk verbod aan een ouder om met het kind contact te hebben;
b. de beslissing bij welke ouder het kind zijn hoofdverblijfplaats heeft;
c. de wijze waarop informatie omtrent gewichtige aangelegenheden met betrekking tot de persoon en het vermogen van het kind wordt verschaft aan de ouder bij wie het kind niet zijn hoofdverblijfplaats heeft dan wel de wijze waarop deze ouder wordt geraadpleegd;
d. de wijze waarop informatie door derden overeenkomstig artikel 377c, eerste en tweede lid, wordt verschaft.
3.Indien op de ouders de verplichting van artikel 247a rust en zij daaraan niet hebben voldaan, houdt de rechter de beslissing op een in het tweede lid bedoeld verzoek ambtshalve aan, totdat aan die verplichting is voldaan. Aanhouding blijft achterwege indien het belang van het kind dit vergt.
4.De artikelen 377a, vierde lid, 377e en 377g zijn van overeenkomstige toepassing. Daar waar in deze bepalingen gesproken wordt over omgang of een omgangsregeling wordt in plaats daarvan gelezen: een verdeling van de zorg- en opvoedingstaken.
5.De rechtbank beproeft alvorens te beslissen op een verzoek als in het eerste of tweede lid bedoeld, een vergelijk tussen de ouders en kan desverzocht en ook ambtshalve, zulks indien geen vergelijk tot stand komt en het belang van het kind zich daartegen niet verzet, een door de wet toegelaten dwangmiddel opleggen, dan wel bepalen dat de beschikking of onderdelen daarvan met toepassing van artikel 812, tweede lid, van het Wetboek van Burgerlijke Rechtsvordering ten uitvoer kunnen worden gelegd.
6.De rechtbank behandelt het verzoek binnen zes weken.

Artikel 253i
1.Ingeval van gezamenlijke gezagsuitoefening voeren de ouders gezamenlijk het bewind over het vermogen van het kind en vertegenwoordigen zij gezamenlijk het kind in burgerlijke handelingen, met dien verstande dat een ouder alleen, mits niet van bezwaren van de andere ouder is gebleken, hiertoe ook bevoegd is.
2.Artikel 253a van dit boek is van overeenkomstige toepassing met dien verstande dat in plaats van 'de rechtbank' wordt gelezen 'de kantonrechter'.
3.Oefent een ouder het gezag alleen uit, dan wordt door die ouder het bewind over het vermogen van het kind gevoerd en het kind in burgerlijke handelingen vertegenwoordigd.
4.Van het bepaalde in het eerste en derde lid kan worden afgeweken:
a. indien de rechter bij de beschikking waarbij de uitoefening van het gezag over het kind aan een van de ouders wordt opgedragen op eensluidend verzoek van de ouders of op verzoek van één van hen, mits de ander zich daartegen niet verzet, heeft bepaald dat de ouder die niet het gezag over het kind zal uitoefenen, het bewind over het vermogen van het kind zal voeren;
b. ingevolge artikel 276, tweede lid, van dit boek, bij ontheffing of ontzetting van het gezag;
c. indien hij die een minderjarige goederen schenkt of vermaakt, bij de gift, onderscheidenlijk bij de uiterste wilsbeschikking, heeft bepaald dat een ander het bewind over die goederen zal voeren.
5.In het laatstbedoelde geval zijn de ouders, of — indien een ouder het gezag alleen uitoefent — die ouder, bevoegd van de bewindvoerder rekening en verantwoording te vragen.
6.Bij het vervallen van het door de schenker of erflater ingesteld bewind zijn het eerste en tweede lid, onderscheidenlijk het derde lid, van toepassing.

Artikel 256
1.De kinderrechter bepaalt de duur van de ondertoezichtstelling op ten hoogste een jaar.

2.De kinderrechter kan de duur telkens voor ten hoogste een jaar verlengen. Hij kan dit doen op verzoek van de stichting, bedoeld in artikel 1, onder f, van de Wet op de jeugdzorg, een ouder, een ander die de minderjarige als behorende tot zijn gezin verzorgt en opvoedt, de raad voor de kinderbescherming of het openbaar ministerie.
3.Indien de stichting, bedoeld in artikel 1, onder f, van de Wet op de jeugdzorg niet overgaat tot een verzoek tot verlenging doet zij hiervan zo spoedig mogelijk en onder overlegging van een verslag van het verloop van de ondertoezichtstelling mededeling aan de raad voor de kinderbescherming.
4.De kinderrechter kan de ondertoezichtstelling opheffen indien de grond daarvoor niet langer bestaat. Hij kan dit doen op verzoek van de stichting, bedoeld in artikel 1, onder f, van de Wet op de jeugdzorg, de met het gezag belaste ouder of de minderjarige van twaalf jaren of ouder.

Artikel 259
1.Op verzoek van de met het gezag belaste ouder of de minderjarige van twaalf jaren of ouder kan de kinderrechter een aanwijzing geheel of gedeeltelijk vervallen verklaren. Het verzoek heeft geen schorsende kracht, tenzij de kinderrechter het tegendeel bepaalt.
2.Bij de indiening van het verzoek wordt de beslissing van de stichting, bedoeld in artikel 1, onder f, van de Wet op de jeugdzorg overgelegd.
3.De termijn voor het indienen van het verzoek bij de kinderrechter bedraagt twee weken en vangt aan met ingang van de dag na die waarop de beslissing is toegezonden of uitgereikt.
4.Ten aanzien van een na afloop van de termijn ingediend verzoek blijft niet-ontvankelijkverklaring op grond daarvan achterwege indien de verzoeker redelijkerwijs niet geoordeeld kan worden in verzuim te zijn geweest.

Artikel 260
1.De met het gezag belaste ouder en de minderjarige van twaalf jaren of ouder kunnen de stichting, bedoeld in artikel 1, onder f, van de Wet op de jeugdzorg verzoeken een aanwijzing wegens gewijzigde omstandigheden geheel of gedeeltelijk in te trekken.
2.De stichting, bedoeld in artikel 1, onder f, van de Wet op de jeugdzorg geeft een schriftelijke beslissing binnen twee weken na ontvangst van het verzoek.
3.Artikel 259 is van overeenkomstige toepassing.
4.Het niet of niet tijdig nemen van een beslissing door de stichting, bedoeld in artikel 1, onder f, van de Wet op de jeugdzorg wordt voor de toepassing van deze bepaling gelijkgesteld met afwijzing van het verzoek. De termijn voor het indienen van het verzoek bij de kinderrechter loopt in dat geval door zolang de stichting, bedoeld in artikel 1, onder f, van de Wet op de jeugdzorg niet heeft beslist en eindigt, indien de stichting, bedoeld in artikel 1, onder f, van de Wet op de jeugdzorg alsnog beslist, twee weken daarna.

Artikel 263
1.Een uithuisplaatsing kan worden beëindigd door de stichting, bedoeld in artikel 1, onder f, van de Wet op de jeugdzorg. De stichting, bedoeld in artikel 1, onder f, van de Wet op de jeugdzorg, doet hiervan zo spoedig mogelijk en onder overlegging van een verslag van het verloop van de uithuisplaatsing mededeling aan de raad voor de kinderbescherming.
2.De met het gezag belaste ouder, een ander die de minderjarige als behorende tot zijn gezin verzorgt en opvoedt en de minderjarige van twaalf jaren of ouder kunnen wegens gewijzigde omstandigheden de stichting, bedoeld in artikel 1, onder f, van de Wet op de jeugdzorg verzoeken:
a. de uithuisplaatsing te beëindigen;
b. de duur ervan te bekorten;
c. af te zien van een krachtens de machtiging toegestane wijziging van de verblijfplaats van de minderjarige. Onder wijziging van de verblijfplaats wordt mede verstaan de plaatsing van de minderjarige bij de ouder die het gezag heeft.
3.De stichting, bedoeld in artikel 1, onder f, van de Wet op de jeugdzorg geeft een schriftelijke beslissing binnen twee weken na ontvangst van het verzoek.

4.Op verzoek van de in het tweede lid genoemde personen kan de kinderrechter de machtiging geheel of gedeeltelijk intrekken of de duur ervan bekorten. Artikel 259, eerste lid, tweede volzin, tweede, derde en vierde lid, alsmede artikel 260, vierde lid, zijn van toepassing.

Artikel 263b
1.Voor de duur van de maatregel kan de kinderrechter op verzoek van de stichting, bedoeld in artikel 1, onder f, van de Wet op de jeugdzorg een rechterlijke beslissing tot vaststelling van een regeling inzake de uitoefening van het omgangsrecht wijzigen voor zover dat noodzakelijk is met het oog op het doel van de ondertoezichtstelling.
2.Op het verzoek van de met het gezag belaste ouder, de omgangsgerechtigde, de minderjarige van twaalf jaren of ouder en de stichting, bedoeld in artikel 1, onder f, van de Wet op de jeugdzorg kan de kinderrechter de in het eerste lid genoemde beslissing wijzigen op grond dat nadien de omstandigheden zijn gewijzigd, of dat bij het nemen van de beslissing van onjuiste of onvolledige gegevens is uitgegaan.
3.Zodra de ondertoezichtstelling is geëindigd, geldt een ingevolge deze bepaling vastgestelde regeling als een regeling bedoeld in artikel 377a dan wel 377f .

Artikel 337
1.De voogd vertegenwoordigt de minderjarige in burgerlijke handelingen.
2.De voogd moet het bewind over het vermogen van de minderjarige als een goed voogd voeren. Bij slecht bewind is hij voor de daardoor veroorzaakte schade aansprakelijk.
3.Indien goederen die de minderjarige geschonken of vermaakt zijn, onder bewind zijn gesteld, is de voogd bevoegd van de bewindvoerder rekening en verantwoording te vorderen. Vervalt dit bewind, dan komen de goederen onder het bewind van de voogd
Artikel 377a
1.Het kind heeft het recht op omgang met zijn ouders en met degene die in een nauwe persoonlijke betrekking tot hem staat. De niet met het gezag belaste ouder heeft het recht op en de verplichting tot omgang met zijn kind.
2.De rechter stelt op verzoek van de ouders of van een van hen of degene die in een nauwe persoonlijke betrekking staat tot het kind, al dan niet voor bepaalde tijd, een regeling inzake de uitoefening van het omgangsrecht vast dan wel ontzegt, al dan niet voor bepaalde tijd, het recht op omgang.
3.De rechter ontzegt het recht op omgang slechts, indien:
a. omgang ernstig nadeel zou opleveren voor de geestelijke of lichamelijke ontwikkeling van het kind, of
b. de ouder of degene die in een nauwe persoonlijke betrekking staat tot het kind kennelijk ongeschikt of kennelijk niet in staat moet worden geacht tot omgang, of
c. het kind dat twaalf jaren of ouder is, bij zijn verhoor van ernstige bezwaren tegen omgang met zijn ouder of met degene met wie hij in een nauwe persoonlijke betrekking staat heeft doen blijken, of
d. omgang anderszins in strijd is met zwaarwegende belangen van het kind.

Artikel 377b
1.De ouder die met het gezag is belast, is gehouden de niet met het gezag belaste ouder op de hoogte te stellen omtrent gewichtige aangelegenheden met betrekking tot de persoon en het vermogen van het kind en deze te raadplegen — zo nodig door tussenkomst van derden — over daaromtrent te nemen beslissingen. Op verzoek van een ouder kan de rechter ter zake een regeling vaststellen.
2.Indien het belang van het kind zulks vereist kan de rechter zowel op verzoek van de met het gezag belaste ouder als ambtshalve bepalen dat het eerste lid van dit artikel buiten toepassing blijft.
3.Artikel 377e is van overeenkomstige toepassing.

Artikel 377e

De rechtbank kan op verzoek van de ouders of van een van hen of van degene die in een nauwe persoonlijke betrekking staat tot het kind een beslissing inzake de omgang alsmede een door de ouders onderling getroffen omgangsregeling wijzigen op grond dat nadien de omstandigheden zijn gewijzigd, of dat bij het nemen van de beslissing van onjuiste of onvolledige gegevens is uitgegaan.

Wetboek van Burgerlijke Rechtsvordering

Artikel 798
1.Voor de toepassing van deze afdeling wordt onder belanghebbende verstaan: degene op wiens rechten of verplichtingen de zaak rechtstreeks betrekking heeft.
2.Ter zake van de instelling en opheffing van curatele, onderbewindstelling ter bescherming van meerderjarigen of mentorschap worden onder belanghebbenden bovendien verstaan: de echtgenoot of andere levensgezel en de kinderen of, bij gebreke van dezen, de ouders, broers en zussen van degene wiens curatele, goederen of mentorschap het betreft.

Artikel 809
1.In zaken betreffende minderjarigen, uitgezonderd die welke het levensonderhoud van een minderjarige betreffen, beslist de rechter niet dan na de minderjarige van twaalf jaren of ouder in de gelegenheid te hebben gesteld hem zijn mening kenbaar te maken, tenzij het naar het oordeel van de rechter een zaak van kennelijk ondergeschikt belang betreft. De rechter kan minderjarigen die de leeftijd van twaalf jaren nog niet hebben bereikt, in de gelegenheid stellen hem hun mening kenbaar te maken op een door hem te bepalen wijze. Hetzelfde geldt in zaken betreffende het levensonderhoud van minderjarigen.
2.In zaken betreffende curatele, onderbewindstelling ter bescherming van meerderjarigen en mentorschap is de eerste volzin van het eerste lid van overeenkomstige toepassing ten aanzien van de onder curatele te stellen of gestelde persoon, ten aanzien van degene wiens goederen het betreft, alsmede ten aanzien van de persoon ten behoeve van wie mentorschap is verzocht of is ingesteld.
3.Indien de gelegenheid waarop de minderjarige zijn mening kenbaar kan maken, niet kan worden afgewacht zonder onmiddellijk en ernstig gevaar voor de minderjarige, kan de rechter een beschikking tot voorlopige ondertoezichtstelling van een minderjarige geven zonder toepassing van het eerste lid. Deze beschikking verliest haar kracht na verloop van twee weken, tenzij de minderjarige binnen deze termijn in de gelegenheid is gesteld zijn mening kenbaar te maken.
4.Indien de minderjarige van de in het eerste en derde lid bedoelde gelegenheid geen gebruik heeft gemaakt, kan de rechter een nadere dag bepalen waarop hij voor hem gebracht zal worden. Verschijnt de minderjarige alsdan wederom niet, dan kan de zaak zonder hem worden behandeld.

Wet op de jeugdzorg

Artikel 29a
1.Dit hoofdstuk is van toepassing op minderjarige jeugdigen alsmede op jeugdigen die de leeftijd van 21 jaar nog niet hebben bereikt, ten aanzien van wie op het tijdstip waarop zij meerderjarig werden, een machtiging gold. Laatstbedoelde jeugdigen worden voor de toepassing van dit hoofdstuk, in afwijking van artikel 233 van Boek 1 van het Burgerlijk Wetboek, als minderjarigen behandeld.
2.In zaken betrekking hebbende op de toepassing van dit hoofdstuk is een minderjarige die de leeftijd van twaalf jaren heeft bereikt, bekwaam in rechte op te treden. Hetzelfde geldt indien de minderjarige de leeftijd van twaalf jaren nog niet heeft bereikt, maar in staat kan worden geacht tot een redelijke waardering van zijn belangen ter zake.

Wet op de Rechtsbijstand

Artikel 13.

1.Onverminderd het tweede lid wordt rechtsbijstand verleend door:

a. door het bestuur ingeschreven advocaten;

b. medewerkers van een voorziening voorzover belast met de verlening van rechtsbijstand;

c. notarissen, onverminderd het bepaalde in artikel 56 van de Wet op het notarisambt, gerechtsdeurwaarders en anderen met wie de raad een overeenkomst is aangegaan tot het verlenen van rechtsbijstand op bepaalde rechtsgebieden.

2.Rechtshulp wordt uitsluitend verleend door medewerkers die in dienstbetrekking zijn bij de voorziening, bedoeld in artikel 7, tweede lid, of bij een voorziening als bedoeld in artikel 8, tweede lid, voorzover deze belast is met het verlenen van rechtshulp, of door anderen met wie de raad in overeenstemming met de regels, bedoeld in het derde lid, een overeenkomst is aangegaan tot het verlenen van rechtshulp.3.Het bestuur stelt regels met betrekking tot het aangaan van de in het eerste lid, onder c, en tweede lid bedoelde overeenkomsten.

Artikel 24.

1. Het bestuur beslist op de aanvraag om een toevoeging ten behoeve van:

    a. rechtsbijstand door een advocaat;

    b. rechtsbijstand door een medewerker die in dienstbetrekking is bij een voorziening, tenzij het betreft een medewerker van de voorziening, bedoeld in artikel 7, tweede lid, of van een voorziening als bedoeld in artikel 8, tweede lid, voorzover het de verlening van rechtshulp betreft;

    c. rechtsbijstand door personen, bedoeld in artikel 13, eerste lid, onder c.

2. De rechtsbijstandverlener dient mede namens de rechtzoekende, een aanvraag om een toevoeging in bij de vestiging van de raad in het ressort waar de rechtsbijstandverlener kantoor houdt. De aanvraag wordt mede namens de rechtzoekende, ondertekend door de rechtsbijstandverlener.

3. De aanvraag om een toevoeging bevat een genoegzame omschrijving van de feiten en omstandigheden betreffende het rechtsprobleem waarvoor rechtsbijstand wordt gevraagd, de aan te voeren gronden dan wel een aanduiding van de werkzaamheden op basis van de toevoeging die ter zake van het rechtsprobleem nodig worden geacht.

4. De rechtsbijstandverlener kan slechts met instemming van het bestuur de toevoeging weigeren. Zolang de toevoeging niet is gewijzigd of ingetrokken, is hij verplicht de nodige rechtsbijstand te verlenen.

5. De toevoeging vermeldt een omschrijving van het rechtsbelang terzake waarvan de toevoeging is verleend. Het besluit vermeldt tevens het bedrag van de eigen bijdrage die op de voet van het bepaalde in artikel 35 is verschuldigd.

Artikel 33b.

1. Alle in Nederland kantoor houdende mediators die daartoe een aanvraag hebben ingediend, worden door het bestuur ingeschreven, indien zij voldoen aan de door het bestuur vastgestelde voorwaarden. Het bestuur kan regels stellen met betrekking tot deze voorwaarden. Deze regels behoeven de goedkeuring van Onze Minister.

2. Het eerste lid is van overeenkomstige toepassing op mediators uit andere lidstaten van de Europese Unie, met uitzondering van Denemarken, die geen kantoor houden in Nederland.

Besluit eigen bijdrage rechtsbijstand

Artikel 6

1.Het bestuur legt geen eigen bijdrage op in geval van een toevoeging ten behoeve van rechtsbijstand aan:

a. personen die uitsluitend zijn aangewezen op verstrekkingen, weergegeven in zowel de Regeling opvang asielzoekers als de Regeling verstrekkingen asielzoekers en andere categorieën vreemdelingen 2005;

b. personen wier vrijheid rechtens is ontnomen en die geen inkomsten meer hebben uit een dienstbetrekking, beroep of bedrijf, sociale verzekering of sociale voorziening;

c. personen die een vordering in kort geding instellen tegen een beslissing als bedoeld in artikel 38, vijfde lid, derde volzin, van de Wet bijzondere opnemingen in psychiatrische ziekenhuizen;

d. minderjarigen ten behoeve van wie een bijzonder curator als bedoeld in artikel 250 van Boek 1 van het Burgerlijk Wetboek is benoemd; en

e. echtgenoten als bedoeld in artikel 817, eerste lid, van het Wetboek van Burgerlijke Rechtsvordering.

2.Het bestuur kan beslissen om geen eigen bijdrage op te leggen in geval van een toevoeging ten behoeve van rechtsbijstand, indien de rechtzoekende geen inkomen of vermogen heeft.

Artikel 8

Indien de rechtzoekende minderjarig is, wordt voor de vaststelling van de financiële draagkracht het inkomen en vermogen van zijn ouder of ouders in aanmerking genomen, tenzij:

a. de minderjarige 16 jaar of ouder en uitwonend is;

b. de minderjarige thuiswonend is en de ouder of ouders geen kinderbijslag voor hem ontvangen; of

c. de rechtsbijstand waarvoor de toevoeging wordt aangevraagd betrekking heeft op een geschil van de minderjarige met de ouder of ouders.

Bijlage 2: Stellingen

Stellingen voorgelegd aan rechters tijdens de focusgroepen

1. Rechters hanteren het begrip belangenconflict te strikt.
2. Voor kinderen vanaf 12 jaar is een bijzondere curator niet nodig.
3. Een goede bijzondere curator heeft pedagogische kennis.
4. Rechters hebben de behoefte aan een bijzondere curator onvoldoende in beeld.

Stellingen voorgelegd aan deelnemers VFAS-bijeenkomst regio Rotterdam

1. Zolang er nog één ouder is die op kan komen voor het belang van het kind, is een bijzondere curator niet nodig.
2. Als kind kun je het beste in Den Haag opgroeien want daar zijn je rechten het beste gewaarborgd.
3. Kinderen boven de 12 kunnen zelf hun mening geven en hebben geen bijzondere curator nodig.
4. De benoeming van een bijzondere curator juridiseert onnodig.
5. In alle gevallen waarin ouders bij een echtscheiding niet zelf tot een ouderschapsplan komen, moet de rechter een bijzondere curator benoemen.
6. Een bijzondere curator naast een gezinsvoogd geeft ellende.
7. Een advocaat volgt de mening van het kind, een bijzondere curator de belangen van het kind.
8. Een bijzondere curator hoeft geen band met het kind op te bouwen.
9. Wat is de belangrijkste rol van een bijzondere curator:
   - bemiddelen
   - adviseren
   - procederen
10. De relatie bijzondere curator – kind eindigt na het oordeel van de rechter.

Bijlage 3: Enquête formulier

Enquête bijzondere curatoren

Onderwerp
Sinds 1 april 2011 heeft Nederland een Kinderombudsman. De Kinderombudsman ziet toe op de naleving van de kinderrechten in Nederland. Eén van die rechten is dat kinderen gehoord worden in procedures die hen aangaan (art 12 van het Kinderrechtenverdrag).

In Nederland is het uitgangspunt dat niet het kind zelf, maar de ouders of voogden als wettelijke vertegenwoordigers aan (juridische) procedures deelnemen namens het kind. Als de ouders of voogden dat niet willen of kunnen, is het mogelijk dat de rechter een bijzondere curator ex art 1:250 BW benoemt die de belangen van het kind behartigt.

De Kinderombudsman doet onderzoek naar de bijzondere curator ex art. 1:250 BW. Het onderzoek richt zich op de vraag welke knelpunten er in de praktijk zijn, en welke verbetermogelijkheden hiervoor zijn. Het onderzoek bestaat onder meer uit gesprekken met rechters, gesprekken met kinderen, en een enquête onder bijzondere curatoren. We verwachten ons onderzoek eind april af te ronden met een rapport.

U heeft aangegeven mee te willen werken aan het onderzoek van de Kinderombudsman. U bent als bijzondere curator benoemd of u kunt als bijzondere curator ex art. 1:250 BW benoemd worden. Graag willen we u een aantal vragen voorleggen over uw werk als bijzondere curator, de knelpunten die u daarbij tegenkomt, en de oplossingen die daarvoor mogelijk zijn.

Praktische informatie
De vragen in deze enquête zijn onderverdeeld naar drie onderwerpen:

1. Vraag om een bijzondere curator
2. Benoeming van de bijzondere curator
3. Werkzaamheden van de bijzondere curator.

De enquête begint met een aantal achtergrondvragen. Het invullen zal naar schatting maximaal 15 minuten in beslag nemen.

Uw antwoorden zullen anoniem verwerkt worden.

U kunt uw antwoorden invullen in deze vragenlijst en deze per mail terugsturen naar **info@dekinderombudsman.nl**.

De vragen in deze vragenlijst hebben betrekking op de bijzondere curator ex art. 1:250 BW (dus *niet* op de bijzondere curator in afstammingszaken ex art 1:212 BW).

Achtergrond

1. In hoeveel zaken bent u tot op heden bijzondere curator ex art. 1:250 BW (geweest)?

2011:
2010:
2009:

2. In welk type zaken was u bijzondere curator ex art. 1:250 BW?
   Graag de globale verdeling in percentages weergeven

echtscheiding (bv. verblijfplaats, verzorging en opvoeding, omgangsregeling)	**%**
uithuisplaatsing niet gesloten	**%**
uithuisplaatsing gesloten	**%**
ondertoezichtstelling	**%**
onderwijszaken (bijv keuze van opleiding)	**%**
vermogenszaken	**%**
anders, namelijk……	**%**

3. Wat is uw professionele achtergrond?

[ ]	advocaat
[..]	(ortho-)pedagoog
[..]	psycholoog
[..]	anders, namelijk …

Vraag om een bijzondere curator
Het is aan de rechter om te bepalen of het in het belang van het kind is om een bijzondere curator aan te stellen.
De rechter kan ambtshalve tot de benoeming van een bijzondere curator besluiten. De rechter kan dat ook doen als een kind daarom gevraagd heeft, of als andere belanghebbenden, zoals ouders, grootouders of pleegouders, een verzoekschrift daartoe hebben ingediend.

Vraag 4
Hieronder sommen we een aantal aspecten op die een rol kunnen spelen bij het formuleren van de vraag om een bijzondere curator en de herkenning van die vraag door de rechter.

Welke van deze aspecten vormen volgens u op dit moment een knelpunt?
Graag aangeven welk antwoord voor u het meest van toepassing is.

Vraag om een bijzondere curator	**Is dit een knelpunt?**		
	Nee	**Klein**	**Groot**
1. Kinderen weten niet *dat* ze om een bijzondere curator kunnen vragen.			
2. Kinderen weten niet *hoe* ze bij de rechter om een bijzondere curator kunnen vragen.			
3. Kinderen zijn niet goed in staat om hun vraag te formuleren.			
4. Kinderen kunnen nergens heen als de rechter hun vraag om een bijzondere curator afwijst (geen beroepsmogelijkheden).			
5. Rechters zijn onvoldoende op de hoogte van de mogelijkheid om een bijzondere curator te benoemen.			
6. Rechters herkennen de situaties niet goed waarin het belang van het kind gediend is met een bijzondere curator.			
7. Ouders zijn onvoldoende op de hoogte van de mogelijkheid om een bijzondere curator te laten benoemen.			
8. Ouders herkennen de situaties niet goed waarin het belang van het kind gediend is met een bijzondere curator.			
9. Gezinsvoogden zijn onvoldoende op de hoogte van de mogelijkheid om een bijzondere curator te laten benoemen.			
10. Gezinsvoogden herkennen de situaties niet goed waarin het belang van het kind gediend is met een bijzondere curator.			
11. Advocaten zijn onvoldoende op de hoogte van de mogelijkheid om een bijzondere curator te laten benoemen.			
12. Advocaten herkennen de situaties niet goed waarin het belang van het kind gediend is met een bijzondere curator .			
13. Kinderrechtswinkels zijn onvoldoende op de hoogte van de mogelijkheid om een bijzondere curator te laten benoemen.			
14. Kinderrechtswinkels herkennen de situaties niet goed waarin het belang van het kind gediend is met een bijzondere curator.			

Vraag 5
Ziet u nog andere knelpunten als het gaat om 'vraag om een bijzondere curator'?
Zo ja, noemt u deze knelpunten dan hieronder.

Andere knelpunten 'vraag om een bijzondere curator':
15. …
16. …
17. …

Vraag 6
Hierboven heeft u kunnen aangeven wat volgens u knelpunten zijn als het gaat om de vraag om een bijzondere curator (zie vraag 4 en 5).
Welke zijn voor u de *belangrijkste* knelpunten als het gaat om de vraag om een bijzondere curator?
Welke oplossingen ziet u voor deze knelpunten?

Belangrijkste knelpunten 'vraag om een bijzondere curator'	Mogelijke oplossing voor dit knelpunt
35 17 …	35 17
35 17 …	35 17
35 17 …	35 17

Vraag 7
Wellicht heeft u ook suggesties voor de oplossing van andere knelpunten die u hiervoor benoemd heeft. Kunt u die hieronder aangeven?

Knelpunt	Mogelijke oplossing voor dit knelpunt
35 17 …	35 17
35 17 …	35 17
35 17 …	35 17

Benoeming van de bijzondere curator
Volgens de wettekst van art. 1:250 BW kan de bijzondere curator benoemd worden als de belangen van het kind in strijd zijn met die van de ouders. In 2009 heeft de wetgever de benoeming van de bijzondere curator willen vereenvoudigen, vanuit het idee dat het kind 'onderwerp van geschil' kan worden in een echtscheidingsprocedure. De wettekst is in 2009 echter niet gewijzigd.

Vraag 8
Hieronder sommen we een aantal aspecten op die een rol spelen bij het benoemen van de bijzondere curator.

Welke van deze aspecten vormen volgens u op dit moment een knelpunt?
Graag aangeven welk antwoord voor u het meest van toepassing is.

Benoemen van de bijzondere curator	**Is dit een knelpunt?**		
	Nee	**Klein**	**Groot**
1. Er is geen landelijk protocol voor rechters over de benoeming van de bijzondere curator.			
2. Rechters hanteren het criterium van 'belangenconflict tussen kind en ouders' te strikt.			
3. Rechters hanteren het criterium van 'belangenconflict tussen kind en ouders' te ruim'.			
4. Als het kind al een advocaat heeft, zijn rechters geneigd te denken dat de bijzondere curator geen toegevoegde waarde heeft.			
5. Als het kind al een gezinsvoogd heeft, zijn rechters geneigd te denken dat de bijzondere curator geen toegevoegde waarde heeft.			
6. Omdat rechters het kind zelf ook kunnen horen, zijn rechters geneigd te denken dat de bijzondere curator geen toegevoegde waarde heeft.			
7. Rechters weten niet wie ze als bijzondere curator kunnen benoemen.			

Vraag 9
Ziet u nog andere knelpunten als het gaat om 'benoemen van de bijzondere curator'?
Zo ja, noemt u deze knelpunten dan hieronder.

Andere knelpunten 'Benoemen van de bijzondere curator':
8. …
9. …
10. …

Vraag 10
Hierboven heeft u kunnen aangeven wat volgens u knelpunten zijn als het gaat om het benoemen van de bijzondere curator (zie vraag 8 en 9).
Welke zijn voor u de *belangrijkste* knelpunten als het gaat om het benoemen van de bijzondere curator? Welke oplossingen ziet u voor deze knelpunten?

Belangrijkste knelpunten 'benoemen van de bijzondere curator'	Mogelijke oplossing voor dit knelpunt
35 17 …	35 17
35 17 …	35 17
35 17 …	35 17

Vraag 11
Wellicht heeft u ook suggesties voor de oplossing van andere knelpunten die u hiervoor benoemd heeft. Kunt u die hieronder aangeven?

Knelpunt	Mogelijke oplossing voor dit knelpunt
…	
…	
…	

Vraag 12
Wat is uw mening over de volgende stellingen?
Graag aangeven welk antwoord voor u het meest van toepassing is.
Wilt u uw mening over de stellingen toelichten, dan kunt u dat eronder doen.

Stellingen 'Benoemen van de bijzondere curator'	**Zeer mee eens**	**Mee eens**	**Eens noch oneens**	**Oneens**	**Zeer mee oneens**
a. Voor kinderen onder de 12 jaar moet altijd een bijzondere curator benoemd worden.					
b. Voor kinderen boven de 12 jaar moet altijd een bijzondere curator benoemd worden.					
c. Behartigen van het belang van het kind is niet hetzelfde als luisteren naar de mening van het kind. Daarom heeft een bijzondere curator altijd toegevoegde waarde ten opzichte van een advocaat.					
d. Een bijzondere curator moet ook benoemd kunnen worden als een kind maar met één van de ouders een conflict heeft.					
e. Als ieder kind een advocaat zou krijgen, is een bijzondere curator niet nodig.					
f. Een bijzondere curator heeft geen toegevoegde waarde als er al een gezinsvoogd benoemd is.					
g. De behoefte aan een bijzondere curator is veel groter dan nu uit het aantal benoemingen blijkt.					

Toelichting op uw mening over de stellingen:
..

Werkzaamheden van de bijzondere curator
De wetgever stelt geen eisen aan de persoon of de opleiding van de bijzondere curator. Elke natuurlijke persoon die de rechter daartoe geschikt acht, kan benoemd worden.

Bij die benoeming moet de rechter omschrijven wat de taak van de bijzondere curator is. Volgens de wetgever heeft de bijzondere curator in beginsel een bemiddelende rol. Als de bemiddeling niet tot overeenstemming tussen ouders en kind leidt, en de bijzondere curator tevens een advocaat is, kan de bijzondere curator namens het kind gaan procederen. Daarnaast kan de bijzondere curator de rechter een advies geven over de voorgelegde kwestie.

Vraag 13
Als u kijkt naar de zaken waarin u tot nu toe bent benoemd als bijzondere curator, wat voor soort werkzaamheden heeft u dan in die zaken verricht?

Graag de globale percentages weergeven

advisering aan de rechter	*in*	*% van de zaken*
vertegenwoordiging van het kind in rechterlijke procedure	*in*	*% van de zaken*
bemiddeling ten behoeve van het kind	*in*	*% van de zaken*

Vraag 14
Hieronder sommen we een aantal aspecten op die verband houden met de werkzaamheden van de bijzondere curator.

Welke van deze aspecten vormen volgens u op dit moment een knelpunt?

Werkzaamheden van de bijzondere curator	**Is dit een knelpunt?**		
	Nee	**Klein**	**Groot**
1. Er zijn geen kwalificatie- of opleidingseisen waaraan de bijzondere curator moet voldoen.			
2. Er is geen toezicht op de kwaliteit van het werk van de bijzondere curator.			
3. Er zijn geen (bij-)scholingsmogelijkheden voor de bijzondere curator.			
4. Er is geen landelijk register voor bijzondere curatoren.			
5. De financiering voor de bijzondere curator is niet geregeld voor bijzondere curatoren die niet zijn ingeschreven bij de Raad voor de Rechtsbijstand.			
6. De financiering voor de bijzondere curator is niet geregeld voor werkzaamheden van de bijzondere curator 'buiten rechte'.			
7. De taakomschrijving die rechters meegeven aan de bijzondere curator is onvoldoende specifiek.			

Vraag 15
Ziet u nog andere knelpunten als het gaat om 'werkzaamheden van de bijzondere curator'?
Zo ja, noemt u deze knelpunten dan hieronder.

Andere knelpunten 'Werkzaamheden van de bijzondere curator':
11. …
12. …
13. …

Vraag 16

Hierboven heeft u kunnen aangeven wat volgens u knelpunten zijn als het gaat om de werkzaamheden van de bijzondere curator (zie vraag 14 en 15).
Welke zijn voor u de *belangrijkste* knelpunten ? Welke oplossingen ziet u voor deze knelpunten?

Belangrijkste knelpunten 'werkzaamheden van de bijzondere curator'	Mogelijke oplossing voor dit knelpunt
…	
…	
…	

Vraag 17

Wellicht heeft u ook suggesties voor de oplossing van andere knelpunten die u hiervoor benoemd heeft. Kunt u die hieronder aangeven?

Knelpunt	Mogelijke oplossing voor dit knelpunt
…	
…	
…	

Vraag 18

Wat is uw mening over de volgende stellingen?

Graag aangeven welk antwoord voor u het meest van toepassing is.

Wilt u uw mening over de stellingen toelichten, dan kunt u dat eronder doen.

Stellingen 'Werkzaamheden van de bijzondere curator'	**Zeer mee eens**	**Mee eens**	**Eens noch oneens**	**Oneens**	**Zeer mee oneens**
a. Familieleden van het kind moeten niet als bijzondere curator benoemd kunnen worden.					
b. Als een bijzondere curator door een rechter wordt aangewezen, is feitelijk het stadium van 'bemiddelen' al gepasseerd.					
c. In echtscheidingsprocedures zouden meer bijzondere curatoren benoemd moeten worden.					
d. Juist bij het *opstellen* van een ouderschapsplan of omgangsregeling bij een echtscheiding heeft een bijzondere curator toegevoegde waarde.					
e. Juist bij *problemen bij het naleven* of *een wijziging* van een ouderschapsplan of omgangsregeling na een echtscheiding, heeft een bijzondere curator toegevoegde waarde.					

Toelichting op uw mening over de stellingen:
..

Vraag 19

Bent u van mening dat in bepaalde zaken waarin een bijzondere curator ex art. 1:212 benoemd wordt, ook een benoeming ex art. 1:250 gewenst is?

Graag een toelichting op uw antwoord geven.

Benoeming ex art. 1:250 naast benoeming ex art. 1:212?
..

Vraag 20

Wilt u ons iets laten weten over de bijzondere curator ex art. 1:250 dat hiervoor nog niet aan bod is gekomen, een verdere toelichting geven op uw antwoorden of overige opmerkingen aan ons doorgeven, dan horen wij dat graag.

Ruimte voor verdere informatie over de bijzondere curator, toelichting of overige opmerkingen
..

Bijlage 4: Resultaten enquête

Inleiding

Aan de bijzondere curatoren is gevraagd om aan te geven wat volgens hen knelpunten zijn als het gaat om de vraag naar, de benoeming van en de uitvoering van taken door de bijzondere curator. Er is aan hen een lijst met mogelijke knelpunten voorgelegd en gevraagd om aan te geven of het naar hun mening een groot, klein of geen knelpunt was. Ook konden ze aangeven of ze nog andere knelpunten zien. Vervolgens is hen gevraagd om uit het geheel aan knelpunten, dus zowel de knelpunten genoemd in de vragenlijst als de knelpunten die ze zelf hebben aangedragen, de belangrijkste drie te noemen. Ook is gevraagd of de bijzondere curatoren zelf oplossingen zien voor de zaken die ze als knelpunt zien. Tot slot is de bijzondere curatoren gevraagd om hun mening te geven over een aantal stellingen. Hieronder een schematisch overzicht van de antwoorden.

Vraag naar de bijzondere curator

Knelpunten: grootte

Op basis van hoe vaak iets als groot, klein of geen knelpunt is aangemerkt[50], hebben wij de onderwerpen ingedeeld naar de kennelijk ervaren 'grootte' van het knelpunt.

Knelpunten 'Vraag om bijzondere curator'
Zeer grote knelpunten
1.1 Kinderen weten niet *dat* ze om een bijzondere curator kunnen vragen
1.2 Kinderen weten niet *hoe* ze bij de rechter om een bijzondere curator kunnen vragen
1.6 Rechters herkennen de situaties niet goed waarin het belang van het kind gediend is met een bijzondere curator
1.7 Ouders zijn onvoldoende op de hoogte van de mogelijkheid om een bijzondere curator te laten benoemen
1.8 Ouders herkennen de situaties niet goed waarin het belang van het kind gediend is met een bijzondere curator.
1.10 Gezinsvoogden herkennen de situaties niet goed waarin het belang van het kind gediend is met een bijzondere curator
Grote knelpunten
1.4 Kinderen kunnen nergens heen als de rechter hun vraag om een bijzondere curator afwijst (geen beroepsmogelijkheden)
1.5 Rechters zijn onvoldoende op de hoogte van de mogelijkheid om een bijzondere curator te benoemen
1.9 Gezinsvoogden zijn onvoldoende op de hoogte van de mogelijkheid om een bijzondere curator te laten benoemen
1.11 Advocaten zijn onvoldoende op de hoogte van de mogelijkheid om een bijzondere curator te laten benoemen
Kleine knelpunten
1.3 Kinderen zijn niet goed in staat om hun vraag te formuleren
1.12 Advocaten herkennen de situaties niet goed waarin het belang van het kind is gediend met een bijzondere curator
1.13 Kinderrechtswinkels zijn onvoldoende op de hoogte van de mogelijkheid om een bijzondere curator te laten benoemen
1.14 Kinderrechtswinkels herkennen de situaties niet goed waarin het belang van het kind gediend is met een bijzondere curator
Zeer kleine knelpunten

[50] Zeer groot knelpunt: 16 of meer respondenten zien het knelpunt als 'groot' en 4 of minder respondenten als 'klein. Groot knelpunt: het aantal respondenten dat het knelpunt als 'groot' ziet is groter dan het aantal dat het als 'klein' ziet, en het aantal 'groot' is ook groter dan het aantal dat als 'geen' knelpunt ziet. Klein knelpunt: alle knelpunten die niet 'zeer groot', 'groot' of 'zeer klein' zijn. Zeer klein knelpunt: 4 of minder respondenten zien het knelpunt als 'groot' en 17 of mee respondenten zien het knelpunt als 'geen' knelpunt.

Knelpunten: belang

Hieronder staan de knelpunten die genoemd zijn als één van de belangrijkste drie knelpunten. In de eerste helft van de tabel gaat het om de knelpunten uit de lijst die vaak genoemd zijn als 'belangrijk', in de tweede helft staan de knelpunten die de respondenten zelf hebben aangedragen en als belangrijk hebben gekwalificeerd.

Belangrijke knelpunten 'Vraag om bijzondere curator'	Genoemde oplossingen
Belangrijke knelpunten (gekozen uit lijst met mogelijke knelpunten)	
1.1 Kinderen weten niet *dat* ze om een bijzondere curator kunnen vragen	Meer bekendheid van bijzondere curator realiseren, onder meer door: - meer publiciteit en voorlichting (postbus 51, sire) - folders drukken en verspreiden op scholen, bibliotheken, kinderrechtswinkels - meesturen van brochure als instanties toch al een brief sturen aan kind (rechtbank, jeugdzorg of raad voor de kinderbescherming)
1.4 Kinderen kunnen nergens heen als de rechter hun vraag om een bijzondere curator afwijst (geen beroepsmogelijkheden)	Een advocaat voor het kind kan zich gewoon melden bij de rechter en wordt in de praktijk nooit geweigerd; eventueel kan dan alsnog om een bijzondere curator gevraagd worden. Voordeel van een advocaat is dat ouders hier geen bezwaar tegen kunnen maken als ze het niet nodig vinden of willen, en tegen de benoeming van een bijzondere curator wel Ouders zouden in de procedure een veel kleinere rol moeten spelen. Nu kunnen ouders een verzoek traineren als ze het niet in hun belang zien als een bijzondere curator wordt benoemd.
1.5 Rechters zijn onvoldoende op de hoogte van de mogelijkheid om een bijzondere curator te benoemen 1.6 Rechters herkennen de situaties niet goed waarin het belang van het kind gediend is met een bijzondere curator	Meer bekendheid van bijzondere curator realiseren door onder meer: - meer aandacht in opleiding - meer scholing geven op rechtbanken (cursussen) - publicaties over bijzondere curator verspreiden - meer voorlichting
1.7 Ouders zijn onvoldoende op de hoogte van de mogelijkheid om een bijzondere curator te laten benoemen 1.8 Ouders herkennen de situaties niet goed waarin het belang van het kind gediend is met een bijzondere curator.	Meer bekendheid van bijzondere curator realiseren, onder meer door: - meer publiciteit en voorlichting (postbus 51, sire) - meesturen van brochure als instanties toch al een brief sturen aan ouders (rechtbank, jeugdzorg of raad voor de kinderbescherming) Meer bekendheid Kinderombudsman realiseren
1.9 Gezinsvoogden zijn onvoldoende op de hoogte van de mogelijkheid om een bijzondere curator te laten benoemen 1.10 Gezinsvoogden herkennen de situaties niet goed waarin het belang van het kind gediend is met een bijzondere curator	Meer bekendheid van bijzondere curator realiseren, onder meer door: - meer voorlichting - meer aandacht geven in opleiding maatschappelijk werk (SPH) die door gezinsvoogden wordt gevolgd - wegnemen vijandsbeeld
1.11 Advocaten zijn onvoldoende op de hoogte van de mogelijkheid om een bijzondere curator te laten benoemen	Meer bekendheid van bijzondere curator realiseren door onder meer: - meer aandacht in opleiding - meer scholing geven aan advocaten (cursussen) - publicaties over bijzondere curator verspreiden - meer voorlichting
Belangrijke knelpunten (zelf aangedragen door bijzondere curatoren)	
Kinderen ervaren een te hoge drempel om actie te ondernemen	Maak het mogelijk dat school of advocaat van de ouders kan bellen naar een advocaat voor het kind
Kinderen maken onvoldoende gebruik van de informele rechtsingang	Meer publiciteit
BJZ laat in de praktijk vaak het belang van de ouders prevaleren terwijl het eigenlijk voor het kind op zou moeten komen	Er is bijna niets tegen te doen. Meer controle op BJZ

Belangrijke knelpunten 'Vraag om bijzondere curator'	Genoemde oplossingen
Administratieve rompslomp. Bij een verzoekschrift worden griffierechten geheven	Geen griffierechten voor deze verzoeken

Benoemen van de bijzondere curator

Knelpunten: grootte

Knelpunten 'Benoeming van bijzondere curator'
Zeer grote knelpunten
8.1 Er is geen landelijk protocol voor rechters over de benoeming van de bijzondere curator
8.5 Als het kind als een gezinsvoogd heeft, zijn rechters geneigd te denken dat de bijzondere curator geen toegevoegde waarde heeft.
Grote knelpunten
8.2 Rechters hanteren het criterium van 'belangenconflict tussen kind en ouders' te strikt
8.4 Als het kind al een advocaat heeft, zijn rechters geneigd te denken dat de bijzondere curator geen toegevoegde waarde heeft.
8.6 Omdat rechters het kind zelf ook kunnen horen, zijn rechters geneigd te denken dat de bijzondere curator geen toegevoegde waarde heeft.
Kleine knelpunten
Zeer kleine knelpunten
8.3 Rechters hanteren het criterium van 'belangenconflict tussen kind en ouders' te ruim.
8.7 Rechters weten niet wie ze als bijzondere curator kunnen benoemen.

Knelpunten: belang

Belangrijke knelpunten 'Benoeming van bijzondere curator'	Genoemde oplossingen
Belangrijke knelpunten (gekozen uit lijst met mogelijke knelpunten)	
8.2 Rechters hanteren het criterium van 'belangenconflict tussen kind en ouders' te strikt	'Benoemen van bijzondere curator, tenzij…' als uitgangspunt nemen bij bepaalde typen zaken zoals: - Zaken waarin ouders met elkaar strijden, in ieder geval bij 'vechtscheidingen' - Gezagskwesties - Zaken over kinderen die in een instelling verblijven - Zaken over kinderen die in een pleeggezin verblijven - Zaken waarin ingrijpende beslissing voor het kind wordt genomen - Zaken waarin kind zelf (of zijn advocaat) vraagt om bijzondere curator Uitzonderingsgronden: - Er is evident sprake van 'oneigenlijk gebruik' - Benoeming van bijzondere curator vertraagt de zaak onnodig Voorlichten van rechters over specifieke belangenbehartiging voor het kind (en dat dit strijdig kan zijn met het belang van het gezin/ de ouders)
8.1 Er is geen landelijk protocol voor rechters over de benoeming van de bijzondere curator	Voortzetten van 'protocolgroep'. Landelijk overleg tussen rechters.

Belangrijke knelpunten 'Benoeming van bijzondere curator'	Genoemde oplossingen
	Mogelijke elementen voor het protocol: - Verzoek om een bijzondere curator niet ongemotiveerd afwijzen - Afweging tussen zelf horen door rechter (in alle gevallen?) en benoemen van bijzondere curator - Bijzondere curator benoemen in vroeg stadium (voorkomen dat de zaak ontspoort en minderjarigen goed kunnen informeren) - Heldere procedurevoorschriften
8.6 Omdat rechters het kind zelf ook kunnen horen, zijn rechters geneigd te denken dat de bijzondere curator geen toegevoegde waarde heeft.	Scholing en voorlichting rechters over mogelijkheden en inbreng van bijzondere curator, namelijk: - Meer mogelijkheden en tijd om kinderen te horen en zaken op een rijtje te zetten - Inbreng van pedagogische kennis over (jonge) kinderen en hun opvoedingssituatie - Aanleveren van bouwstenen vanuit de positie van het kind, die de rechter kan gebruiken om een besluit te nemen - Onafhankelijke positie van bijzondere curator (in tegenstelling tot de advocaat van een kind of de ouders)
Belangrijke knelpunten (zelf aangedragen door bijzondere curatoren)	
Rechters hebben te weinig pedagogische en ontwikkelingspsychologische kennis	Scholing van rechters. Gespecialiseerde kinderrechters (en niet het huidige rouleersysteem, want niet-gespecialiseerde rechters kunnen verzoeken of bezwaren van ouders en kinderen niet op waarde schatten) Speciaal team Jeugdrecht.
Rechters leggen teveel prioriteit bij de rechten van de ouders	Scholing van rechters in kennis over de voorwaarden waaronder een kind zich leeftijdsadequaat kan ontwikkelen
Rechters hebben schroom om een psycholoog of pedagoog te benoemen als bijzondere curator	Goed uitleggen aan rechters wat ze van een psycholoog of pedagoog kunnen verwachten (vertegenwoordigen van de stem van het kind en daarnaast antwoorden op gestelde vragen, mits die vragen zijn gesteld in termen van 'wat als…')

Stellingen

Stellingen 'Benoemen van de bijzondere curator'	Zeer mee eens	Mee eens	Eens noch oneens	Oneens	Zeer mee oneens	Weet niet/ Geen antw
h. Voor kinderen onder de 12 jaar moet altijd een bijzondere curator benoemd worden.	7	7	8	4	2	1
Adv	5	7	7	4	2	0
Rest	2	0	1	0	0	1
i. Voor kinderen boven de 12 jaar moet altijd een bijzondere curator benoemd worden.	5	9	6	6	2	1
Adv	5	7	5	6	2	0
Rest	0	2	1	0	0	1
j. Behartigen van het belang van het kind is niet hetzelfde als luisteren naar de mening van het kind. Daarom heeft een bijzondere curator altijd toegevoegde waarde ten opzichte van een advocaat.	13	8	5	2	0	1
Adv	10	8	5	2	0	0
Rest	3	0	0	0	0	1

k. Een bijzondere curator moet ook benoemd kunnen worden als een kind maar met één van de ouders een conflict heeft.	14	14	0	0	0	1
Adv	12	13	0	0	0	0
Rest	2	1	0	0	0	1
l. Als ieder kind een advocaat zou krijgen, is een bijzondere curator niet nodig.	1	7	4	9	7	1
Adv	1	7	4	8	5	0
Rest	0	0	0	1	2	1
m. Een bijzondere curator heeft geen toegevoegde waarde als er al een gezinsvoogd benoemd is.	0	0	0	9	19	1
Adv	0	0	0	9	16	0
Rest	0	0	0	0	3	1
n. De behoefte aan een bijzondere curator is veel groter dan nu uit het aantal benoemingen blijkt.	12	12	2	1	1	1
Adv	9	12	2	1	1	0
Rest	3	0	0	0	0	1

Uitvoering van taken door de bijzondere curator

Knelpunten: grootte

Knelpunten 'Uitvoering taken door bijzondere curator'
Zeer grote knelpunten
Grote knelpunten
14.1 Er zijn geen kwalificatie- of opleidingseisen waaraan de bijzondere curator moet voldoen
14.2 Er is geen toezicht op de kwaliteit van het werk van de bijzondere curator
14.4 Er is geen landelijk register voor bijzondere curatoren
14.6 De financiering voor de bijzondere curator is niet geregeld voor werkzaamheden van de bijzondere curator 'buiten rechte'
Kleine knelpunten
14.3 Er zijn geen (bij-)scholingsmogelijkheden voor de bijzondere curator
14.5 De financiering voor de bijzondere curator is niet geregeld voor bijzondere curatoren die niet zijn ingeschreven bij de Raad voor de Rechtsbijstand
14.7 De taakomschrijving die rechters meegeven aan de bijzondere curator is onvoldoende specifiek.
Zeer kleine knelpunten

Knelpunten: belang

Belangrijke knelpunten 'Uitvoering taken door bijzondere curator'	Genoemde oplossingen
Belangrijke knelpunten (gekozen uit lijst met mogelijke knelpunten)	
14.1 Er zijn geen kwalificatie- of opleidingseisen waaraan de bijzondere curator moet voldoen	Opleidings- en kwalificatie-eisen formuleren. Suggesties hiervoor: - advocaat en lid VFAS - jeugdadvocaat ('juridische achtergrond- met- jeugdsaus') - competenties bijzondere curator: stelling durven nemen en kinderen een stem geven op een manier die ze vaak niet zelf kunnen of durven; een 'klik' hebben

Belangrijke knelpunten 'Uitvoering taken door bijzondere curator'	Genoemde oplossingen
	met minderjarigen - kennis van pedagogiek en ontwikkelingspsychologie - kennis van gespreksvoering met kinderen - mediator zijn (in geval van bemoeienis met naleven of wijzigen van ouderschapsplan bij echtscheidingen) Bijzondere curator moet kennis hebben van pedagogiek en ontwikkelingspsychologie
14.2 Er is geen toezicht op de kwaliteit van het werk van de bijzondere curator	Toezicht door rechtbanken (die hiervoor dan geschoold zijn) Toezicht door beroepsgroep (advocaten, psychologen)
14.3 Er zijn geen (bij-)scholingsmogelijkheden voor de bijzondere curator	Bijscholing aanbieden
14.6 De financiering voor de bijzondere curator is niet geregeld voor werkzaamheden van de bijzondere curator 'buiten rechte'	Nadere regelgeving/ beleid maken over financiering van werkzaamheden van bijzondere curator Suggesties voor uit te werken onderwerpen: - opdracht die de rechter meegeeft aan de bijzondere curator (bijvoorbeeld specifieke onderzoeksvragen) - adviesmogelijkheden aan minderjarigen - verruiming vergoedingsmogelijkheden, bijvoorbeeld verruiming van aantal uren 'niet-juridisch' dat is toegestaan - eenduidigheid in financiering (vergoedingen voor juristen en niet-juristen; wie betaalt (rechtbank, staatskas of Bureau Jeugdzorg); maximumbedrag)
Belangrijke knelpunten (zelf aangedragen door bijzondere curatoren)	
Als in één zitting zowel de benoeming van de bijzondere curator plaatsvindt als de inhoudelijke behandeling van de zaak, is het voor de bijzondere curator lastig om zich voor te bereiden en kind te adviseren (tot de zitting is dan onduidelijk bijzondere curator alleen bij kindverhoor mag zijn of de hele zitting mag bijwonen)	
Het is onduidelijk wanneer de werkzaamheden van de bijzondere curator stoppen. Er zijn geen regels over 'ontslag'. Geen einddatum aan benoeming.	
Het is onduidelijk welke werkzaamheden een bijzondere curator geacht wordt te doen als de rechtbank alsnog ook een (andere) advocaat benoemt (bijvoorbeeld bij een machtiging uithuisplaatsing gesloten setting).	
Mogelijke aansprakelijkheid in geval van vertegenwoordiging	Eventuele aansprakelijkheid onder de beroepsaansprakelijkheid van advocaten laten vallen
De bijzondere curator heeft in civiele zaken een adviserende functie. Dan is het nog afhankelijk van de rechter of het advies wordt opgevolgd. De vraag is of dat zinvol is.	Betere inbedding van de bijzondere curator in het rechtssysteem

Stellingen

Stellingen 'Uitvoering van taken door de bijzondere curator'	Zeer mee eens	Mee eens	Eens noch oneens	Oneens	Zeer mee oneens	Weet niet/ Geen antw
f. Familieleden van het kind moeten niet als bijzondere curator benoemd kunnen worden.	14	10	3	0	1	1
Adv	13	9	2	0	1	0
Rest	1	1	1	0	0	1
g. Als een bijzondere curator door een rechter wordt aangewezen, is feitelijk het stadium van 'bemiddelen' al gepasseerd.	0	4	5	13	6	1
Adv	0	2	4	13	6	0
Rest	0	2	1	0	0	1

h. In echtscheidingsprocedures zouden meer bijzondere curatoren benoemd moeten worden.	9	13	4	0	1	2
Adv	7	13	3	0	1	1
Rest	2	0	1	0	0	1
i. Juist bij het *opstellen* van een ouderschapsplan of omgangsregeling bij een echtscheiding heeft een bijzondere curator toegevoegde waarde.	7	12	6	2	1	1
Adv	5	12	5	2	1	0
Rest	2	0	1	0	0	1
j. Juist bij *problemen bij het naleven* of *een wijziging* van een ouderschapsplan of omgangsregeling na een echtscheiding, heeft een bijzondere curator toegevoegde waarde.	10	14	4	0	0	1
Adv	8	14	3	0	0	0
Rest	2	0	1	0	0	1

Bijlage 5: Vragen aan Bureaus Jeugdzorg en drie landelijke gezinsvoogdij-instellingen

Vragen

1. Zijn er situaties waarin een bijzondere curator[51] toegevoegde waarde heeft of kan hebben naast een gezinsvoogd?
1a. Zo ja, in welke situaties en waarom?
1b. Maakt de achtergrond van de bijzondere curator (advocaat, orthopedagoog, psycholoog, oom/tante) daarbij nog uit?

2. Zijn er gezinsvoogden die (recente) ervaring hebben met een bijzondere curator? (graag vermelden het jaar en de situatie)
2a. Hoe zijn die ervaringen? Prettig, onrustig, behulpzaam, negatief, et cetera. Het antwoord graag (kort) toelichten.

3. Zijn er situaties waarin vanuit Bureau Jeugdzorg om een bijzondere curator wordt verzocht?
3a. Zo ja, in welke (soort) situaties wordt dit gedaan?
3b. Kunt u concrete voorbeelden/ervaringen geven uit 2010, 2011 en/of 2012?
3c. Werd de bijzondere curator in zo'n geval – over het algemeen en/of in de specifieke gevallen in

[51] In de inleidende tekst was duidelijk gemaakt dat de vragen betrekking hebben op de bijzondere curator ex art 1:250 BW en uitdrukkelijk niet op die ex art 1:212 BW.

Bijlage 6: Beschikkingen van vier rechtbanken

Toegezonden uitspraken inzake de bijzondere curator van de rechtbanken Amsterdam, Den Haag, Leeuwarden en Rotterdam.

(I) = ambtshalve benoeming na informele rechtsingang

Rechtbank	Datum uitspraak	Leeftijd minderjarige	Verzoeker	Reden verzoek om bijzondere curator	Beslissing
Leeuwarden	13-1-2011	geanonimiseerd	pleegouders	verdeling verzorgingstaken	benoeming
Leeuwarden	9-2-2011	geanonimiseerd	advocaat	verdeling verzorgingstaken	benoeming
Leeuwarden	2-11-2011	geanonimiseerd	rechtbank	hoofdverblijfplaats	benoeming
s-Gravenhage	22-9-2011	tien jaar	advocaat	verdeling verzorgingstaken	Afwijzing
s-Gravenhage	7-4-2011	twaalf, acht en zes jaar	moeder	gezag en verdeling van zorgtaken	Afwijzing
s-Gravenhage	11-5-2011	zestien jaar	vader	hoofdverblijfplaats, gezag en zorgregeling	Afwijzing
s-Gravenhage	27-10-2011	drie jaar	moeder	gezag, hoofdverblijfplaats en zorgregeling	Afwijzing
s-Gravenhage	27-4-2011	zes jaar	rechtbank	gezag en verdeling zorgtaken	benoeming
s-Gravenhage	26-1-2011	zestien, veertien en twaalf jaa	moeder	gezag	Afwijzing
s-Gravenhage	2-2-2011	zes jaar	vader	gezag en hoofdverblijfplaats	Afwijzing
s-Gravenhage	22-2-2011	zes jaar	pleegouders	verlenging machtiging uithuisplaatsing	Afwijzing
s-Gravenhage	19-10-2011	veertien jaar	rechtbank (I)	wijziging omgangsregeling	benoeming
s-Gravenhage	1-4-2011	beiden dertien jaar	rechtbank (I)	wijziging omgangsregeling	benoeming
s-Gravenhage	19-7-2011	zeventien jaar	rechtbank (I)	hoofdverblijfplaats	benoeming
s-Gravenhage	12-8-2011	elf jaar	rechtbank (I)	wijziging omgangsregeling	benoeming
s-Gravenhage	2-12-2011	dertien jaar	moeder	gezag	Afwijzing
s-Gravenhage	28-6-2011	zestien jaar	vader	omgang met een ouder	Afwijzing
s-Gravenhage	28-7-2011	zeventien, vijftien, veertien en	advocaat	uithuisplaatsing	benoeming
s-Gravenhage	22-9-2011	tien jaar	advocaat	ondertoezichtstelling	afwijzing
s-Gravenhage	28-10-2011	twaalf en elf jaar	moeder	gezag en ondertoezichtstelling	Aanhouding
s-Gravenhage	16-9-2011	zeventien en dertien jaar	rechtbank (I)	wijziging gezag	benoeming
s-Gravenhage	25-10-2011	tien en vier jaar	pleegouders	terugplaatsing, verlenging machtiging uithuisplaatsing	Afwijzing
s-Gravenhage	7-11-2011	zestien jaar	advocaat	machtiging uithuisplaatsing	benoeming
s-Gravenhage	23-12-2011	geanonimiseerd	advocaat	geschil betreffende verzorging en opvoeding	Afwijzing
s-Gravenhage	12-4-2011	zestien jaar	advocaat	nav verzoek ondertoezichtstelling RvdK	benoeming
s-Gravenhage	24-8-2011	twaalf en tien jaar	rechtbank (I)	wijziging hoofdverblijfplaats	benoeming
s-Gravenhage	21-10-2011	beiden dertien jaar	rechtbank (I)	wijziging hoofdverblijfplaats	benoeming
Rotterdam	30-8-2011	geanonimiseerd	rechtbank	omgangsregeling grootouders	benoeming
Amsterdam	20-4-2011	geanonimiseerd	pleegouders	verzoek moeder tot het ouderlijk gezag	Afwijzing