DO SIXTEEN AND SEVENTEEN YEAR OLD CRIMINAL DEFENDANTS IN VERMONT NEED A GUARDIAN AD LITEM?

INTRODUCTION

In Vermont, a sixteen or seventeen year old, although a minor,[1] is treated differently from other minors who have been charged with committing a criminal act. While those under the age of sixteen are tried in a juvenile court proceeding,[2] the sixteen or seventeen year old minor is tried in a criminal court proceeding.[3] The criminal court treats the minor the same as an adult criminal defendant[4] with one exception—the court must appoint a guardian ad litem for the minor and the minor does not have the legal capacity to waive such appointment.[5]

A guardian ad litem is an individual appointed by the court to protect the interests of a minor during judicial proceedings.[6] In Vermont criminal proceedings, the purpose of a guardian ad litem

---

1. "Persons of the age of eighteen years shall be considered of age and until they attain that age, shall be minors." VT. STAT. ANN. tit. 1, § 173 (Supp. 1980). " 'Minor' means an individual under the age of 18 years." *Id.* tit. 33, § 632(a)(11) (Supp. 1980). *See* Beaudry v. Beaudry, 132 Vt. 53, 312 A.2d 920 (1973).

2. The juvenile court has exclusive jurisdiction of all proceedings brought under the juvenile code. VT. STAT. ANN. tit. 33, § 633(a) (Supp. 1980). The juvenile code applies to minors under the age of eighteen who are "in need of care and supervision," *id.* § 632(a)(1), (12), and minors over the age of twelve and under the age of sixteen who have committed a "delinquent act." *Id.* § 632(a)(1), (3), (4). A " '[d]elinquent act' means an act designated a crime under the laws of this state, or of another state if the act occurred in another state or under federal law." *Id.* § 632(a)(3).

3. Sixteen and seventeen year old minors accused of committing a crime are not covered by the juvenile code, hence, they are not subject to the jurisdiction of the juvenile court. *See* note 2 *supra*. They are left, therefore, to the jurisdiction of the criminal court. *Cf.* VT. STAT. ANN. tit. 33, § 635(b) (Supp. 1980) (criminal courts may transfer sixteen and seventeen year old defendants to juvenile court).

4. *See In re* Moses, 122 Vt. 36, 39, 163 A.2d 868, 871 (1960).

5. *In re* Raymond, 137 Vt. 171, 176, 400 A.2d 1004, 1007 (1979); State v. Reuschel, 131 Vt. 554, 562, 312 A.2d 739, 744 (1973); State v. Harris, 127 Vt. 514, 515, 253 A.2d 147, 148 (1969); *In re* Dobson, 125 Vt. 165, 168, 212 A.2d 620, 622 (1965). *See In re* Russell, 126 Vt. 240, 242, 227 A.2d 289, 290 (1967).

6. Solender, *The Guardian Ad Litem: A Valuable Representative or an Illusory Safeguard?*, 7 TEX. TECH. L. REV. 619 (1976). *See In re* Dobson, 125 Vt. 165, 167-68, 212 A.2d 620, 621 (1965).

is to prevent a minor from making uncounselled decisions. All criminal defendants are required to make decisions regarding their defense, such as whether to seek or waive counsel, and whether to plead guilty or not guilty. These decisions involve the possible waiver of constitutional rights with serious implications for the defendant's life. The Vermont Supreme Court has adopted the presumption that minors are unable to make wise decisions when acting alone, holding that the minor needs an advisor to aid in making these critical decisions. This advisor is the guardian ad litem.[7]

This note reviews the use of guardians ad litem for sixteen and seventeen year old criminal defendants in Vermont. First, the note will trace the background and rationale for the court's requirement of a guardian ad litem. Second, it will review some of the problems that have arisen as a result of this requirement. Third, it will inquire into the necessity of requiring a guardian ad litem for all sixteen and seventeen year olds. Fourth, it will make some suggestions for improving the protections of sixteen and seventeen year old criminal defendants.

I. Background and Rationale for the Requirement of a Guardian Ad Litem for Criminal Defendants Who Are Minors

Vermont's use of a mandatory guardian ad litem for sixteen and seventeen year old criminal defendants is best understood in the context of the law's traditional role in protecting minors involved in judicial proceedings. Historically, Vermont courts were required to appoint guardians ad litem to safeguard the interests of minors who were defendants in civil actions.[8] Deemed incapable

---

7. *In re* Dobson, 125 Vt. 165, 167, 212 A.2d 620, 622 (1965).

8. Appointment of a guardian ad litem in civil proceedings was required by common law. *E.g.*, Fall River Foundry Co. v. Doty, 42 Vt. 412, 416 (1869); Starbird v. Moore, 21 Vt. 529, 533 (1848); Brown v. Hull, 16 Vt. 673, 676 (1844). *See* Priest v. Hamilton, 2 Tyl. 44 (1802). The interests of minors who were plaintiffs were protected by a "next friend." *See, e.g.*, Thomas v. Dike, 11 Vt. 273, 275-76 (1839); Priest v. Hamilton, 2 Tyl. 44, 47 (1802). For a general discussion of the use of a guardian ad litem in civil proceedings, see Hohmann & Dwyer, *Guardians Ad Litem in Wisconsin*, 48 Marq. L. Rev. 445 (1965); Solender, *The Guardian Ad Litem: A Valuable Representative or an Illusory Safeguard?*, 7 Tex. Tech. L. Rev. 619 (1976); Note, *Guardians Ad Litem*, 45 Iowa L. Rev. 376 (1960).

of appearing for themselves or of authorizing an attorney to defend them, minors could act only through a guardian ad litem.[9] Minors who defended themselves without a guardian ad litem were considered not to have had their day in court, rendering any judgment legally unenforceable.[10] Guardians ad litem continue to be used in civil proceedings.[11]

Vermont courts used a different method of protecting minors who were defendants in criminal proceedings. Instead of requiring a guardian ad litem to appear with the minor, the courts determined whether the minor possessed sufficient mental capacity to be held criminally responsible.[12] In making this determination, the Vermont courts followed the common law presumptions of criminal capacity for minors.[13] Minors under the age of seven were conclusively presumed incapable of criminal intent. For those between the ages of seven and fourteen, criminal capacity was a question of fact to be decided by the jury. Those over the age of fourteen were presumed capable of being criminally responsible for their acts.[14]

These early presumptions of criminal capacity were superseded in 1912 by the creation of a juvenile court system.[15] These

---

9. *E.g.*, Bielawski v. Burke, 121 Vt. 62, 66, 147 A.2d 674, 676 (1959); Fall River Foundry Co. v. Doty, 42 Vt. 412, 416 (1869).

10. *E.g.*, Pettengill v. Gilman, 126 Vt. 387, 388, 232 A.2d 773, 774 (1967); Bielawski v. Burke, 121 Vt. 62, 66-69, 147 A.2d 674, 676-78 (1959); Starbird v. Moore, 21 Vt. 529, 533 (1848).

11. Pettengill v. Gilman, 126 Vt. 387, 388, 232 A.2d 773, 774 (1967). *See* Dartmouth Sav. Bank v. Shoen's Estate, 129 Vt. 315, 322, 276 A.2d 637, 641 (1971). Although not cited in most cases, Vermont Rule of Civil Procedure 17(b) allows the court to appoint a guardian ad litem: "The court shall appoint a guardian ad litem for an infant . . . not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant." VT. R. CIV. P. 17(b). This rule was recently cited in *In re* J.S., No. 292-79 (Vt. Sup. Ct. Sept. 8, 1980).

12. *See* State v. Watson, 114 Vt. 543, 549-50, 49 A.2d 174, 178 (1946); State v. Learnard, 41 Vt. 585, 589 (1869).

13. For a discussion of these presumptions, *see, e.g.*, Allen v. United States, 150 U.S. 551, 558 (1893); State v. Rogers, 275 N.C. 411, 424, 168 S.E.2d 345, 352 (1969), *cert. denied*, 396 U.S. 1024 (1970). *See* Frey, *The Criminal Responsibility of the Juvenile Murderer*, 1970 WASH. U.L.Q. 113, 113; McCarthy, *The Role of the Concept of Responsibility in Juvenile Delinquency Proceedings*, 10 U. MICH. J.L. REF. 181, 184-85 (1977); Note, *Problem of Age and Jurisdiction in the Juvenile Court*, 19 VAND. L. REV. 833, 835 (1966).

14. State v. Learnard, 41 Vt. 585, 589 (1869).

15. 1912 Vt. Acts No. 113 (current version at VT. STAT ANN. tit..33, §§ 631-667 (Supp.

courts had exclusive jurisdiction over all children under the age of sixteen who were alleged to have violated a criminal law.[16] The proceedings were considered protective and not punitive in nature. The juvenile court was concerned with providing adequate custody for minors, not with their guilt or innocence.[17]

Minors over the age of sixteen remained under the jurisdiction of the criminal courts where they were subject to the same procedures as adults.[18] In *In re Moses*,[19] for example, a minor[20] was charged with a felony. At arraignment, acting without a guardian ad litem, parent or other advisor, the minor had to decide whether to plead guilty or not guilty, and whether to obtain or waive counsel. He pleaded guilty and was sentenced to jail.[21]

On appeal, the Vermont Supreme Court stated that "infants are generally treated as adults before the criminal bar, except in juvenile court proceedings."[22] It held, therefore, that a criminal court was not required to appoint a guardian ad litem for a minor charged with a crime.[23] The court concluded that minors were capable of making an intelligent waiver of their right to counsel.[24] Thus, the test to determine whether the waiver had been intelligently made was the same for minors as for adults. The test was based on the circumstances of the particular defendant— education, mental capacity, experience, understanding, background, and

---

1980)).

16. 1912 Vt. Acts No. 113, §§ 1, 9.

17. *Id.* § 15; *In re* Rich, 125 Vt. 373, 375, 216 A.2d 266, 267-68 (1966). Vermont reflected the philosophy of juvenile courts prevalent in other states. *See In re* Gault, 387 U.S. 1, 14-17 (1966); Kent v. United States, 383 U.S. 541, 554 (1966).

18. Minors who were tried in criminal court were treated the same as adults during the trial but could be treated differently in sentencing. If found guilty of a crime not punishable by death, the court had discretion to adjudge the minor a delinquent and order commitment to Weeks School until twenty-one years of age. 1951 Vt. Acts No. 177, § 1 (repealed 1967).

19. 122 Vt. 36, 163 A.2d 868 (1960).

20. The defendant was nineteen years of age. The age of majority was lowered from twenty-one to eighteen in 1971. VT. STAT. ANN. tit. 1, § 173 (1972) (amending 1947 VT. STAT. § 21) (current statute VT. STAT. ANN. tit. 1, § 173 (Supp. 1980)).

21. *In re* Moses, 122 Vt. 36, 37-39, 163 A.2d 868, 870 (1960).

22. *Id.* at 39, 163 A.2d at 871.

23. *Id.* at 40, 163 A.2d at 871.

24. *Id.* at 42, 163 A.2d at 872.

conduct. Age was only one of the factors to be considered.[25]

In 1961, a year after the *Moses* decision, the Vermont General Assembly enacted a statute to ensure that minors in criminal proceedings would not be allowed to act without the advice of an adult. Title 33, section 678 of Vermont Statutes Annotated[26] required courts to appoint a guardian ad litem to defend the interests of the minor whenever the minor was charged with a crime and was not represented by counsel.[27]

The Vermont Supreme Court was called upon to construe the requirements of section 678 in *In re Dobson*.[28] Charged with a felony, the minor was not represented by counsel at his arraignment. Although the trial court failed to appoint a guardian ad litem for the defendant, in consideration of his minority the judge entered a not guilty plea and ordered the appointment of counsel for subsequent proceedings. A few days later, acting with advice of counsel, the minor pleaded guilty.[29] The supreme court granted the defendant's petition for a writ of habeas corpus because the trial court failed to comply with section 678. A guardian ad litem should have been appointed at arraignment because at that time the minor was not represented by counsel.[30]

The supreme court did not rest its holding solely on the statutory requirement that a minor be represented by an attorney or a guardian ad litem. It offered another rationale based on the inherent power of courts to appoint a guardian ad litem for any defen-

---

25. *Id.*

26. 1961 Vt. Acts No. 159, § 1 (repealed 1967).

27. "Whenever a minor is charged with a crime in any court and is not represented by counsel the court shall forthwith appoint a guardian ad litem to defend the interests of the minor." *Id.*

28. 125 Vt. 165, 212 A.2d 620 (1965).

29. *Id.* at 166-67, 212 A.2d at 621.

30. *Id.* at 167, 212 A.2d at 622. In a prior case construing section 678, the Vermont Supreme Court held that formal appointment of a guardian ad litem was not required where the father appeared with the minor at arraignment, acted as his guardian ad litem, and was so regarded by the court. Substantial compliance with the statute was sufficient where there was no prejudice to the defendant. *In re* Mears, 124 Vt. 131, 134-37, 198 A.2d 27, 29-31 (1964). In *Dobson* the court pointed out that during the arraignment there was not even substantial compliance with the statute. 125 Vt. at 167, 212 A.2d at 622.

dant found to have a disability. All minors, the court concluded, were under a disability requiring the aid of a guardian ad litem. The court reasoned that if minors were presumed incapable of defending without a guardian ad litem in civil actions, they should also be presumed incapable of defending without a guardian ad litem in criminal actions.[31] Furthermore, in the court's opinion section 678 overruled *In re Moses* and indicated a "legislative determination that a minor have a responsible advisor upon being subjected to criminal proceedings, since [the minor] may be called upon to decide between waiving and asserting certain . . . rights, including important constitutional protections."[32] This responsible advisor was a guardian ad litem.

Based on its inherent power to appoint guardians ad litem for defendants under a disability, buttressed by the legislative intent to avoid the uncounselled waiver of rights by minors, the court announced a two-part prospective rule. First, "[w]e hold that, henceforth, in all cases where a minor is charged with a crime in any court a guardian ad litem shall be appointed."[33] Second, "a minor does not have the legal capacity to waive . . . the appointment of a guardian ad litem."[34] Although this rule was announced in dictum, the supreme court has adhered to it in subsequent cases. Guardians ad litem have been required even when the minor was represented by an attorney.[35]

In 1967 the Vermont General Assembly rewrote the existing juvenile statutes.[36] The juvenile courts retained jurisdiction over

---

31. *In re* Dobson, 125 Vt. 165, 167-68, 212 A.2d 620, 622 (1965).

32. *Id.* at 168, 212 A.2d at 622.

33. *Id.*

34. *Id.* at 169, 212 A.2d at 623.

35. For example, in *In re Raymond* the court said that *"In re Dobson* . . . requires that a guardian ad litem be appointed in all cases in which a minor is charged with a crime . . . [and] [t]he minor is powerless to waive appointment of a guardian ad litem." *In re* Raymond, 137 Vt. 171, 176, 400 A.2d 1004, 1007 (1979) (the court appointed both a guardian ad litem and counsel for the minor); Shequin v. Smith, 129 Vt. 578, 285 A.2d 708 (1971) (the court appointed both a guardian ad litem and counsel for minor); State v. Harris, 127 Vt. 514, 253 A.2d 147 (1969) (jury verdict of guilty was set aside for failure of trial court to appoint a guardian ad litem for the minor).

36. 1967 Vt. Acts No. 304, § 37 (Adj. Sess.). The current juvenile code is found at VT. STAT. ANN. tit. 33, §§ 631-667 (Supp. 1980).

minors charged with a crime who were under the age of sixteen,[37] leaving, as before, those aged sixteen and seventeen to the jurisdiction of the criminal courts.[38] The revision, however, made a significant change by giving judges the option of transferring sixteen and seventeen year old defendants from criminal to juvenile court.[39]

Another change was the elimination of the statutory requirement, previously contained in section 678, that a guardian ad litem be appointed for minors charged with a crime.[40] Despite the repeal of section 678, Vermont courts have continued to follow the dictum in *Dobson* requiring the mandatory, nonwaivable appointment of a guardian ad litem for all sixteen and seventeen year old criminal defendants.[41]

II. Implementation of the Guardian Ad Litem System in Vermont

Section 678, on which the guardian ad litem requirement was originally grounded, provided no standards for determining the guardian's identity or qualifications.[42] In the years since the *Dob-*

---

37. Vt. Stat. Ann. tit. 33, § 632(a)(1) (Supp. 1980). *See* note 2 *supra*.

38. Vt. Stat. Ann. tit. 33, §§ 631-667 apply only to those minors who fall within the definition of "child" under section 632(a)(1).

39. Vt. Stat. Ann. tit. 33, § 635(b) (Supp. 1980) provides:

> If it appears to any court of this state in a criminal proceeding that the defendant was over the age of sixteen years and under the age of eighteen years at the time the offense charged was alleged to have been committed, that court may forthwith transfer the proceedings to the juvenile court under the authority of this chapter, and the minor shall thereupon be considered to be subject to this chapter as a delinquent child.

Prior to the statutory revision, transfer of defendants from criminal to juvenile court was possible only for minors under the age of sixteen. 1947 Vt. Stat. § 9901 (repealed 1967). The current statute provides no guidelines for the trial judge to follow in making the transfer decision. Vt. Stat. Ann. tit. 33, § 635(b) (Supp. 1980). *See* notes 97-99 *infra* and accompanying text.

40. Section 678 applied only to criminal, not juvenile, court proceedings. *In re* Rich, 125 Vt. 373, 377, 216 A.2d 266, 269 (1966). Guardians ad litem are now required in juvenile court proceedings under certain circumstances. Vt. Stat. Ann. tit. 33, § 653(a) (Supp. 1980).

41. *See, e.g., In re* Wool, 137 Vt. 343, 403 A.2d 266 (1979); *In re* Raymond, 137 Vt. 171, 400 A.2d 1004 (1979); State v. Reuschel, 131 Vt. 554, 312 A.2d 739 (1973); State v. Harris, 127 Vt. 514, 253 A.2d 147 (1969).

42. 1961 Vt. Acts. No. 159, § 1 (repealed 1967). The statute is set out in note 27 *supra*.

son decision,[43] the Vermont Supreme Court has, on a case-by-case basis, identified some of these standards. The guardian should be responsible[44] and competent.[45] The guardian should not have an interest that conflicts with the interests of the minor,[46] nor in the course of judicial proceedings should the guardian be allowed to perform dual roles to the detriment of the minor.[47] Implementation of these few requirements has raised a number of problems.

An obvious candidate for guardian ad litem, and one that the Vermont Supreme Court appears to approve of, is a parent[48] or relative[49] of the minor. An advantage of this choice is that a parent or relative is familiar with the minor's background, family, education, social environment, and, ideally, with the minor's particular needs. That a parent or relative who is willing to act as a guardian ad litem has the minor's best interests in mind may be a valid assumption.

Choosing a parent or relative may, nonetheless, cause certain problems. The status of parent, without more, does not ensure a competent guardian ad litem. For example, in one case the minor defendant alleged that his mother was incompetent to act as his guardian ad litem because she was mentally ill and under psychiatric treatment at the time of appointment.[50] As the case was dismissed on other grounds,[51] this issue was never decided by the court; but it suggests that a parent is not always competent to act as a guardian ad litem. Another example occurred where the guardian ad litem changed her mind several times and was unable

---

43. *In re* Dobson, 125 Vt. 165, 212 A.2d 620 (1965).

44. *Id.* at 167, 212 A.2d at 622.

45. *In re* Wool, 137 Vt. 343, 344, 403 A.2d 266, 266 (1979).

46. *In re* Raymond, 137 Vt. 171, 179-80, 400 A.2d 1004, 1008-09 (1979).

47. *In re* Westover, 125 Vt. 354, 359, 215 A.2d 498, 501 (1965); *In re* Dobson, 125 Vt. 165, 168, 212 A.2d 620, 622 (1965).

48. *See In Re* Raymond, 137 Vt. 171, 173, 400 A.2d 1004, 1005 (1979) (mother); Shequin v. Smith, 129 Vt. 578, 579, 285 A.2d 708, 709 (1971) (mother); *In re* Mears, 124 Vt. 131, 136, 139, 198 A.2d 27, 30, 32 (1964) (father).

49. *See* State v. Reuschel, 131 Vt. 554, 556, 312 A.2d 739, 740 (1973) (aunt).

50. Shequin v. Smith, 129 Vt. 578, 580, 285 A.2d 708, 709 (1971).

51. The court held that since defendant's claim was a collateral attack on his sentence, the proper remedy was found under the post-conviction relief statute. The court refused to entertain defendant's application for writ of habeas corpus. *Id.* at 582-83, 285 A.2d at 711.

to decide whether the defendant should plead guilty or not guilty.[52] Since the guardian was undecided and apparently no more competent to make decisions than the minor, this defendant was deprived of the competent advice which the guardian was intended to provide. These cases also raised doubts about the care used by the trial judge in making the selection of a guardian ad litem.

In addition, the appointment of a parent or relative can create a conflict of interests which may be harmful to the minor. The Vermont Supreme Court has recognized that when the guardian ad litem has interests before the court which differ from those of the minor, another guardian should be appointed.[53] In a criminal proceeding it is unlikely that a parent or relative would have a separate interest before the court, yet a parent or relative may have personal interests which conflict with those of the minor. This possibility was raised in *In re Raymond*[54] where the minor alleged that his mother, acting as guardian ad litem, advised him to plead guilty because "she was upset at his involvement in a serious crime and was fearful of losing her job, due to the ongoing emotional strain and the necessity of making court appearances."[55] Although the argument failed for lack of proof, it points out one type of conflict possible in appointing a parent or close relative as guardian ad litem.

Another likely candidate for appointment as guardian ad litem is the minor defendant's attorney. Use of the attorney raises a question of competence because of possible conflicts of interest created by investing two official roles in one person.[56] The role of the attorney is to present the minor with alternative courses of action. The role of the guardian ad litem is to help the minor make discriminating choices between these courses of action. In *In re Dobson*[57] the supreme court indicated in dictum that these roles

52. State v. Reuschel, 131 Vt. 554, 561, 312 A.2d 739, 743 (1973). On appeal, the issue of the guardian's incompetence was not raised.

53. *In re* Raymond, 137 Vt. 171, 179, 400 A.2d 1004, 1008-09 (1979).

54. 137 Vt. 171, 400 A.2d 1004 (1979).

55. *Id.* at 174, 400 A.2d at 1006.

56. *See id.* at 179-80, 400 A.2d at 1009.

57. 125 Vt. 165, 212 A.2d 620 (1965).

could not be combined because it would cast the defendant's counsel "in the quandary of acting as both attorney and client, to the detriment of both capacities and the possible jeopardizing of the infant's interests."[58]

Dictum in *In re Westover*,[59] decided the same year, qualified the dictum in *Dobson* by stating that the separation of roles, though the better practice, was not mandatory.[60] As a matter of law, the minor's constitutional rights were not automatically violated when the same person served as both attorney and guardian.[61] The supreme court acknowledged, however, that disadvantage and prejudice to the minor were always hazards in dual representation.[62]

The function of a guardian ad litem in criminal proceedings, as described in *In re Dobson*,[63] is to provide responsible advice to a minor who "may be called upon to decide between waiving and asserting certain . . . rights. . . ."[64] Subsequent Vermont Supreme Court cases indicate that the guardian plays a more active role in the criminal proceedings than that of merely giving advice. Both the minor and the guardian are informed of the charges and of the defendant's rights.[65] Before accepting the minor's waiver of counsel or plea of guilty, the court questions both the minor and the guardian ad litem to make sure that they understand the proceedings[66] and that the decision is voluntary, intelligent and made with full understanding of its consequences.[67] If the defendant is represented by counsel, the attorney must consult with both the defendant and the guardian ad litem regarding the legal options, the possible consequences of each option, and the defendant's pros-

58. *Id.* at 168, 212 A.2d at 622.
59. 125 Vt. 354, 215 A.2d 498 (1965).
60. *Id.* at 359, 215 A.2d at 501.
61. *Id.*
62. *Id.*
63. 125 Vt. 165, 212 A.2d 620 (1965).
64. *Id.* at 167, 212 A.2d at 622.
65. *See, e.g., In re* Mears, 124 Vt. 131, 134-35, 198 A.2d 27, 29 (1964).
66. *See, e.g., In re* Raymond, 137 Vt. 171, 174, 400 A.2d 1004, 1006 (1979).
67. *See, e.g., id.* at 174, 180-81, 400 A.2d at 1006, 1009; State v. Reuschel, 131 Vt. 554, 561-62, 312 A.2d 739, 743-44 (1973).

pects at trial.[68]

The extent of the guardian ad litem's involvement in the proceedings beyond giving advice and the legal and practical effect of such involvement are unclear. In one misdemeanor case the guardian ad litem was allowed to act for the minor and waive the minor's right to counsel.[69] Generally, however, a guardian ad litem cannot act in place of the minor because a waiver of rights such as the right to counsel or the right to plead not guilty is valid only if made by the minor voluntarily, intelligently, and with full understanding of the consequences.[70]

The guardian ad litem, however, can have a significant impact on the course of the defense. In *In re Reuschel*,[71] for example, the minor, after some indecision, wanted to change his plea to guilty. The guardian ad litem was unable to decide whether the minor should change his plea.[72] The trial court, taking note of the disagreement between the minor and the guardian ad litem, refused to accept the guilty plea.[73] The supreme court affirmed the trial judge's exercise of discretion based on the particular facts and circumstances of the case.[74] *Reuschel* suggests that a guardian who disagrees with the minor's decision can, by expressing doubts to the court, effectively frustrate that decision.

Furthermore, it appears that the minor cannot act without the guardian ad litem's approval. Before accepting a guilty plea, the trial court assures itself that the guardian agrees with the minor's plea.[75] Both the guardian and the minor defendant are required to sign the form waiving any of the defendant's constitutional

---

68. *See In re* Raymond, 137 Vt. 171, 173-74, 180, 400 A.2d 1004, 1005, 1009 (1979).

69. *In re* Mears, 124 Vt. 131, 198 A.2d 27 (1964). The court appears to have justified its decision on two grounds: first, that the guardian had consulted with the minor prior to acting; second, that the judge could have entered a more appropriate plea upon determining that the guardian's decision was unwise. *Id.* at 137, 198 A.2d at 31.

70. *See* note 67 *supra* and text accompanying note 81 *infra*.

71. 131 Vt. 554, 312 A.2d 739 (1973).

72. *Id.* at 561, 312 A.2d at 743.

73. *Id.* at 562, 312 A.2d at 743-44.

74. *Id.* at 562, 312 A.2d at 744.

75. *See In re* Raymond, 137 Vt. 171, 180-81, 400 A.2d 1004, 1009 (1979); State v. Reuschel, 131 Vt. 554, 561, 312 A.2d 739, 743 (1973).

rights.[76] In effect, the guardian must actually approve the minor's decision. The implication is that the minor must either follow the guardian's advice or change the guardian's mind.

This expansive role for the guardian ad litem goes beyond that which was initially described in *Dobson*—to be a responsible advisor who weighs the alternatives for the minor.[77] A guardian ad litem who can raise doubts about the appropriateness of the minor's decisions, and who must express agreement with the minor's plea by co-signing the waiver form, has substantial power to determine the course of the defense. This appears to be an infringement on a criminal defendant's constitutional right to conduct the defense personally.[78] The Vermont Supreme Court, however, has held that appointment of a guardian ad litem for criminal defendants who are minors is not contrary to the constitutional right of self-representation.[79]

Even if the guardian ad litem requirement does not infringe on a defendant's right to personally conduct the defense, it places

---

76. *See In re* Raymond, 137 Vt. 171, 174, 180, 400 A.2d 1004, 1005, 1009 (1979).

77. *In re* Dobson, 125 Vt. 165, 167-68, 212 A.2d 620, 622 (1965).

78. In Faretta v. California, 422 U.S. 806 (1975), the Supreme Court found in the sixth amendment an independent right to conduct a defense without the assistance of counsel when voluntarily and intelligently elected by the criminal defendant. *Id.* at 820, 835-37.

79. *In re* Raymond, 137 Vt. 171, 400 A.2d 1004 (1979). In *Raymond* the defendant made an analogy between the mandatory appointment of counsel, which was held unconstitutional in Faretta v. California, 422 U.S. 806 (1975), and Vermont's mandatory appointment of a guardian ad litem. In *Faretta* the United States Supreme Court held that a state's mandatory appointment of counsel for all criminal defendants interfered with the defendant's constitutional right to conduct a personal defense. 422 U.S. at 836. Likewise, argued the minor in *Raymond*, forcing a guardian ad litem on an unwilling minor who is a criminal defendant interferes with the right to conduct a personal defense. 137 Vt. at 174, 176, 400 A.2d at 1006, 1007. The Vermont Supreme Court rejected this argument, stating that whereas in *Faretta* the United States Supreme Court found the right of self-representation implied in the history and structure of the sixth amendment, there was nothing in the history or structure of the sixth amendment from which to imply the right to defend oneself without a guardian ad litem. The common law practice followed in the majority of states which allows a minor to defend without a guardian ad litem was not considered sufficient to create such a right. *Id.* at 176-77, 400 A.2d at 1007-08. Furthermore, the Vermont Supreme Court considered *Faretta* inapplicable to waiver of guardianship.

The right to self-representation in *Faretta* requires a competent and intelligent waiver of counsel since "[t]he very reason for . . . appointing guardians ad litem . . . is that minors are considered to be unable to make discriminating choices." *Id.* at 177, 400 A.2d at 1008.

a burden on minors that is not shared by adult criminal defendants. In addition to consulting with the guardian ad litem, a minor must either follow the guardian's advice or persuade the guardian to agree with the minor's decision. Adult criminal defendants are not placed in this position. The Vermont Supreme Court, however, has rejected due process and equal protection challenges to the mandatory use of a guardian ad litem.[80]

The expansive role of a guardian ad litem also seems to raise doubts as to the voluntariness of the defendant's plea. The real issue in deciding whether to accept a plea is whether "it was offered voluntarily, after proper advice, and with full understanding of its consequences."[81] The minor is subject to subtle pressures by the guardian's actions and by the requirement that the guardian concur in defendant's decision. Instead of aiding the minor in making voluntary and intelligent decisions, the use of a guardian ad litem may actually undermine the minor's exercise of free will.

A review of the cases indicates that the role of the guardian ad litem is not always made clear to the guardian or to the minor. A guardian ad litem cannot be an effective advisor without understanding what a guardian is expected to do. A minor cannot take advantage of the offered protection if uninformed about the duties and limitations of the guardian's role. This information is not al-

---

80. In *In re* Raymond, 137 Vt. 171, 400 A.2d 1004 (1979), the minor claimed a violation of due process because the trial court failed to inform him and his guardian of all their options, rendering his plea not voluntary or intelligent. The Vermont Supreme Court stated that although it would have been preferable for the trial judge to have fully informed the minor and his guardian of their options, the failure to do so did not render the plea invalid as defendant had failed to prove that these procedural shortcomings had infringed on any rights. *Id.* at 182, 400 A.2d at 1010.

The minor in *Raymond* also raised an equal protection challenge. He argued that the guardian ad litem requirement singles out a class based solely on age for adverse procedural treatment and deprives them of their right to conduct their own defense. The Vermont Supreme Court rejected this argument for failure to prove that the guardian requirement injured a constitutional guarantee or that it discriminated "against the class of individuals it was intended to protect." *Id.* at 178, 400 A.2d at 1008.

In a summary fashion the Vermont Supreme Court reached the same conclusions in *In re* Reuschel, 135 Vt. 348, 349, 376 A.2d 746, 748 (1977).

81. *In re* Raymond, 137 Vt. 171, 180, 400 A.2d 1004, 1009 (1979).

ways communicated to the minor or to the guardian ad litem,[82] even though the Vermont Supreme Court has stated that "it would unquestionably be the better practice for the presiding judge to inform both the minor defendant . . . and the defendant's guardian ad litem concerning all of their duties, responsibilities, and options."[83]

III. Necessity of Using a Mandatory Guardian Ad Litem to Protect Sixteen and Seventeen Year Old Criminal Defendants

Even after repeal of section 678, appointment of a guardian ad litem for all sixteen and seventeen year old criminal defendants continues to be the rule in Vermont based on *In re Dobson*[84] and subsequent cases.[85] The necessity of this judicial requirement may be questioned on several grounds.

One ground for questioning the requirement of a guardian ad litem is the validity of the presumption on which it is based. Appointment of a guardian ad litem to advise minors faced with difficult decisions in criminal proceedings is based on the presumption that sixteen and seventeen year old minors, when acting alone, are incapable of making discriminating choices.[86] This presumption of incapacity is based solely on age.[87]

The Vermont Supreme Court, prior to the *Dobson* decision, had indicated that age was not the only factor to be used in deciding whether minors in the interim age between childhood and adulthood were competent to act for themselves. In one case, for example, the court recognized that age alone was not determina-

---

82. *Id.* at 174, 181-82, 400 A.2d at 1006, 1010 (where the trial judge failed to inform the guardian ad litem or the minor that the guardian could be replaced at the guardian's or the minor's request).

83. *Id.* at 182, 400 A.2d at 1010.

84. 125 Vt. 165, 212 A.2d 620 (1965).

85. *See* note 41 *supra* and accompanying text.

86. *In re* Dobson, 125 Vt. 167, 167-68, 212 A.2d 620, 622 (1965). *See* text accompanying note 31 *supra*.

87. The only criterion to be considered in deciding when a guardian ad litem is necessary is chronological age, i.e., the defendant must be over sixteen but under the age of majority.

tive of whether the minor had intelligently waived the right to counsel.[88] Instead, a minor was considered capable of intelligently waiving counsel depending on such factors as education, experience, mental capacity, understanding, conduct, and age. Age, although a significant factor, was not controlling.[89]

The Vermont General Assembly has also recognized the impossibility of an absolute cut-off based solely on age. Implicit in the creation of the juvenile court system is the recognition of the desirability of treating children differently from adults. The dividing line, set at sixteen for criminal matters, is to a large extent arbitrary.[90] The statutory provision allowing the transfer of sixteen and seventeen year old defendants from criminal to juvenile court[91] provides a correction for this arbitrary age cut-off. The trial judge may consider the facts and circumstances of each case to determine whether the minor should be subject to criminal or juvenile proceedings. The transfer provision can be seen as a recognition that factors other than chronological age are important in the decision whether to treat a minor as a child or as an adult.

The Vermont Supreme Court, since *Dobson*, has ignored this recognition that factors other than chronological age play a role in determining a minor's treatment within the judicial system. In making the appointment of a guardian ad litem mandatory, the court in *Dobson* effectively treated the presumption of incapacity of sixteen and seventeen year olds as conclusive.[92] Common experience indicates that some sixteen and seventeen year olds are capable of deciding for themselves between alternate courses of defense. Some may already understand court procedures and legal consequences because of prior experiences with the courts. Others

---

88. *In re* Moses, 122 Vt. 36, 42, 163 A.2d 868, 872 (1960).

89. *Id. See* text accompanying notes 24 and 25 *supra*.

90. The age selected by the legislature can be seen as a statement of policy, indicating such things as incapacity to commit a crime, potential for rehabilitation, or desirability of separation from adult criminals. Note, *Problems of Age and Jurisdiction in the Juvenile Court*, 19 VAND. L. REV. 833, 833 (1966).

91. *See* note 39 *supra* for language of statute.

92. *In re* Dobson, 125 Vt. 165, 168, 169, 212 A.2d 620, 622 (1965). *See* text accompanying notes 33 and 34 *supra*.

may have the necessary maturity and experience to understand the social and personal consequences of their decisions. . .

Another ground for questioning the requirement of a guardian ad litem is based on the protection already supplied by the minor's attorney. By being a responsible advisor to the minor, the attorney may fulfill the purpose behind the guardian ad litem requirement. Trained in the law, an attorney may be better able to explain to the minor the nature of the personal rights involved, the importance of the decision to be made, the choices available, and the consequences of these choices.[93] Accordingly, it is possible that a guardian ad litem offers no more protection to a minor defendant than would timely appointment of counsel.[94]

It could be argued, however, that a guardian ad litem has a role in the criminal prosecution of a minor which is not filled by the attorney. An attorney is trained to be an advocate, not to make wise choices in the interests of minors.[95] Thus, a guardian ad litem who knows the minor may be better equipped than a busy attorney to point out the social and personal consequences of alternative courses of action.

Further, there may be times during a criminal proceeding when a minor not yet represented by counsel is nevertheless required to make critical decisions. For example, at a prearraignment appearance before a judicial officer, a defendant is required to decide whether to seek or waive representation by counsel.[96] It might

---

93. *See* Summerour v. Fortson, 174 Ga. 862, 164 S.E. 809 (1932), a criminal case which held that a guardian ad litem was not required for a minor defendant who was represented by an attorney. *Id.* at 872-73, 164 S.E. at 812-14. The Georgia Supreme Court stated that the state constitutional requirement that all criminal defendants be represented by counsel superseded any apparent need for a guardian ad litem. "Such representation is much more efficient and valuable than that by an unprofessional guardian ad litem. . . ." *Id.* at 872, 164 S.E. at 814.

See also Note, *Guardians Ad Litem*, 45 IOWA L. REV. 376, 385-86 (1960).

94. *See* Bradley v. State, 36 Wis. 2d 345, 359a, 153 N.W.2d 38, 44-45 (1967).

95. M. PAULSEN & C. WHITEBREAD, JUVENILE LAW AND PROCEDURE 28 (1974).

96. Since 1973 a criminal defendant has had the opportunity to obtain or waive counsel prior to arraignment at an appearance before a judicial officer. VT. R. CRIM. P. 5. At this prearraignment appearance the person is informed of the charge, the right to retain counsel or have counsel provided, and the right to remain silent. *Id.* 5(d). No further proceedings are possible until counsel has been appointed or intelligently waived and until the defen-

be desirable for the minor to have the advice of a guardian during this short period of time.

A final ground for questioning the requirement of a guardian ad litem is the existence of an alternate method of protection, specifically, transfer to juvenile court. The 1967 revision of the juvenile code allows criminal judges to transfer sixteen and seventeen year old defendants to juvenile court. The statute, however, provides the trial judge with no guideline for determining which minors should be transferred.[97]

The Vermont Supreme Court has stated that since the transfer determination is "critical," the trial judge is required to make adequate findings of fact in support of its decision.[98] The court failed, however, to identify what factors the trial judge should consider in making the transfer decision.[99] Presumably, the trial judge

---

dant and the attorney have had an adequate opportunity for consultation. *Id.* 5(e). Presumably, under these rules, a minor is now unrepresented only at the initial appearance before a judicial officer. At arraignment, when the plea must be made, the minor will be represented by counsel, unless counsel was intelligently waived.

97. VT. STAT. ANN. tit. 33, § 635(b) (Supp. 1980). *See* note 39 *supra* for the language of the statute. The transfer decision is discretionary with the trial judge. State v. Powers, 136 Vt. 167, 169, 385 A.2d 1067, 1068 (1978).

98. State v. Powers, 136 Vt. 167, 385 A.2d 1067 (1978). In *Powers* the motion for transfer to juvenile court was filed by the defendant. *Id.* at 168, 385 A.2d at 1067. Presumably a transfer can be made on the trial judge's own motion.

99. Unlike Vermont, in most states the transfer decision is made by the juvenile court judge, not the criminal court judge. *See* Whitebread & Batey, *Transfer Between Courts: Proposals of the Juvenile Justice Standards Project*, 63 VA. L. REV. 221, 229-31 (1977). In Kent v. United States, 383 U.S. 541 (1966), the United States Supreme Court formulated three requirements for a valid judicial transfer from juvenile court to criminal court: a hearing, effective assistance of counsel, and a statement by the court of the reasons for its decision. 383 U.S. at 554, 561. In *Powers* the Vermont Supreme Court stated that the principles of *Kent* also applied to decisions to transfer from criminal court to juvenile court. State v. Powers, 136 Vt. 167, 169, 385 A.2d 1067, 1068 (1978).

Some states and commentators indicate that the following combinations of factors should be considered in making the transfer decision: the seriousness of the offense, the interests of society and the minor, and the defendant's response to any past treatment, DEL. CODE ANN. tit. 10, § 939(b) (1975); the seriousness of the offense, the age and previous history of the minor, available juvenile court facilities, the interests of the minor, and the security of the public, ILL. ANN. STAT. ch. 37, § 702-7(3)(a) (Smith-Hurd Supp. 1980); the seriousness of the offense, the age of the minor and amenability to treatment under available juvenile programs, Peuler, *Juveniles Tried as Adults: Waiver of Juvenile Court Jurisdiction*, 3 J. CONTEMP. L. 349, 356 (1977); the seriousness of the crime, the minor's character

may transfer those minors who need the protection of the juvenile court system because they are unable to make discriminating decisions.

In addition, it should be noted that there is little support in other jurisdictions for the mandatory appointment of a guardian ad litem for criminal defendants who are minors.[100] A few courts occasionally have required a guardian ad litem based on the facts and circumstances of a particular case.[101] Others have refused to recognize a disability based on minority, reasoning that a minor capable of criminal responsibility as an adult is also capable of proceeding in court without the aid of a guardian ad litem.[102] In *Dobson* and subsequent cases the Vermont Supreme Court has rejected this reasoning.[103]

---

and prior record, and the ability of the juvenile court and its supportive services to deal with the particular minor, Whitebread & Batey, *Transfer Between Courts: Proposals of the Juvenile Justice Standards Project*, 63 VA. L. REV. 221, 227, 242 (1977).

100. *See, e.g.*, City of Danville v. Clark, 63 Ill. 2d 408, ___, 348 N.E.2d 844, 845 (1976), *cert. denied*, 429 U.S. 899 (1976) (in criminal proceedings it is not necessary that a minor be represented by a guardian ad litem); Moreno v. State, 511 S.W.2d 273, 275 (Tex. Crim. App. 1974), *cert. denied*, 419 U.S. 1115 (1975) (no constitutional or statutory duty to appoint a guardian ad litem); Mickens v. Commonwealth, 178 Va. 273, 280, 16 S.E.2d 641, 644 (1941), *cert. denied*, 314 U.S. 690 (1941) (criminal proceedings against infants should be conducted in the same manner as against persons of full age); Bradley v. State, 36 Wis. 2d 345, 359a, 153 N.W.2d 38, 44-45 (1967) (the Supreme Court's holding in *In re* Gault, 387 U.S. 1 (1966), does not require appointment of a guardian ad litem for a minor defendant who was prosecuted as an adult and was afforded proper constitutional protections).

101. An 1856 Connecticut case held that when a minor was prosecuted for a criminal offense, the court had a duty to appoint a guardian ad litem to assist in the minor's defense. Fahey v. State, 25 Conn. 204, 206 (1856). But a recent case has held that a Connecticut statute requiring that a minor charged with an offense be accompanied by a parent or legal guardian does not require the court to appoint a guardian ad litem. State v. Villafane, 171 Conn. 644, 660-61, 372 A.2d 82, 92 (1976), *cert. denied*, 429 U.S. 1106 (1977). *Contra*, Kosicki, *Role of Guardian of Minor-Defendant in Criminal and Civil Cases*, 38 CONN. B.J. 232 (1964). In isolated instances New York courts have required a guardian ad litem. *E.g.*, State *ex rel.* Byrnes v. Goldman, 59 Misc. 2d 570, 302 N.Y.S.2d 926 (1969) (quasi-criminal narcotics certification and commitment proceeding where the minor was not represented by counsel, and there was a conflict of interest between the minor and the parent); Scott v. McCaffrey, 12 Misc. 2d 671, 172 N.Y.S.2d 954 (1958) (minor charged with assault).

102. Gibson v. State, 47 Wisc. 2d 810, 822, 177 N.W.2d 912, 918 (1970); Mickens v. Commonwealth, 178 Va. 273, 280, 16 S.E.2d 641, 644 (1941); Summerour v. Fortson, 174 Ga. 862, 870-71, 164 S.E. 809, 811-13 (1932).

103. *In re* Dobson, 125 Vt. 165, 168, 212 A.2d 620, 622 (1965). The requirement of a guardian ad litem "is not in derogation of the concept that all persons should be held to

IV. Ways of Improving the Protection of Sixteen and Seventeen Year Old Criminal Defendants

In requiring the mandatory appointment of a guardian ad litem, the Vermont Supreme Court was merely implementing its special concern for and duty to protect minor litigants. As noted above, the method selected may not provide the desired protection and may not even be necessary. The following discussion will focus on possible ways of improving the protection of sixteen and seventeen year old criminal defendants.

A large part of the problem is that an integrated approach to protecting a minor charged with a crime was never developed. Use of a guardian ad litem appeared to be a solution, but in practice it has not proved to be totally satisfactory. The initial statute, section 678, did no more than require the appointment of a guardian ad litem to defend the interests of the minor.[104] The *Dobson* rule required the mandatory, nonwaivable appointment of a guardian ad litem to act as an advisor.[105] The few guidelines indicating the qualifications and duties of the guardian ad litem were then provided on a case-by-case basis over a number of years and are not entirely consistent.[106]

Clear and consistent guidelines are needed to define better the guardian ad litem's role and to set standards for the selection of a guardian. Meaningful guidelines can be developed only with reference to the goals sought. The purpose of a guardian ad litem for a minor defendant is to provide nonlegal advice, make sure the minor understands the consequences of a decision, and protect the minor from impulsive and thoughtless action. The guardian ad litem's role, therefore, should be limited to assisting the minor in making decisions. It should not include making decisions for the minor, nor directly or indirectly determining the course of the defense. Furthermore, the person selected should not have an inter-

---

standards of responsibility for criminal acts consistent with their understanding." *Id.* For subsequent cases *see* note 41 *supra*.

104. *See* note 27 *supra* for the language of the statute.

105. *See* text accompanying notes 33 and 34 *supra*.

106. *See* discussion in Section III of the text.

est conflicting with the interests of the minor. The minor's interests should be the guardian's only concern.

One guideline that Vermont might consider in order to improve the protection accorded a minor is to require that the guardian ad litem be an informed adult who is interested in the minor's welfare. This standard is patterned on a Pennsylvania rule that before any waiver of *Miranda* rights occurs, the minor must have the opportunity to consult with a mature and informed individual who is primarily concerned with the minor's welfare.[107] For example, in one case a Pennsylvania court refused to admit a confession made after consultation with the minor defendant's father because it found the father to be neither informed nor interested. The representation, therefore, was illusory and meaningless.[108]

In making the selection of a guardian ad litem, there appears to be no ethical reason why the minor's attorney cannot serve, if qualified, since the guardian's task is to advise the minor.[109] Although the Code of Professional Responsibility bars the attorney from deciding what plea the defendant will enter,[110] it recognizes that "the responsibilities of a lawyer may vary according to the intelligence, experience, mental condition or age of a client."[111] Furthermore, the Code states that a lawyer ought to assist the client in reaching a proper decision, and that the lawyer's advice need not be limited to legal matters.[112]

Another way to improve the protection afforded minors by guardians ad litem is to encourage trial judges to use fully their

---

107. Commonwealth v. Smith, 472 Pa. 492, 498, 372 A.2d 797, 800 (1977); Levy & Skacevic, *What Standard Should Be Used to Determine a Valid Juvenile Waiver?*, 6 PEPPERDINE L. REV. 767, 775 (1979). This is a judicial, not a legislative, rule.

108. Commonwealth v. Smith, 472 Pa. 492, 372 A.2d 797 (1977) (father failed to accompany the minor to the police station and record did not show that father was aware of the defendant's rights).

109. *Cf.* text accompanying notes 56-62 *supra* (discussion of the use of an attorney as guardian ad litem in Vermont).

110. ABA CANONS OF PROFESSIONAL ETHICS No. 7, Ethical Consideration 7-7.

111. *Id.* Ethical Consideration 7-11. *See id.* Ethical Consideration 7-12 which states: "[a]ny mental . . . condition of a client that renders him incapable of making a considered judgment on his own behalf casts additional responsibilities upon his lawyer."

112. *Id.* Ethical Consideration 7-8.

authority to supervise and control the guardian's conduct.[113] A judge may override the guardian's actions if they are unwarranted or unwise.[114] The proper standard is whether the interests of the minor are protected.[115]

Because the protection of minors is not necessarily advanced by the mandatory appointment of a guardian ad litem, appointment of a guardian ad litem could be left to the sound discretion of the trial judge.[116] The trial judge is in the best position to determine whether the particular minor needs the aid of an advisor in addition to an attorney.[117] The approach could be similar to that followed under Federal Rule of Civil Procedure 17(c), which requires the judge to appoint a guardian ad litem unless, after careful consideration of all factors, the judge provides the required protection by other means or determines that no such protection is necessary.[118] For example, the trial judge could enter a not guilty plea and appoint an attorney to represent the minor.[119] This would assure the minor of responsible advice before being faced with any decision regarding the defense.

A currently available method of protecting minors is to transfer them to juvenile court.[120] Trial judges should use this option when faced with a minor who does not have the maturity, experience, or mental capacity to make discriminating choices.

---

113. *See* Note, *Guardians Ad Litem*, 45 IOWA L. REV. 376, 379 (1960).

114. *See In re* Mears, 124 Vt. 131, 137, 198 A.2d 27, 31 (1964).

115. *See id.*; *In re* Dobson, 125 Vt. 165, 167-68, 212 A.2d 620, 622 (1965).

116. *See* Summerour v. Fortson, 174 Ga. 862, 868, 164 S.E. 809, 812 (1932).

117. *See also* Whitebread & Batey, *Transfer Between Courts: Proposals of the Juvenile Justice Standards Project*, 63 VA. L. REV. 221, 242 (1977).

118. Roberts v. Ohio Casualty Ins. Co., 256 F.2d 35, 39 (5th Cir. 1958). *See* M.S. v. Wermers, 557 F.2d 170, 176 (8th Cir. 1977). The language in FED. R. CIV. P. 17(c) is the same as in VT. R. CIV. P. 17(b) set out in note 11 *supra*.

119. This was the approach taken by the trial judge in *In re* Dobson, 125 Vt. 165, 212 A.2d 620 (1965). On appeal, however, the Vermont Supreme Court considered this action insufficient in light of the then existing statutory requirement that a guardian ad litem be appointed for all minors charged with a crime who were not represented by counsel. *See* text accompanying notes 28-35 and 40-41 *supra*.

120. *See* notes 97-99 *supra* and accompanying text.

Conclusion

The law has a special concern for protecting minor defendants. In Vermont one manifestation of this concern has been mandatory, nonwaivable appointment of a guardian ad litem for all sixteen and seventeen year old criminal defendants. The presumption on which the requirement rests—that all minors are incapable of reasoned decisionmaking—is subject to question. The mandatory nature of the requirement prevents an assessment of the needs of particular defendants. Implementation of the requirement has created unanticipated problems which have not been satisfactorily resolved. The existence of the requirement discourages consideration of more suitable methods of protection.

These considerations call for a thoughtful reappraisal of the guardian ad litem requirement. It should be possible to develop a system of protection which is sensitive to the needs of individual minors, allows the trial judge flexibility to choose between alternate methods of protection, and does not limit or burden those minors who are capable of making decisions and standing trial as adults.

Anita Bower