No. _____

IN THE
SUPREME COURT OF ILLINOIS

ALEXIS NICHOLS, f/k/a Alexis Brueggeman, Plaintiff-Respondent, v. DAVID FAHRENKAMP and DAVID FAHRENKAMP, d/b/a Fahrenkamp Law Offices, Defendants-Petitioners.	)	Petition for Leave to Appeal from the Illinois Appellate Court, Fifth District, No. 5-16-0316 On appeal from the Circuit Court of the Third Judicial Circuit, Madison County, Illinois, No. 13-L-1395 Honorable Barbara L. Crowder, Judge Presiding

PETITION FOR LEAVE TO APPEAL

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PRAYER FOR LEAVE TO APPEAL

Pursuant to Illinois Supreme Court Rule 315 (eff. July 1, 2018), Defendants David Fahrenkamp and David Fahrenkamp, d/b/a Fahrenkamp Law Offices (collectively "Fahrenkamp") respectfully request that this court grant them leave to appeal from the July 9, 2018 decision of the Illinois Appellate Court, Fifth District, reversing and remanding the circuit court's order granting summary judgment for Fahrenkamp.

Holding that Fahrenkamp, a court-appointed guardian *ad litem*, does not enjoy any form of immunity from malpractice liability, the Appellate Court (1) created a direct conflict with decisions of the First District and Second District; (2) rejected sound legal authority; (3) ignored important public policy considerations; and (4) adopted a rule that will create uncertainty and confusion, discourage attorneys from accepting guardian *ad litem* appointments, impede the circuit court's ability to safeguard the welfare of minors, and hinder the effective administration of justice in cases involving minors.

JUDGMENT BELOW

On July 9, 2018, the Appellate Court issued its decision reversing and remanding the order of the circuit court of Madison County, Illinois, granting summary judgment to Fahrenkamp. On August 6, 2018, the Appellate Court denied the petition for rehearing.

POINTS RELIED UPON FOR REVIEW

This court should grant leave to appeal in this matter for the following reasons:

1. The Appellate Court's ruling improperly deprives a court-appointed guardian *ad litem* acting within the scope of his appointment from any form of immunity from malpractice liability. A 9-10 ¶ 15. This ruling departs radically from prior rulings of the First and Second Districts (as well as the Seventh Circuit Court of Appeals and

district courts applying Illinois law). See *Davidson v. Gurewitz*, 2015 IL App (2d) 150171, ¶ 11, *appeal denied,* 48 N.E.3d 672 (Jan. 20, 2016) ("[W]e hold that the common law affords defendant absolute immunity from suit related to his court-appointed duties as child representative."); *Vlastelica v. Brend*, 2011 IL App (1st) 102587, ¶ 36, *appeal denied,* 962 N.E.2d 490 (Nov. 30, 2011)) ("[W]e hold that the child representative is entitled to absolute immunity for his work as an advocate occurring within the course of his court-appointed duties."); *Heisterkamp v. Pacheco*, 2016 IL App (2d) 150229, ¶ 11, *appeal denied*, 60 N.E.3d 873 (Sept. 28, 2016) (finding court-appointed experts asked to advise on the best interests of a child are entitled to absolute immunity); *Cooney v. Rossiter*, 583 F.3d 967, 970 (7th Cir. 2009) ("Guardians ad litem *** are absolutely immune from liability for damages when they act at the court's discretion. They are arms of the court, much like special masters, and deserve protection from harassment by disappointed litigants just as judges do."); *Scheib v. Grant*, 22 F.3d 149, 157 (7th Cir. 1994) ("We believe that the Illinois Supreme Court would find this reasoning persuasive and grant a court-appointed GAL absolute immunity from lawsuits arising out of statements or conduct intimately associated with the GAL's judicial duties.").

2. The Appellate Court's decision ignores important public policy considerations underlying the traditional immunity afforded to guardians *ad litem* acting within the scope of their duties, and, if left undisturbed, will create confusion and uncertainty, saddle guardians *ad litem* with unforeseeable duties and limitless potential liability, deter acceptance of guardian *ad litem* appointments, impede the circuits court's

ability to exercise its duty to protect the interest of minors, and hinder the effective administration of justice in cases involving minors.

3. This court's supervisory authority is needed to clarify its prior decisions because the Appellate Court misapprehended and misapplied decisions of this court to justify the ruling. See A 6-9, 11 ¶¶ 12, 14, 17 (citing *Stunz v. Stunz*, 131 Ill. 210 (1890); *In re Estate of Finley*, 151 Ill. 2d 95 (1992)).

STATEMENT OF FACTS

When plaintiff was 11 years old, her mother petitioned the circuit court to appoint her as guardian of plaintiff's estate and person and approve settlement of her personal injury claim. (E 2-6.)[1] The circuit court made the appointment. (A 2 ¶ 2; E 14.) Plaintiff's mother filed a bond and oath of office, and the circuit clerk issued Letters of Guardianship authorizing plaintiff's mother "to have under the direction of the court the care, management, and investment of the minor's estate, and to do all acts required of him/her/them by law." (E 9-10, 25.) The court also appointed Fahrenkamp "as Guardian Ad Litem" for plaintiff. (E 13.) Following Fahrenkamp's appointment and pursuant to his recommendation, the court approved the settlement and ordered plaintiff's mother, as guardian, to deposit the net proceeds of $273,477.03 "in a restricted account providing for no withdrawal without Court Order." (E 16-18; C 26 ¶ 6.) The settlement agreement set up an annuity to fund a college account for plaintiff that would pay her $40,000 each July from 2010 to 2013. (C 26 ¶ 7.)

[1] Citations to "E" refer to the Exhibit to Defendant's Motion to Dismiss Amended Complaint, which consists of the impounded Probate file No. 04-P-139 that was included in the Record. The pages of the Exhibit were not numbered for the Record. The cited page numbers to the Exhibit herein refer to the sequential page number of the Exhibit, with the cover page being page 1.

Between February 2005 and April 2008, plaintiff's mother filed verified petitions seeking the following disbursements from the settlement funds, all of which were approved by the court upon Fahrenkamp's recommendation: (1) payment of plaintiff's tax obligations and fees for tax preparation; (2) $22,969.39 for purchase of an automobile for plaintiff, insurance coverage, license, sales tax, and title transfer (with breakdown of sale price and insurance quote); and (3) estimated miscellaneous annual school and activity expenses of $5,700 for 2007-2008 and $5,700 for 2008-2009. (E 29-35, 39-42.)

Between July 2009 and April 2010, plaintiff's mother requested the following additional disbursements, all of which were authorized by the court on the same day that the verified requests were filed, without review or recommendation by Fahrenkamp:[2] (1) $1,650 for senior pictures and tuition for summer classes (with receipts) and $750 per month for plaintiff's estimated expenses from July 2009-August 2010; (2) $750 for tuition (with receipt) and estimate price for books; (3) $1,300 for rental deposit and first month's rent (with copies of checks and lease), $1,700 per month for estimated expenses for May-August 2010, and $7,100 for estimated cost of furniture, computer, printer, vacuum, appliances, and other household items (with quotes). (E 43-55, 62-89, 91.)

Soon after plaintiff reached majority, her mother filed, and plaintiff acknowledged, a verified Final Report certifying that plaintiff had received access to, and all information regarding, the settlement fund account. (E 92-93.) On September 2, 2010, the court "order[ed] that the above-styled Guardianship be closed." (E 94.)

[2] The requests do not contain proof of service on Fahrenkamp (or any other party) and the record does not indicate whether Fahrenkamp responded to these requests.

In 2012, plaintiff sued her mother for conversion, unjust enrichment, fraudulent misrepresentation, breach of fiduciary duty, and constructive trust. (A 22.) Plaintiff claimed that her mother "misappropriated some of the funds she sought from the probate court and did not spend the funds on [plaintiff]. [Plaintiff] in essence asked for receipts for the time period from 2004 through the end of the probate case." (A 23.) Following a bench trial, the court granted some relief to plaintiff,[3] but found that plaintiff's mother was not required to provide receipts for each requested disbursement that had previously been approved as an actual or estimated expense by the court:

> This court cannot fault [plaintiff's mother] for not having receipts for each item provided to [plaintiff] and cannot and will not charge back for items approved in another file while [plaintiff] had a guardian ad litem who approved the estimates and expenditures. This request by [plaintiff] is akin to those made in child support files where the paying parent invariably asks the court to make the person who is raising the child show receipts for each expense. Those requests are routinely denied. While probate courts may require an itemization, the orders in the underlying file allowed estimated expenses and set a future monthly budget to [plaintiff's mother].
>
> The same holds true for reimbursements allowed by the court to [plaintiff's mother] for tuition and other expenses such as the prom and senior pictures. [Plaintiff] attached receipts and the court granted reimbursement. *** The court order does not require [plaintiff's mother] to provide receipts or otherwise account for the sums at any point. *** Again, no itemized receipts were ordered to be kept or submitted.

(A 23.)

Accordingly, the court held that it "cannot second guess or go behind any orders that were entered approving expenditures to [plaintiff's mother] in that file [and the]

[3] The court found in favor of plaintiff on her conversion claim related to the purchased vehicle, a portion of an annuity payment, and the withdrawal of $4,990 from a different joint bank account; and in favor of plaintiff's mother on the unjust enrichment, fraudulent misrepresentation, breach of fiduciary duty, and constructive trust counts. (A 24-25.)

specific claims based on the reimbursements approved or monthly budgets allowed are denied." (A 24.)

Plaintiff then filed a malpractice action against Fahrenkamp, claiming that he negligently performed his duties as guardian *ad litem* by failing to (1) monitor the requests made by plaintiff's mother to determine if they were truly for the benefit of plaintiff, (2) audit the guardianship account to determine whether the mother's distributions were actually used for the benefit of plaintiff, and (3) report any irregularities to the court or to plaintiff. (C 28 ¶ 16; A 16.) Plaintiff did not allege any willful or wanton conduct or that Fahrenkamp engaged in any conduct that exceeded the scope of his duties as a guardian *ad litem*. (C 25-30.)

Fahrenkamp filed a motion for summary judgment asserting that (1) the material facts were not in dispute, (2) he had no duty as guardian *ad litem* to independently monitor the mother's use of funds following the court's approval of distributions, (3) there was no evidence that he breached any duty owed to plaintiff, and (4) he had quasi-judicial immunity for his actions as court-appointed guardian *ad litem* in the underlying probate proceeding. (C 97-101; A 16.)

On June 22, 2016, the circuit court granted Fahrenkamp's motion for summary judgment. The court found that Fahrenkamp did not have a duty to perform audits or to monitor how the court-approved withdrawals were spent:

> There is no duty for a guardian ad litem to perform audits or act as an accountant to review receipts unless the court so instructs the guardian ad litem. The orders in the probate file for plaintiff do not require defendant to act in any such manner. The defendant's role was general and therefore his duty was to act in the ward's best interest by making recommendations to the court.

(A 20-21.) The court thus granted summary judgment for Fahrenkamp regarding his

alleged failure to audit the account and monitor the mother's expenditures because he "had no duty to perform those tasks in his role as guardian ad litem." (A 21.)

With respect to the remaining claim that Fahrenkamp failed to properly scrutinize the mother's requests for distributions, the court ruled that Fahrenkamp enjoyed quasi-judicial immunity. Following the reasoning of *Heisterkamp v. Pacheco*, 2016 IL App (2d) 150229, the court held that "[w]here a court-appointed individual acts within the scope of his or her appointment to give advice to the court regarding the best interest of the minor for use in the court's decision-making process, that individual must be subject to the same immunity as the court." (A 21.) The court recognized a factual dispute as to whether Fahrenkamp met with plaintiff, but found it immaterial in view of his immunity. Because "the actions plaintiff complains of are monetary requests the court approved in granting a budget to the mother," and "[t]he court received the petitions from the guardian for the minor, received input from the guardian ad litem, and ruled," the court held that "a failure by the guardian ad litem to meet with the minor over those requests, even taken as true, does not constitute a failure to fulfill the actions and duties that were assigned to defendant by the probate court." (A 21.) Accordingly, the court granted summary judgment in favor of Fahrenkamp. (A 21.)

On appeal, the Fifth District, with one justice dissenting, reversed and remanded the circuit court's judgment. (A 1-2 ¶ 1.) The Appellate Court held that Fahrenkamp had no immunity whatsoever because he "was not simply a neutral party *** [but] was a licensed attorney, an officer of the court, who should have understood the need to protect the assets of his ward," and he had a duty "independent of merely acting as an arm of the court." (A 9, 11 ¶¶ 15, 17.)

ARGUMENT

I. This Court Should Accept Review and Reverse the Appellate Court's Decision Because it Conflicts with Well-Reasoned Decisions of two Other Districts of the Appellate Court, Disregards the Important Public Policy Promoted by Immunity, and Departs From the Weight of Authority in Other Jurisdictions.

The Appellate Court's decision fundamentally alters the role of a guardian *ad litem*, treating Fahrenkamp as the ward's lawyer rather than as an arm of the court. To assist with its duty to protect a minor's interests, a court may appoint a guardian *ad litem*. *People v. Delores W. (In re Mark W.)*, 228 Ill. 2d 365, 375 (2008) ("The circuit court is charged with a duty to protect the interests of its ward and has, by statute and otherwise, those powers necessary to appoint a guardian *ad litem* to represent the interests of the respondent during the court's exercise of its jurisdiction.") (quoting *In re Serafin*, 272 Ill. App. 3d 239, 244 (2d Dist. 1995)). "A guardian *ad litem* functions as the 'eyes and ears of the court' and *not as the ward's attorney*." *Id.* at 374 (quoting *In re Guardianship of Mabry*, 281 Ill. App. 3d 76, 88 (4th Dist. 1996) (emphasis added). "The traditional role of the guardian *ad litem* is not to advocate for what the ward wants but, instead, to make a recommendation to the court as to what is in the ward's best interests. [Citation.]" *Id.* "The role of the guardian *ad litem* is thus in contrast to the role of the plenary guardian of the person appointed pursuant to the Probate Act [of 1975 (755 ILCS 5/1-1 *et seq.*)]." *Id.*; see also *Clarke v. Chicago Title & Trust Co.*, 393 Ill. 419, 430 (1946) ("[T]he infant is treated as a ward of the court and under its special protection[.] *** [Guardians *ad litem*] are considered as agents or officers of the court, appointed either theoretically or in fact by the court, to represent the interest of the infant in the litigation.").

Although a guardian *ad litem* may provide recommendations to the court, he lacks authority to make decisions affecting the ward. See *Villalobos v. Cicero School District 99*, 362 Ill. App. 3d 704, 712 (1st Dist. 2005). It was the probate court, not the guardian *ad litem*, that authorized all the transactions of which plaintiff now complains, that approved her mother's final report, and that discharged her as guardian of plaintiff's estate. The probate judge, of course, is immune from civil liability arising out these actions because courts cannot function effectively with exposure to liability hanging over the judge's head like the sword of Damocles. *Frank v. Garnati*, 2013 IL App (5th) 120321, ¶ 9 ("[A] judge 'should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption. Imposing such a burden on judges would contribute not to principled and fearless decision-making but to intimidation.'") (quoting *Coleson v. Spomer*, 31 Ill. App. 3d 563, 566, (5th Dist. 1975); *Pierson v. Ray*, 386 U.S. 547, 554 (1967)). Judges are absolutely immune from civil liability, "even when the judge is accused of acting maliciously and corruptly." *Id.* This absolute immunity "is not *** for the benefit of a malicious or corrupt judge, 'but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences.'" *Id.* (quoting *Coleson*, 31 Ill. App. 3d at 566; *Pierson*, 386 U.S. at 554). A guardian *ad litem* acting as the court's advisor merits comparable protection for the same reasons.

Although this court has not had occasion to consider whether a guardian *ad litem* merits immunity, several Illinois Appellate Court and federal cases applying Illinois law have. With the sole exception of this case, all of these decisions hold that guardians *ad litem* and lawyers appointed to serve in comparable roles enjoy the same absolute

immunity as judges. As explained by Judge Posner: "Guardians ad litem and court-appointed experts, including psychiatrists, are absolutely immune from liability for damages when they act at the court's discretion. [Citations.] They are arms of the court, much like special masters, and deserve protection from harassment by disappointed litigants just as judges do." *Cooney v. Rossiter*, 583 F.3d 967, 970 (7th Cir. 2009); see also *Scheib v. Grant*, 22 F.3d 149, 157 (7th Cir. 1994) ("Although no Illinois case has addressed the issue of immunity with respect to a GAL's conduct in a judicial proceeding, state courts which have addressed the general issue of GAL immunity have granted GALs absolute immunity. Those courts reasoned that, absent absolute immunity, the specter of litigation would hang over a GAL's head, thereby inhibiting a GAL in performing duties essential to the welfare of the child whom the GAL represents."); *Offutt v. Kaplan*, 884 F. Supp. 1179, 1191 (N.D. Ill. 1995) ("As in *Schieb* [*sic*] and its progeny cases, we conclude that Bernstein, as a guardian *ad litem*, acted as a judicial officer and was entitled to immunity.").

In *Cooney*, the Seventh Circuit held that child representatives appointed pursuant to section 506(a)(3) of the Illinois Marriage and Dissolution of Marriage Act (750 ILCS 5/506) enjoy absolute immunity for actions taken "within the course of their court-appointed duties" for the same reasons immunity is afforded to guardians *ad litem*. *Cooney*, 583 F.3d at 970. The roles of child representatives and guardians ad litem are defined in section 506(a), which provides that "[i]n any proceedings involving the *** property interest, or general welfare of a minor or dependent child, the court may, on its own motion or that of any party, appoint an attorney to serve in one of the following capacities *** (1) Attorney *** (2) Guardian ad litem *** (3) Child representative." 750

ILCS 5/506(a). The statute explains that the duties of a "guardian *ad litem*" are to "testify or submit a written report to the court regarding his or her recommendations in accordance with the best interest of the child," while the duties of a "child representative" are to "advocate what the child representative finds to be in the best interest of the child after reviewing the facts and circumstances of the case." *Id.* § 506(a)(2), (3). And "[t]he child representative [has] the same authority and obligation to participate in the litigation as does an attorney for a party and shall possess all the powers of investigation as does a guardian ad litem. *** The child representative shall not render an opinion, recommendation, or report to the court and shall not be called as a witness, but shall offer evidence-based legal arguments." *Id.* § 506(a)(3).

Adopting the logic of *Cooney*, the Appellate Court for both the First and Second Districts hold "that the common law affords a court-appointed child representative absolute immunity from suit related to his court-appointed duties." *Davidson v. Gurewitz*, 2015 IL App (2d) 150171, ¶ 11; *Vlastelica v. Brend*, 2011 IL App (1st) 102587, ¶ 36. The First District applied the same reasoning to find that a court-appointed expert is entitled to absolute immunity for actions performed within the scope of his duties, so that he may act without fear that the services "will be challenged in a collateral proceeding in which the professional may be held liable for damages." *Heisterkamp v. Pacheco*, 2016 IL App (2d) 150229, ¶ 11.

Child representatives are regarded "as a 'hybrid' of a child's attorney and a child's guardian ad litem," *Brend*, 2011 IL App (1st) 102587, ¶ 23, because the duties of a child representative include the investigative duties of guardians *ad litem* and the advocacy duties that require he or she "participate in the litigation as does an attorney for

a party," 750 ILCS 5/506(a)(3). If a child representative deserves absolute immunity for exercising the same duties as a guardian *ad litem—in addition to his duties to advocate for the child*—it follows *a fortiori* that a guardian *ad litem* should have the same absolute immunity for exercising his or her duties on behalf of the court. The rationale for immunity is far stronger in the case of a guardian *ad litem.* Unlike a child representative, a guardian *ad litem* acts strictly as a judicial officer. In contrast, a child representative has "the same obligation to participate in the litigation as does an attorney for a party[.]" 750 ILCS 5/506(a)(3). It would be anomalous indeed to expose a guardian *ad litem*—who does not act as the ward's advocate or lawyer—to malpractice liability, while immunizing a child representative—who owes an explicit statutory duty to act as an "advocate" and an "attorney."

Courts in other jurisdictions that have considered the issue have overwhelming endorsed "[t]he general rule *** that guardians ad litem, who are appointed by the court, perform quasi-judicial functions and for that reason are granted judicial immunity. [Citations.]" *Babbe v. Peterson*, 514 N.W.2d 726, 727 (Iowa 1994); see also *Paige K.B. by Peterson v. Molepske*, 580 N.W.2d 289, 296 (Wis. 1998) (GAL "entitled to absolute quasi-judicial immunity from negligence liability for acts within the scope of that GAL's exercise of his or her statutory responsibilities"); *Fleming v. Asbill*, 483 S.E.2d 751, 756 (S.C. 1997) ("The immunity to which guardians ad litem are entitled is an absolute quasi-judicial immunity."); *McKay v. Owens*, 937 P.2d 1222, 1232 (Id. 1997) (GAL entitled to absolute immunity); *Dahl v. Dahl*, 744 F.3d 623, 630 (10th Cir. 2014) (same); *Lewittes v. Lobis*, 164 F. App'x 97, 98 (2d Cir. 2005) ("[W]hether as a 'law guardian' or guardian ad litem, Burrows and his firm are also entitled to quasi-judicial immunity."); *McCuen v.*

Polk County, 893 F.2d 172, 174 (8th Cir. 1990) (guardian *ad litem* entitled to absolute immunity for liability); *Cok v. Cosentino*, 876 F.2d 1, 3 (1st Cir. 1989) (GAL and conservator of assets entitled to absolute immunity); *Gardner v. Parson*, 874 F.2d 131, 146 (3d Cir. 1989) ("[A] guardian [ad litem] should be absolutely immune when acting as an integral part of the judicial process."); *Kurzawa v. Mueller*, 732 F.2d 1456, 1458 (6th Cir. 1984) ("A failure to grant immunity would hamper the duties of a guardian ad litem in his role as advocate for the child in judicial proceedings."); *Sturdza v. Lewin*, No. 16-cv-02174(APM), 2017 U.S. Dist. LEXIS 94233, *5 (June 20, 2017) ("[A] guardian ad litem enjoys immunity from suit for any damages that flow from acts takes within the scope of that role."); *Marr v. Maine Department of Human Services.*, 215 F. Supp. 2d 261, 269 (D. Me. 2002) (GAL "entitled to absolute quasi-judicial immunity for claims against him in the performance of these acts as a GAL"); *Short v. Short*, 730 F. Supp. 1037, 1039 (D. Colo. 1990) ("[P]ublic policy concerns entitle the guardian ad litem to immunity from suit brought by the children for negligence.").

The Appellate Court misapprehended the duty of a guardian *ad litem*, effectively equating it with the duty of the guardian of the estate. Indeed, the Appellate Court's decision imposes even stricter duties—and greater liability—on Fahrenkamp, as a guardian *ad litem*, than on the guardian of the estate, who was exonerated from liability for the very same transactions for which plaintiff seeks to hold Fahrenkamp accountable. Moreover, the court below ignored this court's delineation of the role of the guardian *ad litem*, which "is not to advocate for what the ward wants but, instead, to make a recommendation to the court as to what is in the ward's best interests." *In re Mark W.*, 228 Ill. 2d at 375. Instead, the Appellate Court held that Fahrenkamp should have, in

effect, served as plaintiff's lawyer, acting as her "advisor, advocate, negotiator, or evaluator" and "act[ing] as an advocate on behalf of plaintiff." A 8-9 ¶ 14. Immunity is essential to avoid burdening a guardian *ad litem* with duties and liabilities that equal or exceed those of an estate guardian or an attorney for the ward.

Based on its misconception of a guardian *ad litem's* proper role, the Appellate Court held that "Fahrenkamp was not entitled to the protections of *any* form of immunity" because "Fahrenkamp's alleged omissions, if proven true, were not in plaintiff's best interests," and "[g]ranting the guardian *ad litem* quasi-judicial immunity meant that plaintiff was not allowed to pursue any remedy for the guardian *ad litem*'s failure to exercise that degree of care and judgment that reasonable and prudent men exercise in these circumstances, to protect the assets of a minor." A 9-10 ¶ 15 (emphasis added). This reasoning ignores the important public policy supporting the absolute immunity rule—namely, permitting a guardian *ad litem*, acting as a judicial officer, to candidly advise the court, without fear of harassing civil litigation brought by disappointed litigants. Just as the circuit court, which must protect the best interests of the child, deserves absolute immunity from civil liability for its actions (including the approval of each disbursement request), so too should the guardian *ad litem*.[4]

Moreover, the Appellate Court's decision ignores the remedies that deter misconduct by a guardian *ad litem* and protect the interests of the ward. Immunity does not leave the ward bereft of protection or give the guardian *ad litem* a license to disregard her duties to the court. As the First District in *Brend* noted, an aggrieved party may (1)

[4] The decision strips GALs of absolute immunity and qualified immunity. Since plaintiff alleges mere negligence, her claim would fail as a matter law even if Fahrenkamp had qualified immunity only and no protection from liability for intentional misfeasance.

bring concerns about the guardian *ad litem* before the court or move the court for her removal, (2) seek recourse from the court or the Attorney Registration and Disciplinary Commission for alleged misfeasance, and (3) pursue judicial review of the court decisions. 2011 IL App (1st) 102587 ¶ 27. See also *Fleming*, 483 S.E.2d at 755 (identifying additional safeguards justifying immunity for guardians *ad litem* including (1) the appointing court's oversight of the guardian's discharge of duties, (2) the court's prerogative to reject the guardian's recommendations, and (3) the fact that immunity does not protect guardians for actions beyond the scope of their duties). These safeguards were all present here, along with an even greater protection for the ward—the bond posted by plaintiff's mother upon her appointment as guardian of the estate.

Finally, the Appellate Court's reliance on a discredited statement of South Carolina law from *Dixon v. United States*, 197 F. Supp. 789 (W.D.S.C. 1961) is misplaced. See A 8-9 ¶¶ 13-14. *Dixon* did not involve a claim against a guardian *ad litem* or the issue of immunity, and, more importantly, the portion of South Carolina law quoted in *Dixon* and relied on by the Appellate Court was overturned by the South Carolina Supreme Court in *Fleming v. Asbill*, 483 S.E.2d 751 (S.C. 1997). *Dixon* involved a claim against the United States arising from a post-office vehicle colliding with a two-year old. 197 F. Supp. at 800. The issue was whether the child's claim for $100,000 had been waived under the Federal Tort Claims Act by the mother's prior filing of a claim seeking only $2,000. *Id.* The district court held there was no waiver because the mother had not been appointed guardian *ad litem* at the time of filing the first claim. *Id.* at 802. It also noted that, even if she had been appointed, the claim was voidable and could be set aside based on a guardian's failure to perform her duties. *Id.* at 802-03.

Although it did not touch on the issue of immunity, *Dixon* included a quote from a 1930 South Carolina Supreme Court case, *Simpson v. Doggett,* 156 S.E. 771, 773 (S.C. 1930), that, "[i]f in consequence of the culpable omission or neglect of the guardian *ad litem* the interests of the infant are sacrificed, the guardian may be punished for his neglect as well as made to respond to the infant for the damage sustained." *Dixon*, 197 F. Supp. at 802-03. The Appellate Court repeated this quote in its decision. A 8 ¶ 13. But in 1997, the South Carolina Supreme Court rejected the reasoning of *Simpson* and other similar cases, explaining that they "fail to take into account the historical changes that have occurred in the functions guardians perform." *Fleming*, 483 S.E.2d at 754. The court continued:

> The role of guardians ad litem in the 1990's is not the same as the role they played in the 1920's. Their role has changed significantly in recent decades. Whereas in the past, the guardian ad litem served in almost a trustee-like capacity, seeking to specifically advocate the pecuniary interests of the ward, a present-day guardian ad litem in a private custody dispute functions as a representative of the court appointed to assist it in protecting the best interests of the ward. [Citation.] The guardian accomplishes this responsibility by ascertaining the best interests of the ward and advocating to the court the ward's best interest. Given that guardians ad litem play a different role today, we must analyze anew whether guardians serving in private custody disputes should be granted immunity from suits.

Id.

The South Carolina Supreme Court found immunity was warranted for guardians *ad litem*: "Because one of the guardian's roles is to act as a representative of the court, and because this role can only be fulfilled if the guardian is not exposed to a constant threat of lawsuits from disgruntled parties, a finding of quasi-judicial immunity is

necessary. Such a grant of immunity is crucial in order for guardians to properly discharge their duties." *Id.* at 755-56.

In light of the conflicting authority from the First and Second Districts, the important public policy underlying immunity, and the weight of persuasive authority from other jurisdictions, leave to appeal should be granted to enable this court to provide needed guidance for the lower courts and bar.

II. If Left Undisturbed, the Appellate Court's Decision Will Create Confusion and Uncertainty, Saddle Guardians *Ad Litem* With Extraordinary Duties, Deter the Acceptance of Guardian *Ad Litem* Appointments, Impede the Circuit Court's Ability to Protect the Interest of Minors, and Hinder the Effective Administration of Justice in Cases Involving Minors.

The Appellate Court acknowledged that guardians *ad litem* in dissolution of marriage and child custody proceedings are entitled to absolute immunity, but attempted to draw a distinction for Fahrenkamp by explaining that the rationale for such immunity is simply "so that they can fulfill their obligations, without worry of harassment or intimidation from dissatisfied parents." A 10 ¶ 16. The dissent correctly points out, however, that the majority opinion misreads the case law. A 13 ¶ 25. As the Seventh Circuit explained, guardians *ad litem*, as arms of the court, "deserve protection from harassment by disappointed *litigants*, just as judges do." *Cooney*, 583 F.3d at 970 (emphasis added); see also *Coleson*, 31 Ill. App. 3d at 566 (judicial immunity is appropriate because "a judge 'should not have to fear that unsatisfied *litigants* may hound him with litigation charging malice or corruption. Imposing such a burden on judges would contribute not to principled and fearless decision-making but to intimidation.'") (emphasis added) (quoting *Pierson*, 386 U.S. at 554); *Molepske*, 580 N.W.2d at 296 ("Absolute immunity is necessary in this case to avoid the harassment and intimidation

that could be brought to bear on GALs by those *parents and children* who may take issue with any or all of the GAL's actions or recommendations. We therefore conclude that, from a public policy perspective, it is better to have a diligent, unbiased, and objective advocate to assist the court in determining and protecting the best interests of the child than it is to assure that the minor child may later recover damages in tort.") (emphasis added). These policy reasons for allowing a guardian *ad litem* to perform his court-appointed duties without the threat of harassing litigation by dissatisfied parties apply with equal force in probate and custody proceedings alike.

Moreover, the Appellate Court's rationale, which appears to make immunity turn on the type of proceeding or number of parents involved, results in a confusing, inefficient, and unfair approach to immunity. Would Fahrenkamp have immunity if he engaged in the same alleged conduct, but in the context of a divorce or custody proceeding? If only one of a minor's parents (or a third party) serves as guardian of the minor's estate, is the guardian *ad litem* subject to potential liability arising from transactions which the non-guardian parent disputes?

The implications of the Appellate Court's rationale pose significant risks to the effective administration of justice in cases involving minors. In addition to disregarding the policy rationale for providing absolute immunity, the decision saddles guardians *ad litem* with extraordinary duties that far exceed the scope of their duties as an "arm of the court." As the dissent predicts, "future guardians *ad litem* [could] be blindsided by duties not specific or implied in the trial judge's appointment and subsequent orders, the effects of which are adverse." A 15 ¶ 27. The threat of litigation based on uncertain duties will naturally deter the acceptance of guardian *ad litem* appointments, hindering courts'

ability to fulfil their duty to carefully guard and protect minors' interests and receive unfiltered recommendations as to what is in the minor's best interests. This court's intervention is needed to avoid these adverse jurisprudential and practical consequences.

III. This Court's Supervisory Authority Should be Exercised to Clarify Prior Decisions Which the Appellate Court Misapplied to Justify its Result.

In finding that a guardian *ad litem* had duties that made him more than "an arm of the court," the Appellate Court primarily relied on two of this court's decisions: *In re Estate of Finley*, 151 Ill. 2d 95 (1992) and *Stunz v. Stunz*, 131 Ill. 210 (1890). A 6-9, 11 ¶¶ 12, 14, 17. Neither case involved a lawsuit against a guardian *ad litem* nor addressed the issue of immunity.

In *Finley*, the court simply held that a guardian *ad litem*, who was the only person representing the interest of four minors in a wrongful death case, and who objected to a proposed settlement agreement, had authority to file an appeal following the court's entry of its order approving the settlement. 151 Ill. 2d at 100. A guardian *ad litem*'s standing to appeal is utterly irrelevant to the issue of immunity and provides no authority for the Appellate Court's refusal to follow the great weight of authority recognizing immunity.

The Appellate Court also relied on the following passage in the 1890 *Stunz* case to define Fahrenkamp's liability: "'[I]t was his duty to have understood the cause and the rights of the parties, and to have called [to] the attention of the court' any irregularities in the withdrawals of plaintiff's settlement proceeds." A 8 ¶ 12 (quoting *Stunz*, 131 Ill. at 221). *Stunz* was a partition action following the death of the plaintiff's husband. 131 Ill. at 217. The lower court found the widow had homestead rights but denied them to the decedent's children. *Id.* at 217, 219. The guardian *ad litem* for the decedent's children filed an answer in the litigation, but appears not to have done anything else to make the

court aware that it would be legal error to award the widow the homestead payment and disallow the children their rights in the homestead. *Id.* at 218, 221.

While *Stunz,* in dictum, commented on the duties of a guardian *ad litem* in 1890, it did not involve a claim against the guardian *ad litem* or otherwise involve the issue of immunity. Notably, the court found the guardian *ad litem*'s lack of diligence was "of itself no sufficient ground of reversal." *Id.* at 222. Moreover, *Stunz* has little, if any, vitality in the 21st century, given this court's more recent statement that "[t]he traditional role of the guardian ad litem is not to advocate for what the ward wants but, instead, to make a recommendation to the court as to what is in the ward's best interests," *In re Mark W.*, 228 Ill. 2d at 374, in contrast to the role of a guardian of a minor's estate under the Probate Act of 1975 (and the guardian's corresponding liability to the ward).

Accepting review of this case will enable this court to clarify *Stunz* and *Finley* so that future litigants do not misconstrue these decisions.

CONCLUSION

For the foregoing reasons, Fahrenkamp respectfully prays that this court grant Fahrenkamp's Petition for Leave to Appeal.

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CERTIFICATE OF SERVICE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that on September 10, 2018, a copy of the foregoing Petition for Leave to Appeal and the attached Appendix to Petition for Leave to Appeal were filed and served upon the Clerk of the Illinois Supreme Court via the approved electronic filing service provider and that true and correct copies of the foregoing were sent by United Parcel Service overnight delivery and electronic mail to the following counsel for plaintiff-respondent on September 10, 2018:

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Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct.

/s/ Kevin P. Green

CERTIFICATE OF COMPLIANCE

I certify that this Petition for Leave to Appeal conforms to the requirements of Rules 341(a) and (b). The length of this petition, excluding the pages contained in the Rule 341(d) cover, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 315(c)(6) is 20 pages.

/s/ Kevin P. Green

No. _____

IN THE
SUPREME COURT OF ILLINOIS

ALEXIS NICHOLS, f/k/a Alexis Brueggeman, Plaintiff-Respondent,	)	Petition for Leave to Appeal from the Illinois Appellate Court, Fifth District, No. 5-16-0316
v.	)	On appeal from the Circuit Court of the Third Judicial Circuit, Madison County, Illinois, No. 13-L-1395
DAVID FAHRENKAMP and DAVID FAHRENKAMP, d/b/a Fahrenkamp Law Offices, Defendants-Petitioners.	)	Honorable Barbara L. Crowder, Judge Presiding

APPENDIX
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TABLE OF CONTENTS

2018 IL App (5th) 160316

NO. 5-16-0316

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

ALEXIS NICHOLS, f/k/a Alexis Brueggeman, Plaintiff-Appellant,	)	Appeal from the Circuit Court of Madison County.
v.	)	No. 13-L-1395
DAVID FAHRENKAMP and DAVID FAHRENKAMP, d/b/a Fahrenkamp Law Offices, Defendants-Appellees.	)	Honorable Barbara L. Crowder, Judge, presiding.

JUSTICE CATES delivered the judgment of the court, with opinion.
JUSTICE CHAPMAN concurred in the judgment.
JUSTICE GOLDENHERSH dissented, with opinion.

OPINION

¶ 1 Plaintiff, Alexis Nichols, f/k/a Alexis Brueggeman, brought a legal malpractice action against defendants, David Fahrenkamp and David Fahrenkamp, d/b/a Fahrenkamp Law Offices, to recover damages occasioned by the negligence of defendants during the time attorney Fahrenkamp was acting as plaintiff's guardian *ad litem*. Plaintiff alleged that attorney Fahrenkamp's negligence caused the dissipation of settlement proceeds that had been recovered from a personal injury lawsuit brought on behalf of plaintiff when she was a minor. The circuit court of Madison County entered summary judgment for defendants, relying on the premise that a private attorney appointed as a guardian *ad litem* has quasi-judicial immunity for his or her omissions "so long as the guardian *ad litem* follows the directions of the court and is within the

scope of the appointment." We reverse the entry of summary judgment in favor of defendants and remand for further proceedings.

¶ 2 When plaintiff was 11 years old, she received a $600,000 settlement for injuries she sustained in a motor vehicle accident. Because plaintiff was a minor, her mother was appointed as guardian of plaintiff's person and estate. Attorney Fahrenkamp was appointed by the court as the guardian *ad litem* for plaintiff. In 2012, plaintiff brought suit against her mother, alleging that she spent funds from the settlement account that were not used for the benefit of plaintiff, but instead were used solely for her mother's benefit. According to the allegations in the 2012 litigation, plaintiff alleged that her mother petitioned the probate court and withdrew some $79,507 that was not used on plaintiff's behalf. This litigation, case number 12-MR-188, proceeded to trial in 2013.

¶ 3 On April 17, 2013, during trial, the judge asked, "And where was the GAL [guardian *ad litem*] in all of this?" (The guardian *ad litem*, attorney Fahrenkamp, had not been named as a party-defendant in 12-MR-188.) At the conclusion of the trial in 12-MR-188, the court entered an award for plaintiff, but limited the amount of the recovery. With regard to the amount of damages, the trial court determined that plaintiff's mother could not be faulted for her failure to have receipts to prove each and every amount she claimed to have spent for the items provided to her daughter. The court explained that it would not assess damages "while [Plaintiff] had a guardian *ad litem* who approved the estimates and expenditures." In other words, the court relied on attorney Fahrenkamp's status as guardian *ad litem* to limit plaintiff's remedies against her mother. As a result, judgment was entered against plaintiff's mother for $16,365, plus $10,000 in attorney fees and the return of a 2007 vehicle, far less than the amount plaintiff claimed had been dissipated.

¶ 4 On August 16, 2013, plaintiff filed suit against defendants, contending that they failed to protect her interests by allowing her mother to convert plaintiff's settlement funds for the mother's personal benefit. In her complaint against defendants, plaintiff alleged that attorney Fahrenkamp never met with or talked to plaintiff during any of the time he was acting as her guardian *ad litem*, nor did he ever ask her if the statements contained in her mother's petitions to withdraw monies from the settlement account were accurate. She averred that if Fahrenkamp had spoken with her, she would have told him that the expenses her mother claimed needed to be paid out of plaintiff's settlement account either did not exist, were grossly inflated, or were covered expenses that plaintiff, herself, was already paying for out of other proceeds. Plaintiff further stated that she had no idea she could ask attorney Fahrenkamp, or any other attorney, for advice regarding her mother's requests to withdraw funds from the settlement proceeds. Plaintiff claimed she did not even realize that she had a guardian *ad litem* appointed for her, let alone attorney Fahrenkamp, until after the probate file was closed on September 2, 2010, when she reached the age of 18. Plaintiff further asserted that information about her settlement monies, and the process by which such funds could be used on her behalf, were largely kept from her during her childhood. Finally, plaintiff also claimed that defendants negligently failed to audit the account or report any irregularities to the court or to the plaintiff.

¶ 5 Defendants filed a motion to dismiss, and then a motion for summary judgment, alleging that attorney Fahrenkamp, as a guardian *ad litem*, had quasi-judicial immunity for the functions he performed in the probate proceeding, given that he was acting within the scope of his appointment by the court. Attorney Fahrenkamp specifically averred that he met with plaintiff on three separate occasions during the time he acted as her guardian *ad litem*. He also stated that he gave plaintiff, who was then 11 years old, his business card when he was first appointed as her

guardian *ad litem*, and there was nothing that prevented her from contacting him through the numbers listed on the business card, if she had any questions or concerns.

¶ 6 On June 22, 2016, the court granted defendants' motion for summary judgment. The court, in ruling in favor of defendants, recognized that Illinois law had not yet answered the question of whether a guardian *ad litem* was subject to a grant of immunity under the circumstances presented by plaintiff's claims. The trial court recognized, however, that a guardian *ad litem*, appointed by the court in a probate proceeding, is under a duty to help safeguard and protect the interests and welfare of the minor. In drawing a distinction between immunity and duty, the court then explained, relying on *McCarthy v. Cain*, 301 Ill. 534, 134 N.E. 62 (1922), that a guardian *ad litem* should examine the case, determine what the rights are of his wards, what defense their interests demand, and then make such defense as the exercise of care and prudence would dictate. "The guardian *ad litem* who perfunctorily files an answer for his ward and then abandons the case fails to comprehend his duties as an officer of the court." (Internal quotation marks omitted.) *McCarthy*, 301 Ill. at 539.

¶ 7 Despite the trial court's recognition of the duty imposed upon a guardian *ad litem*, the court granted summary judgment in favor of the defendants, finding that the failure of the guardian *ad litem* to meet with plaintiff over the monies requested by mother did not "constitute a failure to fulfill the actions and duties that were assigned to defendant by the probate court." The court reasoned that so long as the guardian *ad litem* acted within the scope of his appointment to give advice to the court, he should enjoy the same immunity as the court. Because attorney Fahrenkamp's role was general, and his duty was to act in the ward's best interests by making recommendations to the court, the court concluded that Fahrenkamp had no duty to perform the specific tasks of verifying mother's requests, perform audits of the settlement

account, or act as an accountant to review receipts, unless specifically instructed by the court to do so.

¶ 8 In making its ruling, the court relied on *Heisterkamp v. Pacheco*, 2016 IL App (2d) 150229, 47 N.E.3d 1192. Although the facts of that case involved a court-appointed expert to perform a custody evaluation, the trial court adopted the *Heisterkamp* reasoning and determined that when a court-appointed individual acts within the scope of his or her appointment to give advice to the court regarding the best interest of the minor, for use in the court's decision-making process, that individual must be cloaked with the same immunity as the court. With regard to plaintiff's allegations that Fahrenkamp did not meet with her, the court recognized that the facts regarding this issue were in dispute. The court held, however, that this dispute was not a material fact that precluded summary judgment. Accordingly, the failure to meet with plaintiff over monetary requests did not constitute a failure to fulfill the actions and duties that were assigned to the guardian *ad litem* by the probate court. This meant, in essence, that plaintiff had little remedy for the dissipation and conversion of her assets. According to the trial court, the plaintiff's mother was shielded from liability for her alleged misconduct because plaintiff had a guardian *ad litem*, who approved the expenditures, and the guardian *ad litem* was immune from liability because the court order appointing him as guardian *ad litem* lacked any specificity regarding his duties.

¶ 9 We agree with plaintiff that the trial court erred in granting defendants quasi-judicial immunity because of the lack of specific directions in the order appointing attorney Fahrenkamp as guardian *ad litem*. Under the court's reasoning, the guardian *ad litem* had no independent duty to plaintiff, and the appointment of a guardian *ad litem* was nothing more than an empty gesture.

¶ 10 Analysis

¶ 11 The review of an order granting summary judgment is *de novo*. *Forsythe v. Clark USA, Inc.*, 224 Ill. 2d 274, 280, 864 N.E.2d 227, 232 (2007) (opinion of Garman, J., joined by Fitzgerald and Karmeier, JJ.). Summary judgment should not be allowed unless the moving party's right to judgment is clear and free from doubt. If the undisputed material facts could lead reasonable observers to divergent inferences, or if there is a dispute as to a material fact, summary judgment should be denied and the issue should be decided by the trier of fact. *Wells v. Enloe*, 282 Ill. App. 3d 586, 589, 669 N.E.2d 368, 371 (1996). Only when the party seeking summary judgment demonstrates that his or her right to judgment is clear, free from doubt, and determinable solely as a matter of law should summary judgment be entered. *Taitt v. Robinson*, 266 Ill. App. 3d 130, 132, 639 N.E.2d 893, 895 (1994). Under the circumstances before us, the trial court erred in granting summary judgment to defendants. Fahrenkamp, as the guardian *ad litem*, was not entitled to quasi-judicial immunity or any immunity for that matter. Fahrenkamp was under a duty to serve the best interests of plaintiff, and the facts, if taken as true, created a material question of fact with regard to whether Fahrenkamp breached his duty to plaintiff.

¶ 12 This court has previously recognized that "[i]t is the public policy of this State that rights of minors be carefully guarded. No citation of authority need be given to state that one of the cardinal precepts of our law is that in any court proceeding involving minors their best interest and welfare is the primary concern of the court." *Layton v. Miller*, 25 Ill. App. 3d 834, 838, 322 N.E.2d 484, 487 (1975). Here, the probate court recognized that an 11-year-old child needed an attorney who would look out for her best interests and ensure that anyone who sought to use her settlement funds was doing so for the child's welfare. Therefore, a guardian *ad litem* was

appointed to protect plaintiff from anyone who could exploit her. Plaintiff claims she never met with attorney Fahrenkamp, or even knew that he had been appointed to represent her. Attorney Fahrenkamp claims he met with plaintiff three times over a period of six years, and gave the 11-year-old plaintiff his business card the first time they met. We find it incredulous that an 11-year-old would understand the significance of attorney Fahrenkamp being appointed as her guardian *ad litem*, or even understand that she could call numbers listed on a business card to get advice. In any event, contrary to the court's ruling, these issues represented material facts, and this factual dispute was not capable of being resolved by summary judgment. See *Ahle v. D. Chandler, Inc.*, 2012 IL App (5th) 100346, ¶ 13, 966 N.E.2d 1249 (trial court determines *whether* a question of fact exists when ruling on a motion for summary judgment; court does not decide a question of fact and cannot make credibility determinations or weigh evidence). These conflicting facts, despite their significance, are irrelevant if the guardian *ad litem* is immune from liability, as concluded by the trial court. In our view, such a finding ignores a decision of our supreme court in *Stunz v. Stunz*, 131 Ill. 210, 23 N.E. 407 (1890), wherein the court stated:

> "It is the duty of the guardian *ad litem*, when appointed, to examine into the case and determine what the rights of his wards are, and what defense their interest demands, and to make such defense as the exercise of care and prudence will dictate. He is not required to make a defense not warranted by law, but should exercise that care and judgment that reasonable and prudent men exercise, and submit to the court, for its determination, all questions that may arise, and take its advice, and act under its direction in the steps necessary to preserve and secure the rights of the minor defendants." *Stunz*, 131 Ill. at 221.

As the guardian *ad litem*, Farhrenkamp was obligated to protect and defend the interests of the minor plaintiff, regardless of whether the court order contained any specifics. In doing so, "[i]t was his duty to have understood the cause and the rights of the parties, and to have called [to] the attention of the court" any irregularities in the withdrawals of plaintiff's settlement proceeds. See *Stunz*, 131 Ill. at 221.

¶ 13 In deciding this case, we also acknowledge the reasoning set forth in *Dixon v. United States*, 197 F. Supp. 798 (W.D.S.C. 1961), as noted by the trial court in its order, even though based on South Carolina law. The tenets are equally applicable here, where the trial court described more fully the duties and obligations of a guardian *ad litem*:

> "The position of a guardian ad litem or next friend is one of trust and confidence toward the infant as well as the court; hence, it is his duty fully to protect the infant's interests in all matters relating to the litigation, as the infant might act for himself if he were of capacity to do so. His duty requires him to acquaint himself with all the rights of the infant in order to protect them, and to submit to the Court for its consideration and decision every question involving the rights of the infant affected by the suit. He should be as careful not to do anything, or allow anything to be done, to the prejudice of his ward's interest, as the court from which he receives his appointment. If in consequence of the culpable omission or neglect of the guardian *ad litem* the interests of the infant are sacrificed, the guardian may be punished for his neglect as well as made to respond to the infant for the damage sustained." (Internal quotation marks omitted.) *Dixon*, 197 F. Supp. at 802-03.

¶ 14 In light of *Stunz*, and the foregoing, we hold that attorney Fahrenkamp, as guardian *ad litem* for the minor plaintiff, owed a duty to plaintiff to render advice and to protect plaintiff's

assets and interests arising out of the underlying personal injury settlement. He had a duty to act as an advocate on behalf of plaintiff. His failure to meet with or otherwise communicate with his ward, as plaintiff contends, did not comply with that duty owed plaintiff, as he was not fulfilling his role as plaintiff's advisor, advocate, negotiator, or evaluator. Contrary to the arguments made by plaintiff, there are no statutory or common law requirements that would have mandated that the guardian *ad litem* provide the court with an accounting. But there was certainly a common law duty that may have been breached, depending on the outcome of the factual disputes presented by the parties.

¶ 15 We also agree with plaintiff that attorney Fahrenkamp was not entitled to the protections of any form of immunity in his role as guardian *ad litem*. Giving any guardian *ad litem* absolute immunity under the circumstances presented here is contrary to the public policy of this state. Unlike the expert witness in *Heisterkamp*, Fahrenkamp was not simply a neutral party, appointed by the court to act as a professional expert. Fahrenkamp was a licensed attorney, an officer of the court, who should have understood the need to protect the assets of his ward. In his role as guardian *ad litem*, he was to advise the court, but only after making careful inquiry for the purpose of protecting the minor plaintiff's interests. In his role as advisor to the court, Fahrenkamp was not the mother's rubber-stamp, but instead the plaintiff's watchdog, authorized by the court to protect the minor's assets. And, if attorney Fahrenkamp was not supposed to question the mother's requests for funds she was withdrawing from plaintiff's settlement monies, we question what he was supposed to do, and what he got paid for during the six years he allegedly served as plaintiff's guardian *ad litem*. If the situation were as plaintiff claims, attorney Fahrenkamp did not advise plaintiff and seemingly did very little to verify that the substantial sums of money withdrawn from plaintiff's account were truly being used for the benefit of

plaintiff. Fahrenkamp's alleged omissions, if proven true, were not in plaintiff's best interests and, according to plaintiff, led to the dissipation of her settlement proceeds. Granting the guardian *ad litem* quasi-judicial immunity meant that plaintiff was not allowed to pursue any remedy for the guardian *ad litem*'s failure to exercise that degree of care and judgment that reasonable and prudent men exercise in these circumstances, to protect the assets of a minor.

¶ 16 The trial court concluded, and defendants argue, that they are entitled to the same protection afforded guardians *ad litem* appointed in dissolution of marriage and child custody proceedings. See 750 ILCS 5/506(a)(2), (a)(3) (West 2012). The rationale behind giving child representatives in dissolution cases absolute immunity is so that they can fulfill their obligations, without worry of harassment or intimidation from dissatisfied parents. *Vlastelica v. Brend*, 2011 IL App (1st) 102587, ¶ 23, 954 N.E.2d 874. Under the circumstances presented here, there is no reason for granting that kind of immunity. Rather, the situation here is more akin to a fiduciary relationship between a guardian and a ward as a matter of law. See *Apple v. Apple*, 407 Ill. 464, 469, 95 N.E.2d 334, 337 (1950). Such a relationship between a guardian and a ward is equivalent to the relationship between a trustee and a beneficiary. See *Parsons v. Estate of Wambaugh*, 110 Ill. App. 3d 374, 377, 442 N.E.2d 571, 572 (1982); see also *In re Estate of Swiecicki*, 106 Ill. 2d 111, 117-18, 477 N.E.2d 488, 490 (1985) (the fiduciary duties owed a beneficiary by a trustee and a ward by a guardian are similar). The guardian of a minor is a trustee of the minor's property for the minor's benefit and is chargeable as such; in other words, the guardian must be held to have dealt with the minor's property for the benefit of the minor. *In re Estate of Swiecicki*, 106 Ill. 2d at 119. Attorney Fahrenkamp clearly did not deal with plaintiff's property for her benefit, if plaintiff's allegations prove true.

¶ 17 In further support of our reasoning that a guardian *ad litem* has a duty, independent of merely acting as an arm of the court, we note that in *In re Estate of Finley*, 151 Ill. 2d 95, 601 N.E.2d 699 (1992), our supreme court allowed a guardian *ad litem* to file an appeal on behalf of a minor, even after the court had terminated the need for the guardian. *Finley* involved a wrongful death claim wherein the court ruled that minor siblings of the decedent were not entitled to any recovery for loss of society. The guardian *ad litem* for the minors objected to the settlement, wherein the minor siblings of the decedent were awarded no portion of the settlement proceeds for the loss of society of their brother. The trial court overruled the objections of the guardian *ad litem* and approved the settlement. In the same order, the court terminated the guardian *ad litem*'s representation of the minors. Two weeks after the trial court entered its order, the guardian *ad litem* filed an appeal on behalf of the minors. The first issue raised was whether the guardian *ad litem* had standing to bring the appeal. Our supreme court answered this question in the affirmative, finding that the trial court could not preclude the filing of an appeal on behalf of the minors simply by vacating the appointment of the guardian *ad litem*. The guardian *ad litem* was simply fulfilling his obligation to protect the best interests of his wards. *Finley*, 151 Ill. 2d at 100.

¶ 18 The dissent suggests that not granting immunity to a guardian *ad litem*, no matter the factual circumstances, will have a chilling effect on attorneys willing to serve as guardians *ad litem* in general. In support, the dissent refers primarily to those cases involving marital dissolution and child custody. First, we are not concluding that all guardians *ad litem* have no immunity. Again, we recognize that those guardians *ad litem* appointed to serve as "an arm of the court," as in custody situations, for instance, need immunity in order to best serve the needs of the court and any minors involved in such proceedings. Second, the threat of civil liability in

those instances where a guardian does not have immunity is no different than that faced by any attorney appearing in any other type of lawsuit and is consistent with the fiduciary obligation imposed upon any guardian in representing a ward under the Probate Act of 1975. See 755 ILCS 5/11-13(b), (d) (West 2012).

¶ 19 Having concluded that attorney Fahrenkamp, as guardian *ad litem*, did not have quasi-judicial immunity under the circumstances presented here, we also conclude that summary judgment should not have been entered. The evidence presented by plaintiff showed there were genuine issues of fact regarding whether defendant breached his duties to her. Accordingly, the trial court erred in granting summary judgment for the defendants. We therefore reverse the grant of summary judgment in favor of defendants and remand this cause to the circuit court of Madison County for further proceedings.

¶ 20 Reversed and remanded.

¶ 21 JUSTICE GOLDENHERSH, dissenting:

¶ 22 I respectfully dissent.

¶ 23 As noted in the majority opinion, while alluding to both qualified and absolute immunity of attorney Fahrenkamp, as plaintiff's guardian *ad litem*, the majority concludes that attorney Fahrenkamp is not entitled to either form of immunity. In my view, this runs contrary both to sound authority and is impractical in practice in our trial courts.

¶ 24 The trial judge, in her ruling adverse to plaintiff, found that there was no failure by attorney Fahrenkamp to fulfill the actions and duties directed by the probate court. Accordingly, attorney Fahrenkamp, in the trial court's opinion, acted within the scope of his appointment, including making recommendations to the court, and fulfilled the instructions of the court. The

trial court determined that although there was a dispute between plaintiff and defendants as to an alleged failure to meet, this was not a material fact that would preclude summary judgment in favor of defendants. The trial court determined that defendants are entitled to quasi-judicial immunity and relied substantially on *Heisterkamp* (*Heisterkamp v. Pacheco*, 2016 IL App (2d) 150229, ¶ 1 (absolute immunity before an expert)). In my view, the determination of the trial court was correct.

¶ 25 The majority's disposition denying any form of immunity, absolute or quasi-qualified, runs counter to sound authority and reads *Vlastelica v. Brend*, 2011 IL App (1st) 102587, too narrowly. The *Brend* court determined that the child representative and guardians *ad litem* were entitled to absolute immunity. Its sound reasoning, with which I agree, is as follows:

> "The Supreme Court has recognized that the common law provides for absolute immunity for judges (see *Briscoe v. LaHue*, 460 U.S. 325, 334-35 (1983)), and the Seventh Circuit Court of Appeals (hereinafter, the Seventh Circuit) has held that guardians *ad litem* and child representatives are entitled to the same absolute immunity because they are 'arms of the court.' *Cooney v. Rossiter*, 583 F.3d 967, 970 (7th Cir. 2009). The *Cooney* court stated:
>
> > 'Guardians *ad litem* and court-appointed experts, including psychiatrists, are absolutely immune from liability for damages when they act at the court's direction. [Citations.] They are arms of the court, much like special masters, and deserve protection from harassment by disappointed litigants, just as judges do. Experts asked by the court to advise on what disposition will serve the best interests of a child in a custody proceeding need absolute immunity in order to be able to fulfill their obligations "without the worry of intimidation and harassment

> from dissatisfied parents." [Citation.] This principle is applicable to a child's representative, who although bound to consult the child is not bound by the child's wishes but rather by the child's best interests, and is thus a neutral, much like a court-appointed expert witness.' *Cooney*, 583 F.3d at 970.
>
> Plaintiffs here argue that as a federal court decision, *Cooney* is not binding on us (see *Werderman v. Liberty Ventures, LLC*, 368 Ill. App. 3d 78, 84 (2006)) and should not be followed unless its logic is persuasive. ***
>
> Contrary to plaintiffs' arguments, we find *Cooney*'s logic persuasive." *Brend*, 2011 IL App (1st) 102587, ¶¶ 21-23.

¶ 26 This decision and its reasoning clarifies earlier supreme court authority. *Clarke v. Chicago Title & Trust Co.*, 393 Ill. 419, 66 N.E.2d 378 (1946) (which implied that some form of immunity was appropriate for persons in situations similar to that of defendants). In sum, existent authority and sound reasoning for the authority cited above indicates that some form of immunity is appropriate for defendants and the trial court appropriately so found.

¶ 27 Dispositions designated by this court as opinions have consequences, both jurisprudential and practical. In this case, the majority's opinion has adverse practical consequences. It imposes upon trial judges an obligation to provide specificity in directions to the guardian *ad litem*, which may or not be effective, may or may not cover the factual situation at issue, and may very likely be premature in the development of the litigation in which the guardian *ad litem* is acting, since the guardian *ad litem*'s appointment would likely be early in the litigation and prior to development of facts and issues. While this problem may be subject to remedy by appropriate and timely motions of the guardian *ad litem* or other parties, the more serious consequence is to the attorney who considers accepting a guardian *ad litem* appointment. The majority's opinion

imposes upon the guardian *ad litem* duties and requirements, not well defined, despite the finding of the trial court that this guardian *ad litem* fulfilled all of the conditions and instructions imposed upon him. In effect, the majority has set up that future guardians *ad litem* be blindsided by duties not specific or implied in the trial judge's appointment and subsequent orders, the effects of which are adverse. Will an experienced attorney who takes guardian *ad litem* appointments be willing to continue to do so if the attorney disagrees in their professional judgment with a request or a demand and accordingly be subject to litigation for exercising that professional judgment and discretion in their actions in representations to the court? Will a younger, less experienced attorney be willing to accept guardian *ad litem* appointments with such a nebulous or absent delineation of supposed duties and the consequent exposure to liability without either quasi or absolute immunity? Will the trial judge, who has determined that appointment of a guardian *ad litem* is required, be able to find a sufficient number of adequately qualified attorneys to take such appointments? Any of these consequences are adverse to the effective administration of justice in such an important area.

¶ 28 For the reasons stated above, I respectfully dissent from my colleagues' disposition.

THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

ALEXIS NICHOLS,
f/k/a Alexis Brueggeman

v

13-L-1395

DAVID FAHRENKAMP, ET.AL.

ORDER

This case came before the Court on defendants' motion for summary judgment. The court took the matter under advisement and allowed both sides time to file an additional response and affidavits. The court has reviewed the additional filings and also has taken judicial notice of the orders in Madison County file numbers 12-MR-188 and 04-P-139 in ruling on this motion.

This complaint against defendant asserts that he was negligent in his role as appointed guardian ad litem for plaintiff who was a minor who received a personal injury settlement. The minor's mother was named guardian in a probate file overseen by the court. The complaint asserts defendant negligently failed to monitor requests filed by plaintiff's mother (guardian of the person and the estate of plaintiff) with the probate court for distribution of sums from plaintiff's personal injury settlement. It also alleges defendant did not audit the account or report any alleged irregularities to the court or to plaintiff.

A motion for summary judgment filed under 735 ILCS 5/2-1005 may be filed at any time by any party. If the pleadings, depositions, and admissions on file show there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law, then the court should grant the judgment as to all or any part of the relief sought. If there are no genuine issues of material fact as to one or more of the major issues but some exist in regards to others, the court may grant a summary determination of major issues. Here, defendant asserts that the material facts are not in dispute and that there is no evidence that he breached any duty actually owed to the plaintiff in his role as guardian ad litem. Defendant further claims that he is entitled to a quasi-judicial immunity for the functions he performed in the underlying probate file. The court is required to view the supporting and opposing materials in the light most favorable to the responding party.

Duty and Immunity

Defendant's primary argument is that he is immune from any complaint as he enjoys quasi-judicial immunity for the actions he performed as a guardian ad litem.

The role of a guardian ad litem in a probate case is for the purpose of issues concerning the best interest of the minor and is designed to give the court assistance. See, *In re Guardianship of A.G.G., 406 Ill. App. 3d 389 (5th dist. 2011).* The court's authority for an appointment of a guardian ad litem comes from common law.

When a court has notice that a minor is present without proper representation, it is the duty of that court to appoint a guardian ad litem to help safeguard and protect the interests and welfare of the minor. *Layton v. Miller, 25 Ill.App.3d 834, 322 N.E.2d 484, 5th dist. 1975.*

The law provides that:

(b) In any proceeding for the appointment of a standby guardian or a guardian the court may appoint a guardian ad litem to represent the minor in the proceeding. 755 ILCS 5/11-10.1

Duties of a guardian ad litem for any probate case are defined in respect to the appointed guardian ad litem either specifically enumerated in the court order or in general for safeguarding the minor's best interests if not otherwise specified. It is the court whose actual duty it is to direct the care, management and investment of an estate by the person appointed guardian. The control of the estate is the court's, whether the ward is a minor or a mentally disabled person. See, *Estate of Wellman, 220 Ill.Dec. 360 (1996)*. A guardian ad litem is appointed by a probate court to represent the ward's best interest rather than the ward. *In the Matter of the Guardianship of Myrtle E. Mabry, 216 Ill.Dec. 848 (1996).*

From as far back as *Stunz v. Stunz, 131 Ill. 210, 23 N. E. 407*, and cited in other files thereafter, the courts have defined the duties of a guardian ad litem. It is

> 'the duty of the guardian ad litem, when appointed, to examine into the case and determine what the rights of his wards are, and what defense their interest demands, and to make such defense as the exercise of care and prudence will dictate. He is not required to make a defense not warranted by law, but should

> exercise that care and judgment that reasonable and prudent men exercise, and submit to the court, for its determination, all questions that may arise, and take its advice, and act under its direction in the steps necessary to preserve and secure the rights of the minor defendants. The guardian ad litem who perfunctorily files an answer for his ward, and then abandons the case, fails to comprehend his duties as an officer of the court..... While the guardian ad litem will not be warranted in interposing useless or vexatious defenses, the law contemplates a defense in fact so far as necessary to protect the rights and interests of the ward. The appointment of a guardian ad litem is not a mere formality, and, unless it is so, no reason can be given for setting aside the judgment or decree against a minor without the appointment of a guardian ad litem to represent him in the suit which is not equally applicable to a judgment where a guardian ad litem has been appointed but has wholly failed to represent the minor in the suit, and has permitted judgment to be entered against him without presenting any defense or taking any action to protect the minor's interests. It is not a sufficient answer to say that the record shows that the court appointed a guardian ad litem when the proof shows that, beyond the naked appointment, nothing whatever was done to call the rights of the minors to the attention of the court, to present their interests, and claim for them such protection as under the law they were entitled to..... *Stunz, as cited in McCarthy v. Cain, 301 Ill. 534, 538-40, 134 N.E. 62, 64-65 (1922).*

Generally speaking, where a guardian ad litem has been appointed, the actions taken by the court are then binding on the minor. In comparing situations where a GAL acted and ones to where there was a failure, the court in *Matter of Nuyen's Estate, 111 Ill. App. 3d 216, 224, 443 N.E.2d 1099, 1104 (2d Dist. 1982),* noted that:

> "In the case at bar the guardian ad litem, Patrick Dixon, was present at all relevant proceedings and indicated that he reviewed the petitions prior to the trial court's approving them. It is apparent from the record that both the court and the guardian ad litem fulfilled their legal duty in the proceedings below. There was a hearing at which time the court heard evidence, took statements of counsel and rendered its decision. Leonard requires no more than this. Carey Nuyen is bound by his guardian's actions absent some wrongdoing."

In the case before the court, of course, plaintiff accuses defendant of wrongdoing in that she alleges he did not fulfill his required duties.

Illinois has not held that a guardian ad litem is subject to immunity. It has faced the question of whether a person similarly appointed by the court is immune from suit. For instance, in *Vlastelica v. Brend, 2011 IL App (1st) 102587,* the mother filed an action on behalf of herself and her child against a child representative who had been appointed under 750 ILCS 5/506(a). The complaint alleged legal malpractice, intentional breach of fiduciary duty, and intentional interference with the mother's custodial rights. The action was dismissed and the lower court held a child representative in a custody case was entitled to absolute immunity. It held that a child representative "acts as the arm of the court in assisting in a neutral determination of the child's best interests." Id at ¶23. The lower court cited with approval to *Cooney v. Rossiter, 583 F.3d 967 (7th Cir. 2009).* The issue in the *Cooney* case was a claim brought against a custody evaluator. The underlying claim had been brought in federal court under section 1983 of the Civil Rights Act against the same defendant and others over a custody case. The federal district court dismissed the lawsuit, noting the quasi-judicial immunity of judicial officers. A case was filed in state court on different grounds. The trial court dismissed the action based on res judicata and absolute immunity. The Illinois Supreme Court upheld the dismissal on res judicata grounds but did not reach the issue of whether a custody evaluator would be entitled to absolute immunity. *Cooney, 2012 IL 113227.*

In *Heisterkamp v. Pacheco, 2016 IL App (2d) 150229,* there was no dispute as to the material fact that defendant had been appointed by the court to do a custody evaluation. The plaintiff challenged the diagnosis provided to the court and claimed that the evaluator had deviated from the standards of care of clinical psychology and that the erroneous diagnosis was a proximate cause of plaintiff's loss of custody. The appellate court cited to *Cooney v. Rossiter , 583 F.3d 967 at 970 (7th Cir. 2009).* The court approved it, stating that "court-appointed experts***are absolutely immune from liability for damages when they act at the court's direction...Experts asked by the court to advise on what disposition will serve the best interests of a child in a custody proceeding need absolute immunity in order to be able to fulfill their obligations 'without the worry of intimidation and harassment from dissatisfied parents.'"

The court goes on to note that a child's representative appointed pursuant to section 5/506(a)(3) of the IMDMA is although "bound to consult the child is not bound by the child's wishes but rather by the child's best interests..." *Cooney 583 F.3d at 970.* The court held that "when a court enters an order appointing a mental health professional to provide certain services, he or she is entitled to rely on that order...Here defendants acted at the direction of the court in the dissolution proceedings and are entitled to absolute immunity...." Illinois has now adopted immunity for court-appointed custody evaluators.

Federal decisions provide some information and parallels although no precedent. "The position of a guardian ad litem or next friend is one of trust and confidence toward the infant as well as the court; hence, it is his duty fully to protect the infant's interests in all matters relating to the litigation, as the infant might act for himself if he were of capacity to do so. His duty requires him to acquaint himself with all the rights of the infant in order to protect them, and to submit to the Court for its consideration and decision every question involving the rights of the infant affected by the suit. He should be as careful not to do anything, or allow anything to be done, to the prejudice of his ward's interest, as the court from which he receives his appointment. If in consequence of the culpable omission or neglect of the guardian ad litem the interests of the infant are sacrificed, the guardian may be punished for his neglect as well as made to respond to the infant for the damage sustained. The misconduct of a guardian ad litem or next friend in protecting the infant's interest does not affect the jurisdiction of the court in rendering the judgment in the suit or action; the judgment is not rendered thereby void; it is merely a matter of error, for which a judgment may be set aside." *Simpson v. Doggett, 159 S.C. 294, at pages 299, 300, 156 S.E. 771, at page 773. Dixon v. United States, 197 F. Supp. 798, 802-03 (W.D.S.C. 1961).*

In a case dealing with a family-court type appointment, *Ortiz v. Jimenez-Sanchez, United States District Court, D. Puerto Rico, March 31, 2015. 98 F.Supp.3d 357,* a guardian appointed by the court in a child abuse case to protect a minor child's interest was entitled to absolute quasi-judicial immunity from liability in the mother's action against the guardian. In the abuse case, a municipal judge entered an order removing the minor child from the mother's care and placed her in protective custody. The mother sued the guardian, asserting claims under §1983, under the Federal Tort Claims Act (FTCA), and for violation of her substantive due process rights under the Fourteenth Amendment over the guardian's gathered information, prepared report, and recommendations to the court regarding the custody disposition. *U.S.C.A. Const.Amend. 14; 28 U.S.C.A. §§ 1346, 2671 et seq.; 42 U.S.C.A. § 1983; 8 L.P.R.A. § 1142.*

In short, the law does hold defendant to some specific duties and there is no holding at this point that gives him quasi-judicial immunity in all circumstances although it is rational to argue that so long as the guardian ad litem follows the directions of the court and is within the scope of the appointment, he should enjoy immunity.

Thus, the court must then look to the orders in the probate file to determine whether the defendant was specifically ordered to do those things plaintiff complains of. There is no duty for a guardian ad litem to perform audits or act as an accountant to review receipts unless the court so instructs the guardian ad litem. The orders in the

probate file for plaintiff do not require defendant to act in any such manner. The defendant's role was general and therefore his duty was to act in the ward's best interests by making recommendations to the court. The court received the petitions from the guardian for the minor, received input from the guardian ad litem, and ruled. There are conflicting affidavits on whether the defendant met with the plaintiff during the time he was serving as guardian ad litem in the probate file. The court must weigh whether those disputed affidavits are over a material issue. Plaintiff does not allege any misrepresentations by the defendant on the issue disputed in the affidavits.

Conclusion

The court grants summary judgment as to paragraph 16 (b) and (c) in favor of defendant and against plaintiff as defendant had no duty to perform those tasks in his role as guardian ad litem. The court considered carefully the case of *Heisterkamp v. Pacheco, 2016 IL App (2d) 150229*. While it is dealing with a court-appointed expert rather than a court-appointed *guardian ad litem,* the analysis followed by the court is applicable. Where the court-appointed individual acts within the scope of his or her appointment to give advice to the court regarding the best interest of the minor for use in the court's decision-making process, that individual must be subject to the same immunity as the court. Here, there are disputed facts regarding defendant's meeting with the minor. A review of the court file, however, indicates that the actions plaintiff complains of are monetary requests the court approved in granting a budget to the mother. The court determines that a failure by the guardian ad litem to meet with the minor over those requests, even taken as true, does not constitute a failure to fulfill the actions and duties that were assigned to defendant by the probate court. The court therefore grants summary judgment in favor of defendant and against plaintiff.

The Clerk is to send a copy of this order to counsel of record.

Entered June 21, 2016.

Judge

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THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

ALEXIS BRUEGGEMAN

V. 12-MR-188

JELANDA MILLER

ORDER

This cause came before the court for non-jury trial. The court took the matters under advisement following trial to review the exhibits and testimony prior to ruling. The court is now fully advised in the premises and finds and orders as follows:

Alexis Brueggeman filed this complaint against Jelanda Miller on July 18, 2012. The complaint sounds in multiple counts: Count I for Conversion of funds allegedly occurring between March 12, 2004 and January 1, 2012; Count II for Unjust Enrichment; Count III for Fraudulent Misrepresentations allegedly made by defendant to plaintiff; Count IV for Breach of Fiduciary Duty; and Count V for a Constructive Trust.

Alexis is Jelanda's daughter. Alexis was injured in a motor vehicle accident while she was a minor. She received a settlement for her injuries in 2004 and her net proceeds were $273,477.00. Jelanda was appointed the guardian of Alexis in 04-P-139 and the funds were placed with Merrill Lynch. The settlement agreement also set up an annuity to fund a college account for Alexis that would pay her $40,000 in July 2010 (prior to her majority), $40,000 in July 2011, $40,000 in July 2012, and $40,000 in July 2013.

There is no dispute that Jelanda was a single mother and received no assistance in raising Alexis. She petitioned to the court for funds to pay for things for Alexis that generally are indeed paid by children's parents which are part of Alexis' complaint. Jelanda was not the first and will not be the last parent who asks a court to have the funds a minor has received in a settlement be used to help support the minor. Some parents get no assistance in their hope that the child will have to help pay his or her own clothing and living expenses; other parents get reimbursed for some specific items but not all; some parents receive monthly payments to help supplement the family budget to make sure the child has sufficient clothes and other items. Jelanda Miller filed petitions with the probate court that were approved by the court. All withdrawals during

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the time Alexis was a minor child were through orders entered by the probate court in 04-P-139. Some of this dispute stems from Alexis learning that items Jelanda told her were gifts from Jelanda (a car, senior photos and other items) Alexis found out in fact were purchased by Alexis own money. That discovery, along with being informed by a former friend of Jelanda's that Jelanda had apparently misled Alexis on the sums she was to receive from her annuity led Alexis to view all transactions with suspicion. Alexis claims that Jelanda misappropriated some of the funds she sought from the probate court and did not spend the funds on Alexis. Alexis in essence asked for receipts for the time period from 2004 through the end of the probate case. The court will deal with these claims first.

Alexis points to an order entered May 8, 2008, in the probate file giving Jelanda $5,700 lump sum in reimbursement for expenses in the 2007/2008 year and allowing Jelanda another $5,700 on August 15, 2008 to cover anticipated expenses for the 2008/09 school year. Alexis essentially seeks an accounting for the reimbursement and for the 2008/09 year. Whether the court required additional receipts beyond what was filed for the reimbursement is not clear; it is clear that Jelanda was not ordered to provide an itemization for future sums budgeted. This court cannot fault Jelanda for not having receipts for each item provided to Alexis and cannot and will not charge back for items approved in another file while Alexis had a guardian ad litem who approved the estimates and expenditures. This request by Alexis is akin to those made in child support files where the paying parent invariably asks the court to make the person who is raising the child show receipts for each expense. Those requests are routinely denied. While probate courts may require an itemization, the orders in the underlying file allowed estimated expenses and set a future monthly budget to Jelanda.

The same holds true for reimbursements allowed by the court to Jelanda for tuition and other expenses such as the prom and senior pictures. Jelanda attached receipts and the court granted reimbursement. On July 9, 2009, the probate court allowed Jelanda to begin receiving $750 monthly for her to cover Alexis' gasoline, hair care, clothing, and other expenses with the last payment $750 payment to be made August 15, 2010. This court order does not require Jelanda to provide receipts or otherwise account for the sums at any point. The next order was entered on April 22, 2010 which permitted reimbursement to Jelanda for renting an apartment for the then 17-year-old Alexis, $7100 to buy furniture for the apartment, and increased by $1700 the monthly payment to cover Alexis' living expenses, upping the check to $2450 and changing the payee to be Alexis. It is undisputed Alexis moved out of Jelanda's house at this time. Again no itemized receipts were ordered to be kept or submitted.

Alexis signed an acknowledgement with the probate court that she had received all information regarding the Merrill Lynch Account No. ending in 0169, had access to the account, and agreed the probate file should be closed. An order was entered in that file on September 2, 2010, approving the final report and closing the file. This court cannot second guess or go behind any orders that were entered approving expenditures to Jelanda Miller in that file. Those specific claims based on the reimbursements approved or monthly budgets allowed are denied.

Alexis claims not related to budgeting and reimbursement orders:

Alexis also claims Jelanda converted and still has possession of a car purchased for Alexis and that she converted a portion of the annuity payments. Finally, Alexis put her mother on Alexis' bank account other than the account overseen by the court and Alexis claims that Jelanda misappropriated some of Alexis' money prior to Alexis removing her mother from the account.

Most notably, in October 2007 the court allowed Jelanda's petition to purchase a 2007 Jeep Compass 2WD for $20,015.39 for Alexis. In addition, the court authorized an insurance premium to Affirmative Insurance to insure the Jeep for $2,954 at purchase and thereafter. After the court allowed Jelanda to remove funds to purchase that car for Alexis and insure it, Jelanda titled the car in Jelanda's name, not in the name of the Estate of Alexis Brueggeman. Further, although Alexis has been of age since 2010, Jelanda still has the car that was purchased via court order for Alexis. Jelanda does not dispute this. Jelanda testified that she (Jelanda) traded in her 2006 Chevy and bought a 2008 Mitsubishi Eclipse (also in Jelanda's name) in June 2008 which Alexis began to drive. Jelanda then began driving the 2007 Jeep. Jelanda testified that after Alexis turned 18, Jelanda signed the Eclipse car title over to Alexis. Jelanda believes that she is entitled to keep the car the court ordered to be purchased for Alexis from Alexis' funds because she traded her Chevy in on the Eclipse (which was really just a deficiency debt) and has no other car. No court order was entered in the probate file while Alexis was a minor allowing such a 'swap'. Incredibly, Jelanda does not dispute that she made some of the car payments for the 2008 Mitsubishi from Alexis' money, so in fact Alexis also paid a portion of the debt for Jelanda's 2006 Chevy Impala that exceeded its trade-in value, being $3,764.43 ($18,064.42 owed less the $14,300.00 trade-in), and also paid for some if not all of the Eclipse in addition to paying for 100% of the Jeep Jelanda drove. Jelanda and Alexis agree that the Eclipse was ultimately signed over to Alexis' after she came of age. Since Alexis paid for at least some of it, and also paid for the Jeep, Jelanda cannot be allowed to claim the Jeep became hers in exchange for the Eclipse. This court will not allow Jelanda to keep a car purchased with

Alexis' money for Alexis. The Jeep is awarded to Alexis. Jelanda is to sign the title over to her and to give Alexis possession of the Jeep.

Alexis also cites conversion of her annuity funds. The first $40,000 check was distributed from the annuity in July 2010 while Alexis was still a minor. It is undisputed that Jelanda told Alexis she was receiving $30,000 from an annuity for college. Jelanda testified she kept the other $10,000 "for safekeeping" but did not tell Alexis about it. Jelanda similarly intercepted $10,000 in July 2011 from that $40,000 annuity payment. Jelanda converted that money. Jelanda paid back $10,000 of those funds after Alexis confronted her when she learned the annuity was really $40,000 instead of $30,000. A Jelanda still owes $10,000 plus prejudgment interest beginning with August 2010 at 5% per annum in the sum of $1375.

Alexis had a bank account separate from the one created through probate court in which Alexis placed her paychecks from her part-time work after she turned 16 and from which Alexis paid many of her expenses such as gasoline and entertainment. Alexis claims Jelanda converted funds from her account both before and after Alexis turned 18 as Jelanda was also on the account. Alexis closed the account in May 2012 after deciding that Jelanda had used some funds from the account without her consent or approval. The facts were disputed as to what funds Jelanda received and checks that Alexis claims she did not endorse. Some of the checks were written to both Alexis and Jelanda; some were payable only to Alexis. The court finds that Alexis sustained her burden of proof that some funds were withdrawn and unaccounted for and finds that Jelanda Miller converted an additional $4990 after deducting the transactions that either Alexis agreed were acceptable or Jelanda established were made for Alexis benefit.

Alexis seeks attorney's fees in the sum of $17,077. The law typically requires each party to pay his or her own fees except for specific kinds of actions. Conversion is one of those types of action where the prevailing party receives attorney's fees. The conversion by Jelanda of the $10,000 in 2010 and in 2011 justifies the award of attorney's fees even without consideration of the disputed car issue and accounting for expenditures from Alexis funds. The law provides that a party who converts the property of another is responsible for that party's reasonable attorney's fees. The Court notes that Alexis did not sustain her burden of proof for Counts II through V. The court therefore assesses attorney's fees against Jelanda Miller in the sum of $10,000 plus costs. No other penalty is entered against Ms. Miller.

It is therefore ordered that Jelanda Miller convey possession of and sign the title to the blue 2007 Jeep Compass with VIN number 1J8FT47W07D371053 to Alexis Brueggeman at once. In addition, this court enters judgment against Jelanda Miller and in favor of Alexis Brueggeman for $16,365.00. Finally, the court enters judgment in favor of Todd Sivia and Alexis Brueggeman for attorney's in the sum of $10,000 plus costs. So ordered. Execution to issue.

The Clerk is to send a copy of this order.

Entered April 17, 2013.

B. Crowley

Judge

No. _____

IN THE
SUPREME COURT OF ILLINOIS

ALEXIS NICHOLS, f/k/a Alexis Brueggeman, Plaintiff-Respondent, v. DAVID FAHRENKAMP and DAVID FAHRENKAMP, d/b/a Fahrenkamp Law Offices, Defendants-Petitioners.	)	Petition for Leave to Appeal from the Illinois Appellate Court, Fifth District, No. 5-16-0316 On appeal from the Circuit Court of the Third Judicial Circuit, Madison County, Illinois, No. 13-L-1395 Honorable Barbara L. Crowder, Judge Presiding

NOTICE OF FILING PETITION FOR LEAVE TO APPEAL

Please take notice that a Petition for Leave to Appeal to reverse the July 9, 2018, order of the Appellate Court of Illinois, Fifth Judicial District, was electronically filed with the Illinois Supreme Court on September 10, 2018.

Dated: September 10, 2018

GOLDENBERG HELLER & ANTOGNOLI, P.C.

/s/ Kevin P. Green

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Attorneys for Defendants-Petitioners David Fahrenkamp and David Fahrenkamp, d/b/a Fahrenkamp Law Offices

CERTIFICATE OF SERVICE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that on September 10, 2018, a copy of the foregoing Notice of Filing Petition for Leave to Appeal filed and served upon the Clerk of the Illinois Supreme Court via the approved electronic filing service provider and that true and correct copies of the foregoing were sent by United Parcel Service overnight delivery and electronic mail to the following counsel for plaintiff-respondent on September 10, 2018:

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Michael T. Blotevogel,
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Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct.

/s/ Kevin P. Green