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Alberto Bernabe

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# Guarding the Guardians: Should Guardians ad Litem Be Immune from Liability for Negligence?

Alberto Bernabe\*

*Illinois has a very comprehensive regulatory system for guardianships, which are recognized and regulated by several different statutes including the Illinois Probate Act and the Illinois Marriage and Dissolution of Marriage Act. Unfortunately, notwithstanding this comprehensive regulation, courts have struggled with the question of whether guardians ad litem should be immune from possible liability for injuries caused to their wards. Under the Marriage Act, an attorney appointed as a guardian ad litem is expected to perform duties on behalf of the court while the language of the Probate Act suggests that a guardian ad litem is appointed to represent the minor as an advocate. This distinction could result in holding that a guardian ad litem appointed under the Marriage Act could be immune from liability, while one appointed under the Probate Act could be subject to liability. Also, given that judges have inherent authority to appoint guardians ad litem without reference to any specific statute, whether the appointed guardian could be subject to possible liability for negligence could also depend on an analysis of the actual duties assigned to the guardian. Adding to the confusion, in a case called Nichols v. Fahrenkamp the Illinois Supreme Court recently made the analysis more difficult to understand. This Article explores the issue of whether guardians ad litem should be subject to liability and whether the Illinois Supreme Court reached the correct result in Nichols. The Article concludes that although the facts before the court did not quite support the court's conclusion, the court made some good suggestions that can help clarify this area of the law in the future.*

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\* Professor of Law, The University of Illinois at Chicago John Marshall Law School. The author would like to thank the deans and administration of the UIC John Marshall Law School for their support during the preparation of this article and Jerry Shen and Emily Mosnik for their research assistance.

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#### INTRODUCTION

Illinois has a very comprehensive and, at least according to some, “progressive,” regulatory system for guardianships.<sup>1</sup> According to Illinois law, a “guardian” is defined as a person, institution, or agency appointed by a court to manage the affairs of another person, who can be a minor or an adult with a disability due to a mental illness, physical incapacity, or developmental disability, who is referred to as their “ward.”<sup>2</sup> The Illinois Probate Act (the Probate Act) recognizes no less than seven different types of guardianships.<sup>3</sup> In addition, according to the Illinois Marriage and Dissolution of Marriage Act (the Marriage Act), in any proceedings involving the support, custody, visitation, allocation of parental responsibilities, or general welfare of a minor or dependent child, the court may appoint an attorney to serve as a guardian ad litem or as a child representative.<sup>4</sup> Finally, the Illinois Juvenile Court Act (the Juvenile Act) provides that a court may appoint a guardian ad litem for a minor during a juvenile delinquency proceeding if the court finds that there may be a conflict of interest between the minor and his or her parent, guardian, or legal custodian or that it is otherwise in the minor’s interest to do so.<sup>5</sup>

Unfortunately, for the same reason that the Illinois list of guardianships is so comprehensive, and although the Probate Act establishes a comprehensive framework for guardianship, some areas of guardianship

1. Vincent Machroli, *What Types of Guardianships Are Available in Illinois?*, ILL. LAW. NOW (June 13, 2019), <https://www.illinoislawyernow.com/2019/06/what-types-of-guardianships-are-available-in-illinois/> [<https://perma.cc/Z5QW-5ZJB>]. See also George S. Mahaffey, Jr., *Role Duality and the Issue of Immunity for the Guardian ad Litem in the District of Columbia*, 4 J.L. & FAM. STUD. 279, 280 (2002) (noting that guardianship policy has its origins in ancient Greece and Rome, but the approach to it taken by courts in the United States is based on the English Common Law and the doctrine of *parens patriae*, which was appropriated by the colonies and applied to both minors and those incapable of caring for themselves in the form of court appointed guardians).

2. Illinois Probate Act, 755 ILL. COMP. STAT. 5/1-2.08, 1-2.14 (2020); Illinois Marriage and Dissolution of Marriage Act, 750 ILL. COMP. STAT. 5/506 (2020). See also MARY L. MILANO ET AL., A GUIDE TO ADULT GUARDIANSHIP IN ILLINOIS 1 (June 2011) [hereinafter GUIDE TO GUARDIANSHIP], available at <https://www.illinois.gov/sites/gac/OSG/Documents/GuideAdultGuardianship2011.pdf> [<https://perma.cc/3MRE-T8CF>] (“A guardian may also be appointed if, because of ‘gambling, idleness, debauchery, or excessive use of intoxicants or drugs,’ a person spends or wastes his/her estate so as to expose himself/herself or his/her family to want or suffering. In either case, guardianship may be necessary to protect the person and to promote the interests of others, such as service providers or creditors.”).

3. Illinois Probate Act, 755 ILL. COMP. STAT. 5/1-1–11 (2020).

4. Illinois Marriage and Dissolution of Marriage Act, 750 ILL. COMP. STAT. 5/506(a) (2020).

5. Illinois Juvenile Court Act, 705 ILL. COMP. STAT. 405/5-610(1) (2020).

law and practice in Illinois are still confusing.<sup>6</sup> In fact, it has been reported that, although the only way someone can be appointed as guardian for another person in Illinois is to be appointed by the circuit court,<sup>7</sup> many Illinois probate judges interpret legal principles or procedures differently, and sometimes do not apply them at all.<sup>8</sup> Each county circuit court may also have its own practices or rules. Consequently, certain procedures that may be taken for granted in a particular county may not be used in another, such as the appointment of a guardian ad litem during guardianship procedures, which the statute anticipates will be done in all cases, but which is a component of the process that is often waived by some probate courts.<sup>9</sup>

In addition, one area of the law that has proven to be confusing is the issue of whether guardians ad litem should be immune from possible liability for injuries caused to their wards when performing their duties as guardians. Historically, courts sometimes rely upon guardians ad litem to provide objective determinations as to the best interests of a minor or of a person with a disability, unbiased by the interests of the respective parties involved. In so doing, guardians ad litem have to make decisions, the outcomes of which have significant repercussions for the parties

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6. One area of confusion that has been eliminated is the possible conflict of interest in appointing a lawyer to represent a minor at the same time that he or she is appointed to be a guardian ad litem in a juvenile delinquency proceeding. The Illinois Supreme Court invalidated this widespread practice in 2012, holding that representing a minor as an attorney and as a guardian at the same time constitutes an inherent conflict of interest and creates too much of a risk of a violation of a minor's constitutional right to counsel. *People v. Austin M.*, 975 N.E.2d 22, 42 (Ill. 2012). See generally Alberto Bernabe, *A Good Step in the Right Direction: Illinois Eliminates the Conflict Between Attorneys and Guardians*, 38 J. LEGAL PROF. 161 (2013) [hereinafter *A Good Step in the Right Direction*]; Alberto Bernabe, *The Right to Counsel Denied: Confusing the Roles of Lawyers and Guardians*, 43 LOY. U. CHI. L.J. 833 (2012) [hereinafter *The Right to Counsel Denied*].

7. The procedures for obtaining a court-appointed guardian are set forth in the Illinois Probate Act, 755 ILL. COMP. STAT. 5/11-5 (2020).

8. As a result of this incongruity between the statutory regimes under the Marriage Act and the Probate Act, in recent years Illinois courts have appointed guardians ad litem to report on children's best interests, as described by the Marriage Act, even in proceedings under article XI of the Probate Act. See MARY L. MILANO ET AL., A PRACTITIONER'S GUIDE TO ADULT GUARDIANSHIP IN ILLINOIS 1 (2007) [hereinafter PRACTITIONER'S GUIDE TO GUARDIANSHIP], available at <https://www2.illinois.gov/sites/gac/OSG/Documents/PRAGUIDE2007.pdf> [https://perma.cc/GYQ7-LFB5]; see also Nichols v. Fahrenkamp, 2019 IL 123990, ¶ 32-34 (discussing certain courts that provide descriptions of guardians ad litem consistent with the Marriage Act, while noting that others fail to provide descriptions at all).

9. Compare GUIDE TO GUARDIANSHIP, *supra* note 2, at 4 ("Although the process described in the Illinois Probate Act anticipates the appointment of guardians ad litem in all cases, many probate courts will waive this requirement for cause."), with PRACTITIONER'S GUIDE TO GUARDIANSHIP, *supra* note 8, at 11-12 ("In Cook County, protocol requires the appointment of a *guardian ad litem* in all estate guardianships, and in person guardianships which might result in a physical intrusion (surgery or forced medication) or a denial of rights (involuntary placement or objection to guardianship by the respondent). Most downstate courts require the appointment of *guardians ad litem* in all cases except temporary guardianships . . . regardless of whether estate guardianship is at issue.").

involved. Accordingly, it has been argued that guardians ad litem should be allowed to have immunity from liability in order to make such important decisions without the fear that their judgment will be second guessed through the use of personal liability claims that could force them to engage in expensive, stressful, and time consuming litigation.

This is an important issue because, by definition, guardians operate under circumstances in which the wards depend on them to make important decisions that often have long term, even life changing, effects. Also, guardians are often in charge of their ward's financial affairs, which puts the guardians in a position to manage—or mismanage—the ward's money. Plenary guardianship is even more extreme, having the potential to deprive a ward of participation in meaningful decisions that affect the ward's life.<sup>10</sup> Thus, given the potential for improper conduct by guardians, there is often a threat of litigation which leads to the question of whether those affected by the conduct should be allowed to support a claim to recover for the injuries suffered. In other words, is the type of injury suffered by a ward as a result of the negligence of a guardian an injury for which the law should recognize a remedy?

In a recent opinion, the Illinois Supreme Court tried to settle this issue and seemed to agree with the argument that guardians ad litem should be granted immunity and, therefore, should be protected from possible liability.<sup>11</sup> However, even though the court expressed a principle of law that is (or should be considered to be) correct in the abstract, it is not clear the analysis was entirely applicable to the facts of the case. For that reason, it is not clear whether the result was justified, and the decision may create some confusion as to its application in the future.

In order to further the discussion and to attempt to clarify the remaining confusion, this Article will explore the issue of whether guardians ad litem should be subject to liability for injuries caused to those whose interests they are supposed to advance and whether the Illinois Supreme Court reached the correct result in addressing it. The Article concludes that although the facts before the court did not quite support its conclusion, the court made some important suggestions that will go a long way to help clarify this area of the law in the future. As a result, the General Assembly should consider reviewing the Probate Act and the Marriage Act to ensure that the phrase “guardian ad litem” is used consistently throughout the statutes and courts should try to avoid misunderstandings by specifying the statutory basis for an appointment

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10. Edward Spurgeon & Mary Jane Ciccarello, *Lawyers Acting as Guardians: Policy and Ethical Considerations*, 31 STETSON L. REV. 791, 791–92 (2002).

11. See *Nichols*, 2019 IL 123990, ¶ 49 (“Therefore, we hold that guardians *ad litem* who submit recommendations to the court on a child's best interests are protected by quasi-judicial immunity.”).

of a guardian and the specific tasks assigned to anyone appointed to serve as a guardian ad litem.

### I. GUARDIANSHIP AND GUARDIANS

As explained by the director of the Illinois Guardianship and Advocacy Commission, “[g]uardianship is an extreme form of intervention in the life of a person, because control over personal and/or financial decisions is transferred to someone else for an indefinite, often permanent, period.”<sup>12</sup> Thus, guardianships are meant to be utilized only if clearly necessary to promote the wellbeing of the person subject to the guardianship.<sup>13</sup>

The Probate Act recognizes and regulates several different types of guardianships, but, interestingly, it does not provide a definition for the concept of a guardian ad litem. Guardians ad litem are more prominently mentioned in the Marriage Act<sup>14</sup> and the Juvenile Act.<sup>15</sup> Understanding the distinctions between all these forms of guardianship and the context in which they can operate is important before considering whether the approach to immunity for guardians recently adopted by the Illinois Supreme Court is valid.

Without more, a person’s age, or a mental, physical, or developmental disability does not automatically dictate a need for guardianship. Guardianship is needed only if a person is unable to make and communicate responsible decisions regarding his or her personal care or finances. Making incorrect or ill-advised decisions every once in a while is not enough; what is relevant is the ability to make decisions to begin with.<sup>16</sup>

Before 1979, people in need of possible guardianship were referred to in Illinois as “incompetent” and the probate courts could appoint “conservators” to care for their estate and finances.<sup>17</sup> In 1979, the Illinois Probate Act was amended to provide statutory protection for disabled persons by establishing new forms of guardianship and new procedures

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12. GUIDE TO GUARDIANSHIP, *supra* note 2, at 8.

13. *See id.* (“The law requires that guardianship be used only if it will promote the well-being of the person with disabilities and protect the person with disabilities against neglect, exploitation and abuse, and encourages development of maximum self-reliance and independence.”).

14. *See generally* 750 ILL. COMP. STAT. 5/101–802 (2020).

15. *See, e.g.*, 705 ILL. COMP. STAT. 405/2-17 (2020).

16. *See* 755 ILL. COMP. STAT. 5/11a-3 (2020) (allowing courts to appoint a guardian to those with disabilities upon a demonstration by clear and convincing evidence “that because of his disability he lacks sufficient understanding or capacity to make or communicate responsible decisions concerning the care of his person”).

17. PRACTITIONER’S GUIDE TO GUARDIANSHIP, *supra* note 8, at 2.

for the appointment of guardians and for the supervision of disabled persons and their estates.<sup>18</sup>

The Probate Act recognizes two general categories of guardianships based on the specific duties the guardian is asked to perform: personal guardians and guardians of the estate. When a person's mental or physical limitations require a guardian to decide on everything regarding that person's personal care, as well as their financial affairs, the court can appoint a plenary guardian, who would have the authority to make decisions for the ward regarding all matters.<sup>19</sup> More commonly, however, guardians are appointed as either guardians of the person or guardians of the estate. Both of these types of guardians can be appointed for adults with disabilities, or for minors, and can also be appointed as temporary guardians,<sup>20</sup> limited guardians,<sup>21</sup> stand-by guardians,<sup>22</sup> short-term

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18. See generally 755 ILL. COMP. STAT. 5/1-1-30-3 (2020).

19. See *id.* § 11a-3 (granting courts authority to appoint guardians to persons with a disability).

20. Temporary guardianship is used in emergency situations to make sure that the person in need of a guardianship is protected. *id.* § 11a-4(a). The court may appoint a temporary guardian prior to the appointment of a guardian, during an appeal in relation to the appointment, or upon a guardian's death, incapacity, or resignation. *Id.* This type of guardianship can only last a maximum of sixty days. *Id.* § 11a-4(b). For a description of all the different types of guardianships recognized by the Illinois Probate Act, see PRACTITIONER'S GUIDE TO GUARDIANSHIP, *supra* note 8, at 1-3 and GUIDE TO GUARDIANSHIP, *supra* note 2, at 12-15.

21. See 755 ILL. COMP. STAT. 5/11a-14 (2020) (defining the boundaries of limited guardianship). Courts appoint a limited guardian when the ward can make limited decisions about his or her personal care or finances. GUIDE TO GUARDIANSHIP, *supra* note 2, at 12-13. In such cases, the court must list the exact limits of authority the guardian will have to make decisions for the ward. *Id.* Outside of those limits, the ward would be allowed to make his or her own decisions. *Id.*

22. See 755 ILL. COMP. STAT. 5/11a-3.1 (2020) ("Appointment of standby guardian."); see also PRACTITIONER'S GUIDE TO GUARDIANSHIP, *supra* note 8, at 8 (noting that standby guardianship is used to provide continuity in the guardianship case if the primary guardian dies, becomes incapacitated or is no longer acting); GUIDE TO GUARDIANSHIP, *supra* note 2, at 14 (explaining that the standby guardian has the authority to act as guardian without direction of court for a period of up to sixty days).

guardians,<sup>23</sup> successor guardians<sup>24</sup> or testamentary guardians,<sup>25</sup> all of which are terms that refer to guardianships with limits in terms of time of service or of the tasks imposed by the court.

A guardian of the person is appointed when a person with a disability lacks enough understanding or ability to comprehend and express appropriate decisions concerning his or her personal care.<sup>26</sup> Similarly, if the person is not disabled but is a minor, the court can appoint a “guardian of a minor.”<sup>27</sup> Guardians for a person, whether the person is an adult with disabilities or a minor, are authorized to make decisions to provide for the support, care, comfort, medical treatment, health, residential placement, social services, education, and maintenance of the ward.<sup>28</sup> Ideally, the guardian should assist the ward in the development of maximum self-reliance and independence and, for that reason, all decisions made by a guardian on behalf of a ward are supposed to be made by conforming as closely as possible to what the ward, if competent, would have done under the circumstances.<sup>29</sup>

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23. Short-term guardianship is used to enable a guardian to appoint an acting guardian to take over the guardian’s duties, without court approval, for short periods of time. *See* GUIDE TO GUARDIANSHIP, *supra* note 2, at 14–15; PRACTITIONER’S GUIDE TO GUARDIANSHIP, *supra* note 8, at 8. The duration of the appointment cannot “exceed a cumulative total of 60 days in any 12 month period . . .” 755 ILL. COMP. STAT. 5/11a-18.3(a) (2020). “[A] short-term guardian shall have the authority to act as a guardian” of the person of a ward, “but shall not have any authority to act as guardian of the estate of” the ward, other than to apply for and receive benefits to which the ward may be entitled under federal, state, or local organizations or programs. *Id.* § 11a-18.3(b).

24. A successor guardian might be named in instances where guardianship is still necessary after the originally-appointed guardian dies, becomes disabled, or resigns. *See* 755 ILL. COMP. STAT. 5/11a-15 (2020) (“Upon the death, incapacity, resignation or removal of a guardian of the estate or person of a living ward, the court shall appoint a successor guardian or terminate the adjudication of disability. The powers and duties of the successor guardian shall be the same as those of the predecessor guardian unless otherwise modified.”); *see also* GUIDE TO GUARDIANSHIP, *supra* note 2, at 13–14 (detailing same).

25. A testamentary guardianship is appointed when the parent of a disabled person creates a will that names a specific person who they would like to take on guardianship of the disabled person after the parent’s death. GUIDE TO GUARDIANSHIP, *supra* note 2, at 14. As with all other guardianships, though, the designated person has to be approved by the court before he or she can be officially appointed as guardian, and the court can appoint another person if they so choose. *Id.*; *see also* 755 ILL. COMP. STAT. 5/11a-16 (2020) (explaining testamentary guardianship).

26. GUIDE TO GUARDIANSHIP, *supra* note 2, at 13; *see also* 755 ILL. COMP. STAT. 5/11a-3 (2020) (“If the court adjudges a person to be a person with a disability, the court may appoint (1) a guardian of his person, if it has been demonstrated by clear and convincing evidence that because of his disability he lacks sufficient understanding or capacity to make or communicate responsible decisions concerning the care of his person . . .”).

27. *See* 755 ILL. COMP. STAT. 5/11-13 (2020) (explaining the duties of a guardian of a minor).

28. *See id.* § 11a-17 (outlining the duties of a personal guardian).

29. The statute specifically states that in order to make decisions, “the guardian shall determine how the ward would have made a decision based on the ward’s previously expressed preferences, and make decisions in accordance with the preferences of the ward.” *Id.* § 11a-17(e). In order to do this, the statute suggests that the guardian should take into account “the ward’s personal,



In contrast, when a person is unable to make or communicate responsible decisions regarding the management of his or her finances, the court can appoint a “guardian of the estate.”<sup>30</sup> Subject to court supervision, the guardian of the estate will make decisions about the ward’s funds and the safeguarding of the ward’s income or other assets. In doing so, the guardian of the estate can exercise all powers over the estate and business affairs of the ward that the ward could exercise were it not for the need for the guardianship.<sup>31</sup> For example, the guardian may make disbursements of the ward’s funds to the ward or others, may perform contracts on behalf of the ward and, unless another person is appointed to do so, may appear for the ward in legal proceedings.

Additionally, the Probate Act gives the court the flexibility to tailor guardianship to meet the specific needs and capabilities of disabled persons. For this reason, depending on the circumstances—most importantly the needs and decision-making capacity of the disabled person—the guardianship can be limited to specific tasks, matters, or a specific period of time.<sup>32</sup>

The requirements for someone to qualify to be a guardian are minimal. Any legal resident of the United States who is older than eighteen, who has not been convicted of a serious crime, and who is of sound mind can serve as guardian.<sup>33</sup> Public and private not-for-profit agencies, other than agencies that provide residential services to disabled persons residing in their facilities, are also eligible to be guardians.<sup>34</sup> If there is no other

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philosophical, religious and moral beliefs, and ethical values relative to the decision to be made by the guardian.” *Id.* “If the ward’s wishes are unknown and remain unknown after reasonable efforts to discern them, the decision shall be made on the basis of the ward’s best interests as determined by the guardian.” *Id.*

30. *Id.* § 11a-18(a); *see also id.* § 11-13(b) (“The guardian or other representative of the ward’s estate shall have the care, management and investment of the estate, shall manage the estate frugally and shall apply the income and principal of the estate so far as necessary for the comfort and suitable support and education of the ward, his children, and persons related by blood or marriage who are dependent upon or entitled to support from him, or for any other purpose which the court deems to be for the best interests of the ward, and the court may approve the making on behalf of the ward of such agreements as the court determines to be for the ward’s best interests.”). In other jurisdictions, as it was in the past in Illinois, guardians who perform similar functions are often called “conservators.” *See* Bruce S. Ross, *Conservatorship Litigation and Lawyer Liability: A Guide Through the Maze*, 31 STETSON L. REV. 757 (2002).

31. 755 ILL. COMP. STAT. 5/11a-18(a-5) (2020).

32. *See* GUIDE TO GUARDIANSHIP, *supra* note 2, at 7–10, 12–15 (explaining that guardianships can be temporary, short-term or limited, depending on the circumstances, to ensure that a person receives immediate protection).

33. 755 ILL. COMP. STAT. 5/11a-5(a) (2020); *accord* GUIDE TO GUARDIANSHIP, *supra* note 2, at 12.

34. 755 ILL. COMP. STAT. 5/11a-5(b) (2020); *accord* GUIDE TO GUARDIANSHIP, *supra* note 2, at 12.

person available and willing to accept a guardianship appointment, as a last resort, the Office of State Guardian will be appointed guardian.<sup>35</sup>

In all cases, however, the guardian can only be appointed by the court as the result of a guardianship proceeding. Based on the evidence presented by the parties at that proceeding, the court makes a determination as to the need for guardianship and the type of guardianship required, and appoints whomever the judge believes will make the best guardian under the circumstances, regardless of the guardian's relation to the ward.<sup>36</sup>

The final type of guardian considered by the Probate Act is a guardian ad litem, which, as the name suggests,<sup>37</sup> is a guardian only for the purposes of the guardianship proceeding itself. In other words, if so appointed, the ward would have a guardian for purposes of the proceeding during which the court will determine whether to appoint one of the previously mentioned types of guardians for other specific purposes, such as a guardian of the estate or a guardian of the person. As shall be explained below, the notion of a guardian ad litem is not exclusive to the Probate Act and, in fact, is more prevalent in other types of proceedings.

Given the limited duties of the guardians ad litem in a guardianship proceeding under the Probate Act, it is often said that they operate as eyes and ears of the court, whose main duty is owed to the court to help the court make the decisions needed in the best interest of the ward.<sup>38</sup> To meet that responsibility, guardians ad litem are expected to interview the

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35. See 20 ILL. COMP. STAT. 3955/31 (2020). In fact, the "Office of State Guardian attorneys will contest or seek to vacate guardianship orders naming the State Guardian as guardian where a suitable and willing alternative is available." See PRACTITIONER'S GUIDE TO GUARDIANSHIP, *supra* note 8, at 4–5. To avoid this problem, unless the Office of State Guardian petitions for its own appointment as guardian, in all cases where a court appoints the State Guardian, the court shall indicate as a finding of fact that no other suitable and willing person could be found to accept the guardianship appointment. *Id.*

36. Ideally, the appointed guardian is responsible for overseeing a program intended to maximize the ward's self-reliance and independence. 755 ILL. COMP. STAT. 5/11a-17(a) (2020) (stating "[t]he guardian shall assist the ward in the development of maximum self-reliance and independence."). In reality, whether this is possible will depend largely on the ward's ability to exercise self-reliance and independence, which might be questionable since lack of that ability was one of the reasons for seeking a guardianship in the first place. *Id.* § 11a-3(a). In order for a guardian to be appointed, a petition must be filed in the court by an "interested person." PRACTITIONER'S GUIDE TO GUARDIANSHIP, *supra* note 8, at 3. The petition includes basic information, such as the name, date of birth and address of the person alleged to be in need of guardianship. 755 ILL. COMP. STAT. 5/11a-8 (2020). A report must also be filed which includes a physician's description of the person's physical and mental capacity along with their relevant evaluations which would enable the court to determine the kind of guardianship needed. 755 ILL. COMP. STAT. 5/11a-9 (2020); accord GUIDE TO GUARDIANSHIP, *supra* note 2, at 2–3.

37. The term "ad litem" means "for the purposes of the legal action only." *Ad Litem*, *Legal Dictionary*, LAW.COM, <https://dictionary.law.com/Default.aspx?selected=2331> [<https://perma.cc/JX6U-SKES>].

38. *Right to Counsel Denied*, *supra* note 6, at 837 n.9; see also *infra* notes 43–44.

ward, inform him or her of their rights, and to investigate the appropriateness of guardianship in order to prepare a report to the court.

If the ward opposes the opinions of the guardian ad litem, or disputes the need for a guardianship, the court may appoint an attorney to represent the ward. Thus, at a guardianship hearing the court may have to consider the position of the parties as expressed by an attorney for the respondent (possible ward), an attorney for the person who requested the appointment of a guardian, a guardian ad litem, and the person or persons who seek to be appointed as guardians.

Eventually, based on the court's review of the information and supporting evidence presented by all these interested parties, the court decides whether to appoint a guardian, what type of guardian to appoint, and whether to impose any special powers or limits to the authority of the appointed guardian. For example, a guardian may be required to submit an annual report to the court concerning the services provided to the ward. Estate guardians must file inventories of the ward's assets and periodic accounting of estate receipts and disbursements.<sup>39</sup> All estate expenditures are subject to court review, and the guardian may be held accountable for estate assets improperly managed.

## II. GUARDIANS AD LITEM

In addition to all the types of guardianships recognized in the Probate Act, Illinois law authorizes, and in some instances encourages, the use of guardians ad litem in any divorce proceedings, delinquency proceedings, and probate court proceedings that may have consequences on a minor, including proceedings affecting child support, custody, visitation, allocation of parental responsibilities, education, parentage, and property interests.<sup>40</sup> However, the concept of a guardian ad litem is very different than the other guardianships recognized in the Probate Act. Again, understanding the difference is key to addressing the issue of whether guardians ad litem should be subject to liability for negligence.

The Latin phrase *ad litem* means "for the purposes of the legal action only,"<sup>41</sup> which suggests that a person appointed to serve as a guardian ad litem is appointed to perform a very specific task in a very specific

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39. 755 ILL. COMP. STAT. 5/11a-17(b) (2020); *see also* PRACTITIONER'S GUIDE TO GUARDIANSHIP, *supra* note 8, at 6–7.

40. 755 ILL. COMP. STAT. 5/11-1–5/11a-24 (2020). *See* Layton v. Miller, 322 N.E.2d 484, 487 (Ill. App. Ct. 1975) ("It 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.").

41. *See supra* note 37.

context.<sup>42</sup> The task of the traditional<sup>43</sup> guardian ad litem is essentially to gather information to share with the court in order to aid the court in making judicial decisions affecting the disposition of a child and to use the guardian's judgment to seek whatever remedies he or she decides are in the best interest of the child.<sup>44</sup> Thus, while the guardian of the person and the guardian of the estate are tasked to make decisions that presumably the ward would have made, the guardian ad litem is tasked to make his or her own decisions about the best interests of the ward, to report those conclusions to the court, and to aid the court make a decision. Thus, unlike the other types of guardians, the guardian ad litem typically does not have the authority to act for the ward nor does he or she have other tasks outside the context of the proceeding.<sup>45</sup> In the context of a guardianship proceeding itself, the guardian ad litem's role is limited to independently advising the court concerning the need for a guardianship.<sup>46</sup> Likewise, in a divorce proceeding the guardian ad litem may be asked to determine the best interests of a minor in order to help the court decide which parent should have custody.<sup>47</sup> For this reason, it is

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42. According to Black's Law Dictionary, "[a] guardian ad litem is a special guardian appointed by the court in which a particular litigation is pending to represent an infant, ward or unborn person in that particular litigation, and the status of guardian ad litem exists only in that specific litigation in which the appointment occurs." *Ad Litem*, BLACK'S LAW DICTIONARY (6th ed. 1990).

43. Using words like "traditional" or "typical" in reference to guardians ad litem is problematic because courts (both in Illinois and nationally) are not always consistent in their use of the term. As explained by one commentator:

Though appointed by courts pursuant to statute, the role and duties of the guardian ad litem generally are not clearly defined. Depending upon the jurisdiction, guardians have been appointed to be neutral fact-finders for the judiciary. They have also been appointed to be advocates for minor children and in some instances they have been assigned a dual role encompassing both advocacy and neutral fact-finding. Though the confusion as to the guardian ad litem's role may, at first glance, seem to be de minimis, it is of great import both to the issue of the personal liability of the court appointed guardian ad litem and the immunity a guardian may have from said liability.

Mahaffey, *supra* note 1, at 281. In Illinois, the "dual role" of guardian ad litem and advocate was ruled to be a conflict of interest in juvenile delinquency proceedings, but not in civil cases. *See, e.g., People v. Austin M.*, 975 N.E.2d 22, 42 (Ill. 2012) ("We conclude, therefore, that the interests of justice are best served by finding a *per se* conflict when minor's counsel in a delinquency proceeding simultaneously functions as both defense counsel and guardian *ad litem*."); *A Good Step in the Right Direction*, *supra* note 6, at 165–66 (discussing the confusion the dual role can create); *The Right to Counsel Denied*, *supra* note 6, at 834 (discussing same).

44. *The Right to Counsel Denied*, *supra* note 6, at 857–58; PRACTITIONER'S GUIDE TO GUARDIANSHIP, *supra* note 8, at 11–12.

45. *See Villalobos v. Cicero Sch. Dist.* 99, 841 N.E.2d 87, 93 (Ill. App. Ct. 2005) (explaining that although a guardian ad litem may provide recommendations to the court, the guardian lacks authority to make decisions affecting the ward).

46. PRACTITIONER'S GUIDE TO GUARDIANSHIP, *supra* note 8, at 11–12.

47. The Marriage Act states that the guardian ad litem shall investigate the facts of the case and interview the child and the parties. 750 ILL. COMP. STAT. 5/506(a)(2) (2020). Using that information, the guardian should prepare a written report to the court regarding his or her

often said that while other types of guardians owe a duty to the ward, the guardian ad litem owes a duty to the court.<sup>48</sup>

This is also the case in juvenile delinquency proceedings, which explains why the Supreme Court of Illinois has decided it would be a conflict of interest to assign an attorney to serve as advocate for the child and as a guardian ad litem at the same time.<sup>49</sup> Likewise, because the role of the guardian ad litem is very different than the role of a lawyer for the minor, the distinction makes all the difference when it comes to determining whether the guardian can be subject to liability for negligence.

A lawyer appointed to appear as an attorney for a minor is expected to provide “independent legal counsel for the child”<sup>50</sup> and, thus, owes the child the same duties of undivided loyalty, confidentiality, and competent representation that are owed to an adult client.<sup>51</sup> As explained by the New

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recommendations in accordance with the best interest of the child. *Id.* The report is not confidential; it is made available to all parties. *Id.* In addition, the guardian ad litem may be called as a witness for purposes of cross-examination regarding the guardian ad litem’s report or recommendations. *Id.*

48. *See, e.g., In re Mark W.*, 888 N.E.2d 15, 20 (Ill. 2008) (explaining that “a guardian ad litem functions as the ‘eyes and ears of the court’ and not as the ward’s attorney.”); *see also K.O.H. ex rel. Bax v. Huhn*, 69 S.W.3d 142, 146 (Mo. Ct. App. 2002) (stating that the guardian ad litem’s “principal allegiance is to the court”).

49. *People v. Austin M.*, 975 N.E.2d 22 (Ill. 2012). Allowing an attorney to fulfill the roles of attorney and guardian ad litem at the same time threatens all of the basic elements of the attorney-client relationship and the ethical duty created to protect them and is, therefore, considered to be a conflict of interest. *Id.* at 42. This is so because an attorney who is also a guardian will be in a position of having to choose between advancing the client’s desired objectives, as required by the duties prescribed in the rules of professional conduct, or violating those duties in order to advocate for what the attorney believes to be in the best interest of the minor. *Id.* In addition, confusion over the role of an attorney can affect the duty of confidentiality owed to a minor. *Id.* at 36. An attorney for a minor, just like any other attorney with any other type of client, is bound by the duty of confidentiality expressed in the rules of professional conduct. ILL. RULES OF PROF’L CONDUCT r. 1.14. For this reason, the attorney has an obligation to keep information related to the representation confidential unless an exception to the rule applies. ILL. RULES OF PROF’L CONDUCT r. 1.6; MODEL RULES OF PROF’L CONDUCT r. 1.6 (AM. BAR ASS’N 2019). In contrast, to fulfill the duties of a guardian ad litem, the attorney serving as guardian ad litem must prepare a report and be available to testify at the request of the court, even regarding confidential information. For a detailed discussion of the issues raised by the appointment of lawyers to serve as advocates and guardians at the same time, *see generally The Right to Counsel Denied*, *supra* note 6, and *A Good Step in the Right Direction*, *supra* note 6.

50. 750 ILL. COMP. STAT. 5/506(a)(1) (2020).

51. *See supra* note 49 and accompanying text; *Nichols v. Fahrenkamp*, 113 N.E.3d 1183, 1189 (Ill. App. Ct. 2018) (“Such a relationship between a guardian and a ward is equivalent to the relationship between a trustee and a beneficiary.” (citations omitted)). This approach to an attorney’s duty is also reflected in the Illinois Rules of Professional Conduct. Illinois Rule 1.14(a) states: “When a client’s capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.” ILL. RULES OF PROF’L CONDUCT r. 1.14(a). Also, the comment to Rule 1.14

Jersey Supreme Court in a case involving a guardian ad litem for a client with Down syndrome,

[T]he attorney's role differs from that of a guardian ad litem . . . . A court-appointed counsel's services are to the child. Counsel acts as an independent legal advocate . . . and takes an active part in the hearing, ranging from subpoenaing and cross-examining witnesses to appealing the decision, if warranted. If the purpose of the appointment is for legal advocacy, then counsel would be appointed. A court-appointed guardian ad litem's services are to the court . . . . The [guardian ad litem] acts as an independent fact finder, investigator and evaluator as to what furthers the best interests of the child. The [guardian ad litem] submits a written report to the court and is available to testify. If the purpose of the appointment is for independent investigation and fact finding, then a [guardian ad litem] would be appointed.<sup>52</sup>

If a lawyer is negligent in performing his or her duties as an advocate for the child, including by acting with a conflict of interest for attempting to perform as a guardian at the same time that the lawyer is appointed to act as a lawyer, the lawyer is subject to liability for malpractice just like any other lawyer would be. On the other hand, as shall be discussed below in more detail, an attorney acting as guardian ad litem may be entitled to immunity for negligence if the conduct in question was not that of an advocate for the minor.<sup>53</sup>

Because the use of guardians ad litem is more prevalent under the terms of the Marriage Act, it should be noted that this Act recognizes yet another layer of protection for minors by authorizing the appointment of a so-called "child representative" for the minor in addition to a guardian ad litem and an attorney.<sup>54</sup> According to the Marriage Act, an appointed

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explicitly states that "children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody." *Id.* r. 1.14 cmt. 1.

52. *In re M.R.*, 638 A.2d 1274, 1283 (N.J. 1994).

53. See 3 RONALD E. MALLIN, LEGAL MALPRACTICE § 28:42 (2020 ed.) (explaining that an attorney may be entitled to the defense of judicial immunity for an alleged error made while acting as guardian ad litem depending on whether the guardian acted as an advocate or as a functionary of the court).

54. The Marriage Act defines the duties of a child representative as follows:

The child representative shall advocate what the child representative finds to be in the best interests of the child after reviewing the facts and circumstances of the case. The child representative shall meet with the child and the parties, investigate the facts of the case, and encourage settlement and the use of alternative forms of dispute resolution. The child representative shall have 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 consider, but not be bound by, the expressed wishes of the child. A child representative shall have received training in child advocacy or shall possess such experience as determined to be equivalent to such training by the chief judge of the circuit where the child representative has been

child representative shall advocate what the child representative believes to be in the best interests of the child after reviewing the facts and circumstances of the case.<sup>55</sup> In this way, the child representative is a hybrid figure, somewhere between a guardian ad litem and an attorney. He or she acts as an advocate for the child but has a different type of authority to make decisions than an attorney for a child.

An attorney representing a minor is expected to maintain an attorney-client relationship with the client, which means the attorney has to respect the client's autonomy to make decisions and, therefore, abide by the client's decisions concerning the objectives of the representation.<sup>56</sup> A child representative is an advocate for the child who does not have to abide by such decisions and, to the contrary, has the authority to do something a lawyer rarely, if ever, has the authority to do: to make decisions *for* the client after independently forming an opinion about what the representative believes to be the best interests of the child.<sup>57</sup>

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appointed. The child representative shall not disclose confidential communications made by the child, except as required by law or by the Rules of Professional Conduct. 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. The child representative shall disclose the position as to what the child representative intends to advocate in a pre-trial memorandum that shall be served upon all counsel of record prior to the trial. The position disclosed in the pre-trial memorandum shall not be considered evidence. The court and the parties may consider the position of the child representative for purposes of a settlement conference.

750 ILL. COMP. STAT. 5/506(a)(3) (2020).

55. *Id.*

56. Alberto Bernabe, *Waiving Goodbye to a Fundamental Right: Allocation of Authority Between Attorneys and Clients and the Right to a Public Trial*, 38 J. LEGAL PROF. 1, 2 nn.2-3 (2013) [hereinafter *Waiving Goodbye to a Fundamental Right*] (citing MODEL RULES OF PROF'L CONDUCT r. 1.2 (AM. BAR ASS'N 2019)); RONALD ROTUNDA & JOHN DZIENKOWSKI, PROFESSIONAL RESPONSIBILITY: A STUDENT'S GUIDE § 1.2-2(a) (2014) (stating that the lawyer is the agent—not the guardian—of the client; lawyer must “abide by the client's decisions concerning the objectives of the representation”).

57. Even in those rare circumstances where attorneys are allowed to use their own judgment to protect the interests of younger clients or clients with diminished capacity, it is clear that the lawyer's conduct should be guided more by respect toward the client's autonomy rather than by what the lawyer may think may be better for the client. *See generally* MODEL RULES OF PROF'L CONDUCT r. 1.14 (AM. BAR ASS'N 2019). Thus, according to generally accepted notions of professional responsibility, an attorney should follow the client's instructions rather than substitute his or her judgment for that of the client. *Id.* On this point, the comment to rule 1.14 states that “[i]n taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client's best interests and the goals of intruding into the client's decision making autonomy to the least extent feasible, maximizing client capacities and respecting the client's family and social connections.” *Id.* at cmt. 5. Thus, rules of professional conduct demand that, other than in some rare circumstances, attorneys for minors and those with diminished capacity abide by the same duties owed to an adult client. This is why in cases where the lawyer is in doubt as to the best way to proceed, the suggested course of action is not to make decisions for the client but to ask for the appointment of a guardian other than the lawyer himself or herself. *See State v. Joanna V.*, 94 P.3d 783, 786 (N.M. 2004) (holding that, “[a]lthough counsel may advise

Thus, the child representative under the Marriage Act is essentially a lawyer with special powers.<sup>58</sup> As explained in the Act, the child representative

shall have 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 consider, but not be bound by, the expressed wishes of the child. . . . The child representative shall not disclose confidential communications made by the child, except as required by law or by the Rules of Professional Conduct. 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.<sup>59</sup>

In other words, just like in the case of a guardian ad litem, the duties of the child representative are limited to the particular proceeding and are based on the representative's own conclusion as to the best interests of the minor. Yet, unlike in the case of a guardian ad litem, the child representative acts as an advocate and, therefore, owes a duty to the minor and not to the court.

### III. SHOULD GUARDIANS AD LITEM BE SUBJECT TO POSSIBLE LIABILITY FOR NEGLIGENCE?

There should be no question that the position of a guardian ad litem is extremely important. Regardless of the type of proceeding in which guardians are appointed, the lives of their wards, whether minors or people with disabilities, can be severely affected if the person serving as a guardian is incompetent or negligent. Both the ward and the court depend on the ability of the guardians ad litem to do their job properly. For this reason, it is expected that guardians will fulfill their duties fully, carefully, and non-negligently.<sup>60</sup>

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the client on counsel's view of the client's best interests, counsel is ultimately required to advance the client's expressed wishes"). See also Annette Appell, *Decontextualizing the Child Client: The Efficacy of the Attorney-Client Model for Very Young Children*, 64 *FORDHAM L. REV.* 1955, 1959–60 (1996) (stating that "lawyers may not normally substitute their own opinions regarding the goals of the representation").

58. As the court explains in *Nichols*, "the child representative . . . acts as an 'advocate' for the child's best interests. Like the child's attorney, the child's representative 'shall have the same authority and obligation to participate in the litigation as does an attorney for a party.'" *Nichols v. Fahrenkamp*, 2019 IL 123990, ¶ 17. Also like a traditional attorney, 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.* However, the child representative "shall possess all the powers of investigation as does guardian ad litem" and is not bound by the child's expressed wishes when determining the child's best interests. *Id.*

59. *Id.*

60. *Dixon v. United States*, 197 F. Supp. 798, 802 (W.D.S.C. 1961) (noting that guardians should be as careful not to do anything, or allow anything to be done, to the prejudice of the ward's interest).



Unfortunately, that is not always the case and courts have had to determine whether to recognize a possible cause of action against guardians for injuries caused by their negligence. In some cases, courts have stated that guardians ad litem should be subject to liability,<sup>61</sup> but the majority view is that guardians ad litem should be protected from liability in most cases. It is important to say “in most cases” when affirming that guardians ad litem should be immune to liability because it depends not on the label attached to their appointment but on the actual tasks the court asks them to perform and the person to whom the duty to perform those tasks is owed.

If, as mentioned above, the guardian performs tasks at the request of the court to help the court make a decision, the guardian is usually thought of as an extension of the court and therefore owes a duty to the court. And, since judges are immune from liability,<sup>62</sup> by extension of the concept of judicial immunity, guardians ad litem are usually also granted immunity.<sup>63</sup> Thus,

[a]n attorney may be entitled to the defense of judicial immunity for an alleged error made while acting as a guardian ad litem. The controlling analysis is whether the guardian acted as an advocate or as a fiduciary of the court. In custody matters, the guardian is considered an agent of the court with investigative powers rather than as counsel for the minor. . . . Under this rationale, judicial immunity has been extended to attorney guardians.<sup>64</sup>

This view is not uncommon. Many courts have held that when someone acts in a quasi-judicial role, the immunity long recognized for judges so that they can perform their duties without fear of retaliation from unhappy litigants applies too. And many courts have held that

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61. *See id.* at 802–03 (stating that 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).

62. *Nichols*, 2019 IL 123990, ¶ 14 (citing *Pierson v. Ray*, 386 U.S. 547, 553–54 (1967)) (explaining that “[f]ew doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction”).

63. *Id.* at ¶ 15 (first citing *Rehberg v. Paulk*, 566 U.S. 356, 366–67 (2012); then citing *Briscoe v. LaHue*, 460 U.S. 325, 335 (1983); and then citing *Butz v. Economou*, 438 U.S. 478, 513 (1978)).

64. *MALLEN ET AL.*, *supra* note 53, § 28:42 (footnotes omitted) (first citing *Sarkisian v. Benjamin*, 820 N.E.2d 263 (Mass. App. Ct. 2005); then citing *Fox v. Wills*, 890 A.2d 726 (Md. 2006); and then citing *Berndt v. Molepske*, 565 N.W.2d 549 (Wis. Ct. App. 1997)). The authors also cite cases from Colorado, New Mexico, Idaho, and Wisconsin to illustrate how those jurisdictions have addressed the issue of whether a guardian ad litem should be immune from possible liability for negligence based on whether they perform as a lawyer for the ward or as an extension of the court. *See, e.g.*, *Short v. Short*, 730 F. Supp. 1037 (D. Colo. 1990); *Collins ex rel. Collins v. Tabet*, 806 P.2d 40 (N.M. 1991); *Hunnicut v. Sewell*, 219 P.3d 529 (N.M. Ct. App. 2009); *McKay v. Owens*, 937 P.2d 1222 (Idaho 1997); *Molepske*, 565 N.W.2d 549.

guardians ad litem act in a quasi-judicial role because their role is to assist the court in making a decision.<sup>65</sup>

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65. MALLE ET AL., *supra* note 53, § 28:42 (stating that court appointed guardians, like lawyers who function in a judicial capacity, are entitled to immunity); Inga Laurent, “*This One’s for the Children: The Time Has Come to Hold Guardians Ad Litem Responsible for Negligent Injury and Death to the Their Charges*,” 52 CLEV. ST. L. REV. 655, 658 (2004) (explaining that immunity is routinely granted to guardians who function within a quasi-judicial role); Jennifer Paige Hanft, *Attorney for Child Versus Guardian ad Litem: Wyoming Creates a Hybrid, But Is it a Formulation for Malpractice?*, 34 LAND & WATER L. REV. 381, 394 (1999). Also, although they use different language to refer to the extent of immunity, Texas, Florida, Washington State, South Carolina, Michigan, Tennessee, and Maine have statutes that specifically afford statutory immunity to guardians for acts committed within the scope of their appointments. See TEX. FAM. CODE § 107.009 (2019); FLA. STAT. ANN. § 61.405 (2020); WASH. REV. CODE ANN. § 13.34.105 (2020); S.C. CODE § 63-11-560 (2020); MICH. COMP. LAWS § 691.1407 (2020); TENN. CODE ANN. § 37-1-149 (2020). Myriad decisions in state and federal court also affirm the immunity enjoyed by guardians ad litem. See *Widoff v. Wiens*, 45 P.3d 1232, 1235 (Ariz. Ct. App. 2002) (holding that a guardian ad litem appointed by the court to assist in child custody dispute was entitled to judicial immunity from lawsuit because guardian must be allowed to perform his or her duties without fear of litigation, and children would suffer if the decisions of a guardian ad litem were influenced by the threat of litigation); *Kimbrell v. Kimbrell*, 331 P.3d 915, 918 (N.M. 2014) (holding that immunity is granted to a guardian ad litem who is acting as an arm of the court in order to prevent the guardian’s work from being compromised by the threat of liability); *Surprenant v. Mulcrone*, 44 A.3d 465, 467 (N.H. 2012) (holding that in custody related proceeding, court appointed guardian ad litem was entitled to immunity for any alleged negligence in actions taken in her official capacity in preparing and presenting report to court); *Hunnicut*, 219 P.3d at 534 (holding that immunity attaches to a guardian ad litem when the appointment contemplates investigation on behalf of the court into the fairness and reasonableness of a settlement); *Cooney v. Rossiter*, 583 F.3d 967, 970 (7th Cir. 2009) (stating that guardians ad litem operate as 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) (explaining that state courts have reasoned that, “absent absolute immunity, the specter of litigation would hang over a [guardian ad litem’s] head, thereby inhibiting a [guardian ad litem] in performing duties essential to the welfare of the child”); *Offutt v. Kaplan*, 884 F. Supp. 1179, 1192 (N.D. Ill. 1995) (holding that a guardian ad litem acts as a judicial officer and was entitled to immunity); *Billups v. Scott*, 571 N.W.2d 603, 607 (Neb. 1997) (stating that a guardian ad litem is entitled to immunity for any suit for damages based on performance of duties which are within scope of guardian’s authority); *Collins v. Tabet*, 806 P.2d 40, 51 (N.M. 1991) (holding that immunity for guardian ad litem provided that the appointment contemplates investigation on behalf of the court into the fairness and reasonableness of a settlement and its effect on the minor); *Marr v. Me. Dep’t of Hum. Servs.*, 215 F. Supp. 2d 261, 268 (D. Me. 2002) (holding that immunity attaches when guardian ad litem performs certain delegated duties because of intimate relationship between a guardian ad litem and court in judicial process); *Kennedy v. State*, 730 A.2d 1252, 1255 (Me. 1999) (stating that a guardian ad litem in custody proceedings was entitled to immunity because she functioned as an arm of the court and was acting on behalf of the court in its efforts to determine what would be in the best interests of the children); *Short v. Short*, 730 F. Supp. 1037, 1039 (D. Colo. 1990) (granting immunity to court-appointed guardian ad litem for minor children in a domestic relations dispute); *Tindell v. Rogosheske*, 428 N.W.2d 386, 387 (Minn. 1988) (stating that a guardian ad litem is immune from negligence for acts within the scope of the exercise of statutory responsibilities); *Dahl v. Dahl*, 744 F.3d 623, 631 (10th Cir. 2014) (holding that guardians ad litem are entitled to quasi-judicial immunity); *Carrubba v. Moskowitz*, 877 A.2d 773, 783–785 (Conn. 2005) (determining that a court-appointed attorney for minor child most closely resembles a guardian ad litem and is entitled to absolute immunity); *Babbe v. Peterson*, 514 N.W.2d 726, 727 (Iowa 1994) (noting that guardian ad litem acting on behalf of the appointing court was entitled to judicial immunity); *Paige K.B. v.*

There would be nothing more to discuss if that was all there is to the issue. It makes sense to say that a guardian whose task is to help the court operate as an arm of the court and should, therefore, be protected from possible liability. The problem in Illinois, however, is that the case that brought the issue to the supreme court for review did not fit this mold.

#### A. *Nichols v. Fahrenkamp*: Background

The Supreme Court of Illinois had not considered whether a guardian ad litem should be immune from possible liability for negligence until *Nichols v. Fahrenkamp* was decided in the summer of 2019. Following the generally accepted rule, the court decided that guardians ad litem should be granted immunity. This general principle is not surprising, but the result in the case is surprising because it is not clear that the facts supported it.

The facts of *Nichols* are relatively straight forward. When the plaintiff, Alexis Nichols, was eleven years old she received a \$600,000 settlement in a lawsuit for injuries she sustained in a car accident.<sup>66</sup> Because Alexis was a minor at the time, the probate court appointed her mother as a guardian of the person and of the estate<sup>67</sup> and, as such, was ordered to place the settlement money in a restricted account from which no withdrawal could be made unless it was approved by the court.<sup>68</sup> Presumably, that was all that would be needed since by doing so the court was, in effect, appointing a plenary guardian. However, without explaining its reasons, delineating specific tasks, nor pointing out the statute upon which the decision was based, the court also appointed a

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Molepske, 580 N.W.2d 289, 296 (Wis. 1998) (holding that a guardian ad litem appointed by the court to represent the best interests of a child in a child custody case is entitled to absolute quasi-judicial immunity to prevent harassment and intimidation); Fleming v. Asbill, 483 S.E.2d 751, 756 (S.C. 1997) (holding that guardians ad litem in private custody proceedings are entitled to common law immunity); *McKay*, 937 P.2d 1222 (holding that a guardian ad litem should be considered to be acting as an arm of the court and entitled to absolute quasi-judicial immunity); Lewittes v. Lobis, 164 F. App'x 97, 98 (2d Cir. 2005) (noting that a guardian ad litem is entitled to quasi-judicial immunity); McCuen v. Polk Cty., 893 F.2d 172, 174 (8th Cir. 1990) (noting that a child protection worker was comparable to a prosecutor and entitled to at least qualified immunity); Cok v. Cosentino, 876 F.2d 1, 3 (1st Cir. 1989) (explaining guardian ad litem functioned as and agent of the court had have absolute quasi-judicial immunity for activities integrally related to the judicial process); Gardner v. Parson, 874 F.2d 131, 146 (3d Cir. 1989) (noting a guardian ad litem as absolutely immune when acting as an integral part of the judicial process); Kurzawa v. Mueller, 732 F.2d 1456, 1458 (6th Cir. 1984) (holding that a guardian ad litem enjoys absolute immunity).

66. *Nichols*, 2019 IL 123990, ¶ 3.

67. The opinion of the Illinois Supreme Court said that the mother was appointed “as her guardian to administer her estate,” *id.*, while the opinion of the appellate court stated that the mother was appointed as a guardian of the person and the estate, *Nichols v. Fahrenkamp*, 113 N.E.3d 1183, 1184 (Ill. App. Ct. 2018).

68. *Nichols*, 2019 IL 123990, ¶ 3.

lawyer as what the court referred to as a guardian ad litem.<sup>69</sup> This lawyer was the eventual defendant in the case, David Fahrenkamp.

Between 2005 and 2010, Alexis's mother requested permission to withdraw money from the account holding the settlement money for many different reasons, including to pay taxes, to buy a car, and to pay for school costs, among others. All the requests were approved by the court.<sup>70</sup> Presumably, one of Fahrenkamp's duties was to review these requests and to recommend to the court whether the court should approve them. Fahrenkamp approved all the requests but the plaintiff alleged that he failed to verify whether the requests were accurate or legitimate before recommending approval by the court.<sup>71</sup>

Soon after Alexis reached majority, her mother filed a Final Report certifying that plaintiff had received access to the remaining amount of money available in the settlement fund account, and in 2010, the court ordered that the guardianship appointment was no longer needed and officially ended it.<sup>72</sup>

Two years later, Alexis sued her mother for conversion, unjust enrichment, fraudulent misrepresentation, and breach of fiduciary duty, among other claims, alleging that her mother misappropriated some of the funds and used them solely for the mother's benefit.<sup>73</sup> Following a bench trial, the court found in favor of the plaintiff in part, but denied full recovery precisely because Alexis had been appointed a guardian ad litem.<sup>74</sup> In other words, the court relied on attorney Fahrenkamp's status as guardian ad litem to limit plaintiff's remedies against her mother. As explained 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."<sup>75</sup>

Taking the hint, Alexis then filed a malpractice action against attorney Fahrenkamp claiming that he failed to protect her interests by allowing her mother to convert settlement funds for the mother's personal benefit.<sup>76</sup> She claimed, among other things, that Fahrenkamp negligently performed his duties as guardian ad litem by failing to monitor the requests made by plaintiff's mother to determine if they were truly for the

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69. *Id.* ¶¶ 33–34.

70. *See Nichols*, 113 N.E.3d at 1184–85.

71. *Id.* at 1185.

72. *Id.*

73. *Id.*

74. *Id.* at 1184–85 (finding that the mother was not liable for the requested amount because the plaintiff had a "guardian ad litem who approved the estimates and expenditures").

75. *Id.*

76. *Id.* at 1185.

plaintiff's benefit, failing to verify that the money was actually used for the plaintiff's benefit, and failing to report any irregularities to the court.<sup>77</sup>

In response, Fahrenkamp filed a motion to dismiss and, later, a motion for summary judgment, arguing that the plaintiff could not meet the elements of the cause of action because she could not show that he had a duty as guardian ad litem to independently monitor the mother's use of funds following the court's approval of distributions.<sup>78</sup> More importantly, he also argued that even if there was a duty, the plaintiff could not support the cause of action because he was entitled to quasi-judicial immunity for his actions as a court-appointed guardian ad litem.<sup>79</sup>

After years of litigation, the trial court granted Fahrenkamp's motion and dismissed the complaint, holding that Fahrenkamp's duty as a guardian was limited to reviewing the mother's requests and to making recommendations to the court, and that he was entitled to immunity for that type of duty.<sup>80</sup> In other words, the court held that Fahrenkamp had immunity for the duty to review the mother's requests for withdrawals of funds, and had no duty to follow up on the use of those funds after they were approved by the court based on his recommendations.

As a result, the plaintiff was left with no remedy for the alleged conversion of her assets. According to the trial court, the plaintiff could not recover against the mother because the plaintiff's guardian ad litem had approved the expenditures, and she could not recover from the guardian ad litem because he was immune from liability given that the court order appointing him as guardian ad litem lacked any specificity regarding his duties.<sup>81</sup>

In 2018, the appellate court reversed and remanded, holding that Fahrenkamp was not entitled to immunity because of his role in the process and because finding against the plaintiff would mean that the appointment of a guardian ad litem was nothing more than an empty gesture.<sup>82</sup> The defendant then appealed to the Illinois Supreme Court.

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77. *Id.* In addition, plaintiff alleged that attorney Fahrenkamp never met with her or talked to her during the time he was acting as her guardian ad litem, and that he never asked her if the statements contained in her mother's petitions to withdraw monies from the settlement account were accurate. *Id.* Moreover, she claimed 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. *Id.*

78. *Nichols v. Fahrenkamp*, No. 13-L-1395, 2016 WL 11576860, at \*1 (Ill. Cir. Ct. June 22, 2016) (“[D]efendant asserts . . . that there is no evidence that he breached any duty actually owed to the plaintiff in his role as guardian ad litem.”).

79. *Nichols v. Fahrenkamp*, 2019 IL 123990, ¶ 7.

80. *Id.*

81. *Id.* ¶ 8.

82. *Nichols*, 113 N.E.3d 1183. In a dissenting opinion, Justice Goldenhersh argued that

The Illinois Supreme Court granted leave to appeal and, in June 2019, reversed the Illinois appellate court.<sup>83</sup> Notably, the court recognized the problems that make *Nichols* a difficult case: that the phrase “guardian ad litem” did not have a consistent meaning,<sup>84</sup> that the guardian in this case was not clearly appointed under any one of the statutes that recognize guardianships, that the Probate Act and the Marriage Act have disparate language pertaining to guardians ad litem,<sup>85</sup> and that the court that appointed Fahrenkamp as a guardian ad litem did not specify his role or specific tasks.

Yet, despite the fact that these problems should have made a difference in the analysis, the court concluded that because most Illinois cases consider guardians ad litem as aides of the courts rather than as advocates, they should be entitled to quasi-judicial immunity as long as the functions actually performed are consistent with that of “a witness and not an advocate.”<sup>86</sup> In doing so, the court explained a good way to approach the issue, but it is questionable whether it applied the analysis correctly to the facts of the case.

Whether the result in the case is justified is consequential for two reasons. First, because without a right to sue the defendant, a minor for whom a lower court appoints both a plenary guardian and a guardian ad litem would be left without a remedy. It is strange that if the probate court had assigned just a plenary guardian the plaintiff might have a claim, but because the court appointed more people in order to protect the interests of the minor, the minor is left with no remedy at all. Second, as the court points out, there is still a significant discrepancy between the approach to the figure of the guardian ad litem under the Marriage Act and the Probate Act and it is not clear whether the result in this case will clarify the analysis to be used in the future.

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guardians ad litem are entitled to immunity because they do not serve as advocates for their wards but as agents of the court. *Id.* at 1191 (Goldenhersh, J., dissenting). The dissent also expressed concern that denying guardians ad litem immunity would discourage attorneys from accepting appointments as guardians ad litem. *Id.*

83. *Nichols*, 2019 IL 123990, ¶¶ 51–53.

84. *Id.* ¶ 16 (citing *Fox v. Wills*, 890 A.2d 726, 732 (2006)) (stating that American authorities have not always used this phrase consistently and that “[t]here is little uniformity in the case law and statutes of other states with regard to the functions, duties, and immunities of ‘guardians ad litem.’”). The court also discussed how the concept of the guardian ad litem is different in the Marriage and Dissolution of Marriage Act and the Probate Act. *Id.* ¶¶ 29–33.

85. *Id.* ¶ 49 (encouraging the General Assembly to review these acts in order to ensure consistent use of the phrase “guardian ad litem” across statutes).

86. *Id.* at ¶ 35.

*B. Nichols v. Fahrenkamp: Analysis*

In the abstract, the conclusion that guardians ad litem are entitled to immunity as long as the functions actually performed are consistent with those of an “arm of the court” and not those of an advocate is not unreasonable. In fact, this has been the view in many jurisdictions for some time.<sup>87</sup> The problem with the Illinois Supreme Court’s opinion in *Nichols*, however, is not in the conclusion it reaches but in the way it applied the analysis in order to reach it.

First of all, because the texts of the Marriage Act and the Probate Act do not use the term “guardian ad litem” in the same way, the mere fact that attorney Fahrenkamp had the title of “guardian ad litem” does not explain what exactly his role was in the case.

To understand the different possible roles an attorney can play, it is easier to start by looking at the Marriage Act, which defines the appointment of a guardian ad litem in more detail. According to the Marriage Act, for the types of proceedings covered by the Act, the court can protect the interests of a minor by assigning him or her the help of any combination of an attorney, a guardian ad litem, or a child representative. As explained above, a lawyer appointed to appear as an attorney for a child is expected to provide independent legal representation for the child and, thus, owes the child the same duties of loyalty, confidentiality, and competent representation that are owed to an adult client.<sup>88</sup> This view is reflected in the Rules of Professional Conduct, according to which an attorney representing a minor should act as an advocate for the minor and should avoid trying to decide for the minor what may be in the minor’s best interest.<sup>89</sup> Moreover, even in emergency

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87. See *Nichols*, 2019 IL 123990, ¶ 14 (stating that court appointed guardians, like lawyers who function in a judicial capacity, are entitled to immunity). The *Nichols* court cited a number of cases in support of its conclusion. See, e.g., *Kimbrell v. Kimbrell*, 331 P.3d 915, 919 (N.M. 2014); *Fleming v. Asbill*, 483 S.E.2d 751, 756 (S.C. 1997); *McKay v. Owens*, 937 P.2d 1222, 1231 (Idaho 1997); *Barr v. Day*, 879 P.2d 912 (Wash. 1994); *Cooney v. Rossiter*, 583 F.3d 967, 970 (7th Cir. 2009) (holding that child representative deserves immunity and suggesting that guardians ad litem also have quasi-judicial immunity); *Dahl v. Dahl*, 744 F.3d 623, 630 (10th Cir. 2014) (widespread recognition that quasi-judicial immunity protects guardians ad litem); *Cok v. Cosentino*, 876 F.2d 1, 3 (1st Cir. 1989); *Gardner v. Parson*, 874 F.2d 131, 146 (3d Cir. 1989); *Hughes v. Long*, 242 F.3d 121, 127 (3d Cir. 2001); *Heisterkamp v. Pacheco*, 47 N.E.3d 1192 (Ill. App. Ct. 2016) (holding that when a court-appointed individual acts 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).

88. See *supra* notes 49 and 51.

89. Although establishing an attorney-client relationship with a minor raises some concerns because of the fact that the client is, in fact, a minor, the general principles reflected in the rules do not change much. This conclusion is expressed in Rule 1.14 of the Illinois Rules of Professional Conduct, which explains the approach an attorney must follow when establishing an attorney-client relationship with a client with diminished capacity. ILL. RULES OF PROF’L CONDUCT r. 1.14. The

situations, an attorney is only permitted to use his or her judgment to make decisions for a minor client in limited circumstances and, even in those circumstances, substituting the attorney's judgment for that of the minor client should end as soon as it is possible.<sup>90</sup> In addition, because the Marriage Act and the Rules of Professional Conduct expect an attorney for a minor to act like an attorney for any other client, it follows that if a lawyer is negligent in performing his or her duties as an advocate for a child, the lawyer is subject to liability for malpractice just like any other lawyer would be.

In contrast, the relationship between a guardian ad litem and a minor is fundamentally different. An attorney's role is to be a legal advocate for his or her client, which means that the attorney has a duty to advance the client's objectives as defined by the client. The role of the guardian ad litem under the Marriage Act, on the other hand, is to form an opinion as to what is in the best interest of the child, based on information gathered and later shared with the court in order to aid the court in making judicial decisions affecting the disposition of the child. Thus, the attorney-advocate acts at the request of the minor-client and, therefore, owes his or her duties to the child including a duty of confidentiality. In contrast, the guardian ad litem acts at the request of the court and owes his or her duties to the court, which often means that the guardian ad litem can't

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general principle expressed in the rule is that regardless of the age of the client, the attorney should maintain a normal client-lawyer relationship with his or her client, which, of course, means the attorney has a duty to comply with all the duties any attorney owes an adult client. *See supra* notes 49 and 51.

90. The comments to the rules of professional conduct discuss the proper approach to take in emergency situations as follows:

In an emergency where the health, safety or a financial interest of a person with seriously diminished capacity is threatened with imminent and irreparable harm, a lawyer may take legal action on behalf of such a person even though the person is unable to establish a client-lawyer relationship or to make or express considered judgments about the matter, when the person or another acting in good faith on that person's behalf has consulted with the lawyer. Even in such an emergency, however, the lawyer should not act unless the lawyer reasonably believes that the person has no other lawyer, agent or other representative available, except when that representative's actions or inaction threaten immediate and irreparable harm to the person. The lawyer should take legal action on behalf of the person only to the extent reasonably necessary to maintain the status quo or otherwise avoid imminent and irreparable harm. A lawyer who undertakes to represent a person in such an exigent situation has the same duties under these Rules as the lawyer would with respect to a client. A lawyer who acts on behalf of a person with seriously diminished capacity in an emergency should keep the confidences of the person as if dealing with a client, disclosing them only to the extent necessary to accomplish the intended protective action. The lawyer should disclose to any tribunal involved and to any other counsel involved the nature of his or her relationship with the person. The lawyer should take steps to regularize the relationship or implement other protective solutions as soon as possible. Normally, a lawyer would not seek compensation for such emergency actions taken.

ILL. RULES OF PROF'L CONDUCT r. 1.14 cmts. 9-10.



guarantee confidentiality since he or she must prepare a report and be available to testify at the request of the court. Given these important distinctions, a person performing the role of a guardian ad litem under the Marriage Act has a good argument for immunity from liability since his or her task is essentially to help the court make a decision that will affect the child.

Originally, neither the Marriage Act nor the Probate Act made these important distinctions between an advocate and a guardian ad litem and treated all guardians as advocates. However, the understanding of the duties of a guardian ad litem under the Marriage Act has changed and now it is clear that there is a distinction, which, in turn, can affect the claim for immunity.

On the other hand, the language in early cases under the Probate Act that allowed courts to hold that the role of the guardian ad litem was equivalent to that of an attorney-advocate,<sup>91</sup> and the section of the Probate Act that authorizes the court to appoint a guardian for a minor has remained essentially unchanged.<sup>92</sup> In fact, in its decision in *Nichols*, the court cites several cases to illustrate that courts understood guardians ad litem were expected to act like traditional attorneys under the Probate Act.<sup>93</sup> The court also points out that it is notable that the Illinois General Assembly has amended other sections of the Probate Act to reflect the newer usage of the phrase “guardian ad litem” but has not amended the section related to guardians ad litem for minors.<sup>94</sup> For example, prior to 1995, the section of the Probate Act related to the appointment of guardians for adults with intellectual disabilities allowed a court to appoint a guardian ad litem “to represent the respondent,” just as the Act currently provides for guardianship proceedings involving minors.<sup>95</sup> However, in 1995 the Illinois General Assembly updated the section on

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91. *Stunz v. Stunz*, 23 N.E. 407 (Ill. 1890) (finding that guardian ad litem had an obligation to mount a legal defense of the ward’s interests).

92. In *Nichols* the court admits that while the meaning of “guardian ad litem” in the Marriage Act has changed, the text of the Probate Act has remained largely unchanged since it took effect in 1979, that parts of it are directly copied from a section of the earlier Probate Act of 1939 and that, as the plaintiff in the case had pointed out, the text of article XI of the Probate Act continues to allow courts to appoint a “guardian ad litem” to “represent” a minor. *Nichols*, 2019 IL 123990, ¶ 30.

93. *Id.* ¶¶ 25–26 (first citing *In re Estate of Cohn*, 419 N.E.2d 951 (Ill. App. Ct. 1981) (noting the guardian ad litem provided the minor with legal representation before both the trial and appellate courts); then citing *Roth v. Roth*, 367 N.E.2d 442 (Ill. App. Ct. 1977) (detailing how a guardian acted as an “advocate” for two children by delivering a closing argument and filing an appeal on the children’s behalf); then citing *In re Estate of Azevedo*, 450 N.E.2d 423 (Ill. App. Ct. 1983) (explaining that the guardian “represented” the minor in court appearances and contacts with social services); and then citing *Layton v. Miller*, 322 N.E.2d 484 (Ill. App. Ct. 1975) (holding that a guardian ad litem should be appointed to represent the minors)).

94. *Nichols*, 2019 IL 123990, ¶ 31.

95. *Id.*

guardians for adults with disabilities to read that a court can appoint a guardian ad litem “to report to the court concerning the respondent’s best interests.”<sup>96</sup> This change evidently reflects the more traditional use of the term “guardian ad litem,” and is similar to how the term is used in the Marriage Act. Yet, the same amendment was not adopted for the section on appointing guardians ad litem for minors.

Accordingly, it is fair to argue that as far as the appointment of guardians ad litem for minors is concerned, the language in the Act, its legislative history, and the case law that has interpreted it suggest that a guardian ad litem under the Probate Act should be an advocate for the minor. More importantly, this in turn suggests that the role of the guardian ad litem under the Probate Act is more akin to that of a lawyer than that of the traditional guardian ad litem under the Marriage Act. In other words, based on the different approaches to the role of a guardian ad litem under the two statutes it could be argued that a guardian ad litem appointed under the Marriage Act operates as a representative of the court and should be granted immunity from possible liability for negligence, while a guardian ad litem for a minor appointed under the Probate Act, acts more like an attorney and therefore should not be granted immunity.

For this reason, it would seem that one way to determine whether someone serving as a guardian ad litem could be subject to liability would be to determine which statutory authority was used to appoint the guardian in the case. The problem in *Nichols* was that the lower court did not state which statute the appointment was based on.

Facing this lack of important information, early on in the opinion in *Nichols*, the court suggests that courts should look past the title attached to the appointment and instead examine the tasks the person was asked to perform based on what it called a “functional analysis,” first suggested by the United States Supreme Court.<sup>97</sup> According to this analysis, to determine whether an actor’s role is sufficiently connected to the judicial process to merit immunity, courts should consider

- (a) the need to assure that the individual can perform his functions without harassment or intimidation; (b) the presence of safeguards that reduce the need for private damages actions as a means of controlling

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96. *Id.*

97. *Id.* ¶¶ 15–16; *Cleavinger v. Saxner*, 474 U.S. 193 (1985). A few years after the Illinois Supreme Court suggested this functional test, the United States District Court for the Northern District of Illinois reiterated that rather than adopting blanket immunity for all guardians ad litem, it would be best to analyze the functions of the guardian on a case-by-case basis in order to determine if the guardian deserved to have immunity from possible civil liability. *Kohl v. Murphy*, 767 F. Supp. 895 (N.D. Ill. 1991). *See also* Hanft, *supra* note 65, at 394–95 (noting that the functional approach is widely accepted as an appropriate way to evaluate an attorney/guardian ad litem’s potential vulnerability to suit by focusing on the guardian ad litem’s specific actions to determine if he or she is, in fact, functioning as a quasi-judicial officer of the court).

unconstitutional conduct; (c) insulation from political influence; (d) the importance of precedent; (e) the adversary nature of the process; and (f) the correctability of error on appeal.<sup>98</sup>

However, the functional test is also difficult to apply in the *Nichols* case because, not only did the lower court not state which statute the appointment was based on, the court also did not specify what Fahrenkamp's duties as a guardian ad litem were going to be. Therefore, with no guidance from the appointing court on the duties assigned to be performed, any analysis using the functionality test would have to be based on an interpretation of either what the guardian should have been doing or what the guardian actually did while serving as the guardian, rather than on an evaluation of the tasks given to him by the court.

Interestingly, having explained the functional test, the court did not seem to apply it in *Nichols*, and it can be argued that had it applied the test, the result of the case should have been different. Aside from the first factor—the need to assure that the individual can perform his or her functions without harassment or intimidation—which is applicable to any and all court appointments, the other factors did not support a finding of immunity for Fahrenkamp, particularly since the process involved was not adversary and since, without a remedy in tort, there would be no way to correct the effects of the guardian's misconduct on appeal.<sup>99</sup>

Instead of focusing on the different prongs of the functionality test, much of the court's discussion revolved around an attempt to explain the consequences of appointing a guardian ad litem outside the basis of a recognized statutory scheme with no explanation of assigned tasks. As explained by the court, rather than looking at the title "guardian ad litem" to determine whether Fahrenkamp deserved immunity, the court had to consider the function he actually performed. As stated above, if the guardian operated as an advocate for the minor, the argument for immunity is weak, while if the guardian's role was to assist the court in making a decision, the argument for immunity is stronger.<sup>100</sup> In this case, however, the parties did not agree as to what the guardian's function was.<sup>101</sup>

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98. *Nichols*, 2019 IL 123990, ¶¶ 15–16.

99. The fact that the minor could report the attorney serving as a guardian to the attorney's disciplinary agency does not constitute a remedy since, even if the agency imposed discipline on the attorney, the result would not provide any benefit to the minor ward.

100. Hanft, *supra* note 65, at 395 (noting that when utilizing the functional approach, courts hold guardians ad litem immune from malpractice when they function in their traditional role as an agent or arm of the court, and are responsible for conducting their own investigation and for reaching independent conclusions as to a child's best interests, but the functional approach does not support application of quasi-judicial immunity when a guardian ad litem acts as a legal advocate).

101. *Nichols*, 2019 IL 123990, ¶ 16.

Not surprisingly, Fahrenkamp argued that he filled the role of a guardian ad litem as it is described in the Marriage Act. However, because he was not, in fact, appointed under the authority of the Marriage Act, nor was the proceeding a marriage dissolution action, he argued that his appointment was based on a court's inherent authority to name a guardian whenever a child could be affected by a proceeding<sup>102</sup> and that a guardian so appointed fulfills a function similar to that of a guardian ad litem under the Marriage Act.

Meanwhile, also not surprisingly, the plaintiff emphasized that the guardian was appointed by the probate court and outside the context of a marriage dissolution.<sup>103</sup> More specifically, the plaintiff emphasized that the relationship between the guardian and ward was equivalent to the relationship between a trustee and a beneficiary and that guardians for minors appointed by the probate court are appointed to advocate for the rights of the child. Finally, she argued that because the proceeding at issue was not an antagonistic marriage dissolution created by litigating parents, the guardian did not need protection from unwarranted harassment and, therefore, did not require immunity.<sup>104</sup>

With these two different arguments about the role of the guardian in the case before it, the Illinois Supreme Court then proceeded to do what it had stated at the beginning of the opinion it would *not* do. It adopted a blanket rule for immunity for all guardians ad litem based on the concept of the guardian ad litem in the abstract, or on the “title” itself, rather than on the functionality test that would have required a closer look at the actual tasks performed by the guardian. The court simply concluded that Fahrenkamp's role corresponded to a guardian ad litem under the current version of the Marriage Act because “[m]ost Illinois cases in the twenty-first century that involve a guardian ad litem treat that guardian ad litem as a reporter or a witness and not as an advocate.”<sup>105</sup> In other words, the court concluded that Fahrenkamp's role was akin to a guardian ad litem under the Marriage Act because he was named to be a “guardian ad litem”—rather than something else—and because some recent cases had decided that the guardians ad litem in those cases operated as an extension

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102. *Id.* ¶ 19 (citing *In re Mark W.*, 888 N.E.2d 15 (Ill. 2008)) (concluding that the circuit court had the inherent authority to appoint a guardian ad litem to report on the best interests of a mentally disabled parent).

103. *Id.* ¶ 20.

104. Brief of Plaintiff/Appellee Alexis Nichols at 16, 19–23, *Nichols v. Fahrenkamp*, 113 N.E.3d 1183 (2018) (No. 5-16-0316), 2019 WL 847149, \*16, \*19–23.

105. See *Nichols*, 2019 IL 123990, ¶ 35 (first citing *In re Mark W.*, 888 N.E.2d 15 (Ill. 2008); then citing *In re Estate of M.J.E.*, 2016 IL App (2d) 160457-U; and then citing *In re Estate of Cadle*, 2014 IL App (1st) 131700-U).

of the court<sup>106</sup> without explaining if the role or tasks performed by Fahrenkamp resembled the roles or tasks performed by the guardians in those cases.<sup>107</sup> Thus the court held that Fahrenkamp operated as a guardian ad litem not because of what he actually was asked to do, nor because of what he actually did, but because of what a “traditional” guardian ad litem is supposed to do.

In fact, even after reading the opinions of the appellate court and the supreme court, it is not totally clear what Fahrenkamp’s role in the case was. It could be argued that he was appointed to help the court make decisions regarding the child because the court had the ultimate power to authorize the disbursement of the funds the mother wanted access to, and the court was to rely on the guardian’s opinion to make the decision on whether to authorize the use of the funds. In such a case, as the court ultimately assumed, it could be said that he operated as a traditional guardian ad litem (as described in the Marriage Act).

On the other hand, it could be argued that his role was to represent the interests of the ward before the court by supervising the mother’s control or use of the ward’s money and by advocating for the minor in court when the mother wanted to use the minor’s money. In this case, the guardian would have owed a duty to the minor ward, either because he had a specific task to perform to protect the ward’s interest or because he would be operating as an advocate. Analyzed this way, the guardian’s duty would have been to protect the minor from the possibility of misconduct by the guardian of the estate. And, more importantly, because this is a duty owed to the child rather than to the court,<sup>108</sup> the guardian would not have been acting as a traditional guardian ad litem and should not have been granted immunity.

This argument is similar to the analysis used by some courts in cases involving guardians appointed to review a settlement agreement between

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106. The court concluded that Fahrenkamp had been appointed as guardian under the inherent authority recognized in *In re Mark W.* and that that case held 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.” *Nichols*, 2019 IL 123990, ¶ 38.

107. Interestingly, although the court cited more cases in which the guardian ad litem had been held to represent a ward as an advocate, the court dismissed their importance because, in the court’s words, they “date to earlier in Illinois’s history.” *Id.* ¶ 35.

108. See, e.g., *Gibson v. Theut*, 438 P.3d 666 (Ariz. Ct. App. 2019) (denying immunity to an attorney who had been appointed as a guardian ad litem but whose real task was to represent a minor as an advocate); *Collins v. Tabet*, 806 P.2d 40 (N.M. 1991) (stating guardian does not deserve immunity and may be held liable under ordinary principles of malpractice if appointment does not contemplate actions on behalf of the court, but rather, representation of the minor as an advocate, or if the guardian departs from the scope of appointment as a functionary of the court); *Hunnicut v. Sewell*, 219 P.3d 529, 533 (N.M. Ct. App. 2009) (citing the New Mexico code requiring that the court assure that the child’s attorney “zealously” represent the child).

a minor plaintiff and a defendant in order to determine whether the settlement is reasonable and in the best interests of the minor.<sup>109</sup> Even though in such cases the guardian ad litem reports his or her conclusion to the court and the court makes the final decision to approve the settlement, at least one court has held that when performing that duty the guardian ad litem is not an agent of the court.<sup>110</sup> Instead, the guardian acts independently of the court and should be provided no immunity. Although the court recognized that this decision could discourage people from participating in the guardian ad litem program, it reasoned that this concern was outweighed by a minor's right to sue for inadequate representation of her interests.<sup>111</sup>

Given that the confusion as to Fahrenkamp's role as a guardian in *Nichols* was never fully resolved, the decision of the court seems incomplete. As stated above, the abstract conclusion it reaches is correct: A guardian ad litem who serves as an arm of the court deserves immunity from possible liability for negligence. But it is not clear that in this case the guardian ad litem was, in fact, acting as an arm of the court.

The way in which the court ends the opinion suggests why this apparent contradiction is important. As the court states, one of the most important lessons of the case is that it is imperative for lower courts to make abundantly clear what each person's role is when appointing guardians. As the court explains:

Courts, attorneys, and other professionals should strive to avert misunderstandings before any issues develop. When a circuit court appoints someone to a position like guardian ad litem, it should specify that appointee's role in the order of appointment. Finally, we urge the General Assembly to consider reviewing the Probate Act and Marriage Act to ensure that those statutes use the phrase "guardian ad litem" consistently. . . . Reconciling all these provisions would help prevent further confusion.<sup>112</sup>

Yet, despite the inadequate facts and the inconsistency in the statutes, instead of deciding that the case needed to be remanded to clarify the role of the guardian<sup>113</sup> and the statutory analysis upon which the appointment had been based, the court made certain assumptions to support a conclusion that, although correct in the abstract, may or may not have been the most accurate to apply given the facts of the case.

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109. Jennifer L. Anton, *The Ambiguous Role and Responsibilities of a Guardian Ad Litem in Texas in Personal Injury Litigation*, 51 SMU L. REV. 161, 174 (1997).

110. See *Byrd v. Woodruff*, 891 S.W.2d 689, 707–08 (Tex. Ct. App. 1994).

111. *Id.* at 708.

112. *Nichols*, 2019 IL 123990, ¶ 49.

113. See, e.g., *Collins*, 806 P.2d at 53–54 (remanding the case for the jury to decide whether attorney simply "rubber-stamped" requests to obtain court approval, whether lawyer was supposed to investigate reasonableness of a settlement, and the manner of compensation).

As a result, it is still not clear whether a guardian ad litem for a minor appointed under the Probate Act should be granted immunity from possible liability for negligence. This is important because it creates the risk that lower courts might grant immunity to lawyers appointed as guardians ad litem merely because the term “guardian ad litem” was used when making the appointment, leaving injured minors without recourse to seek recovery for their injuries.<sup>114</sup>

It is also not clear whether a lawyer assigned to protect a child from the possible misconduct of an appointed guardian of the estate of the child should be considered to be a traditional guardian ad litem or something different. It has been argued that courts should grant immunity to guardians ad litem because there are other ways available to protect the wards from possible misconduct. These include the facts that (1) immunity attaches only to conduct within the scope of a guardian ad litem’s duties, (2) the appointing court oversees the guardian ad litem’s discharge of those duties, with the power of removal, (3) the parents can move the court for termination of the guardian, (4) the court is not bound by and need not accept the recommendations of the guardian, and (5) the determinations adopted by an appointing court are subject to judicial review.<sup>115</sup>

Yet, as the facts in *Nichols* show, these alternatives hardly offer any help. First, the fact that immunity attaches only to conduct within the scope of a guardian ad litem’s duties does not help since the issue remains whether the guardian’s duty is akin to those of a judicial officer. Second, although it is true that the court retains the ultimate authority to make decisions, the reason a court assigns a guardian to oversee the conduct of a personal guardian is precisely because the court needs someone else to do it—maybe because it does not have the time or the expertise to do so—and as a practical matter will likely rely entirely on the decisions of the appointed guardian. Third, the fact that the parents can complain is irrelevant in a case like *Nichols* in which the court appointed the guardian to protect against the possible conduct of a parent. Lastly, having the right to seek judicial review of the decisions of the court is not a practical alternative when the person whose interest in seeking that review is a minor without legal representation still under the care of the person whose conduct the guardian should have been overseeing.

In *Nichols*, as a practical matter, the reason the court appointed Fahrenkamp to do anything was to create another layer of protection for

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114. For an argument in favor of not granting immunity to guardians ad litem, see Laurent, *supra* note 65, at 658 (arguing that absolute immunity has historic justifications, but it also represents one of the major failures of the modern child welfare system because it leaves injured children and their parents without recourse for a guardian’s negligence actions).

115. *Short v. Short*, 730 F. Supp. 1037, 1039 (D. Colo. 1990).

the child by having someone make sure that the guardian for the estate was acting appropriately. Viewed this way, it makes sense to argue that the lawyer owed a duty to the child to perform this task with due care. For this reason, in a case like that, if there is an allegation that the lawyer did not do so, the minor should be allowed to have his or her day in court to attempt to support a claim for the injuries caused by the negligence of the lawyer. Otherwise, the analysis of the court has the perverse result that in cases in which a lower court appoints someone for the purpose of providing more protection for the minor, the minor ends up with no protection at all.

The policy behind awarding immunity to guardians ad litem is that the threat of litigation could negatively interfere with the ability of guardians ad litem to function on behalf of the court to provide the court with reliable independently gathered information.<sup>116</sup> In contrast, extending judicial immunity to a lawyer who is appointed to represent and protect the interests of the child would actually operate to prejudice the minor as it would serve, in effect, to excuse negligent representation of the minor's interests before the court.

#### CONCLUSION

Illinois law recognizes many ways in which courts can appoint attorneys to help protect minors whose interests might be affected by different types of court proceedings. Courts can appoint attorneys to serve as attorneys, guardians of the person, guardians of the estate, child representatives and guardians ad litem in many different circumstances and under several different statutes. The statutes however are not consistent on what the duties of a guardian ad litem should be and, therefore, by implication, on whether their duties are owed to the minor or to the court.

Under the Marriage Act, an attorney appointed to represent a minor as a lawyer for the minor clearly owes the minor a duty of due care and would be subject to liability if negligent. Although there is some case law in lower courts that suggests the contrary,<sup>117</sup> the same should be true of

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116. Mahaffey, *supra* note 1, at 284 (stating that immunity is granted because it is viewed as necessary to prevent the “chilling” effect of potential civil liability might have on the exercise of judgment on the part of the guardian ad litem).

117. *See* Cooney v. Rossiter, 583 F.3d 967, 970 (7th Cir. 2009) (finding that guardians ad litem and court-appointed experts are immune from liability for damages when they act at the court's direction); Davidson v. Gurewitz, 48 N.E.3d 1129, 1132–33 (Ill. App. Ct. 2015), *aff'd*, 48 N.E.3d 672 (Ill. 2016) (“Section 506(a) does not confer any immunity from civil liability for the work performed thereby.”); Vlastelica v. Brend, 954 N.E.2d 874, 884 (Ill. App. Ct. 2011), *aff'd*, 962 N.E.2d 490 (Ill. 2011) (“Although a child representative is not intended to abrogate the decision making power of the trier of fact or act in the role of a surrogate . . . his investigative and advocacy



lawyers appointed as child representatives because, in essence, they act as attorneys with a different level of authority to make decisions for their clients. An attorney appointed as a guardian ad litem, on the other hand, is expected to perform duties on behalf of the court and, therefore, should be granted immunity from possible liability.

Under the language of the Probate Act, on the other hand, a guardian ad litem is appointed to represent the minor in a way that suggests the Probate Act considers the guardian ad litem for a minor more like an advocate. This would mean that the guardian ad litem for a minor under the Probate Act owes a duty to the minor and may be subject to liability for negligence.

Lastly, courts in Illinois recognize that judges have inherent authority to appoint guardians ad litem without reference to any of these statutes in cases where the interests of minors might need to be protected. In such a case, whether the appointed guardian owes a duty to the minor or to the court and, therefore, whether the guardian could be subject to possible liability for negligence, should depend on an analysis of the actual duties assigned to the guardian by the court. 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.

Unfortunately, in the most recent case to study these issues, the Illinois Supreme Court made them more difficult to understand because the facts of the case did not quite support the conclusion reached by the court. The court did, however, make some important suggestions that can help clarify this area of the law in the future. Thus, as the court suggests, the General Assembly should consider reviewing the Probate Act and Marriage Act to ensure that the phrase "guardian ad litem" is used consistently throughout the statutes. More importantly, however, courts, attorneys, and other professionals should strive to avert misunderstandings before any issues develop by specifying the statutory basis for an appointment of a guardian and the specific tasks assigned to anyone appointed to serve as a guardian ad litem. Only that way will the interests of both minors and guardians be better protected. Only that way the interests of both minors and guardians will be better protected.

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roles aid the court making a neutral determination of the child's best interests. In so aiding the court in making a neutral determination of the child's best interests, the child representative is acting as an arm of the court even while performing his role as an advocate. Accordingly, we 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.").