2019 IL 123990 IN THE SUPREME COURT OF THE STATE OF ILLINOIS (Docket No. 123990) ALEXIS NICHOLS, f/k/a Alexis Brueggeman, Appellee, v. DAVID FAHRENKAMP et al., Appellants.

Opinion filed June 20, 2019. JUSTICE GARMAN delivered the judgment of the court, with opinion. Chief Justice Karmeier and Justices Thomas, Kilbride, Burke, Theis, and Neville concurred in the judgment and opinion. OPINION ¶ 1 This appeal asks whether defendant David Fahrenkamp has quasi-judicial immunity from tort liability for his conduct within the scope of his appointment as guardian ad litem for plaintiff Alexis Nichols. We hold that he has such immunity. We reverse the appellate court's decision and affirm the circuit court's grant of summary judgment in defendant's favor. - 2 - ¶ 2 BACKGROUND

¶ 3 In 2004 plaintiff Alexis Nichols, formerly known as Alexis Brueggeman, received $600,000 as part of a settlement for injuries she suffered in a motor vehicle accident. Because Nichols was only 11 years old at the time of the settlement, the probate court appointed her mother, Jelanda Miller, as her guardian to administer her estate. Additionally, the court appointed defendant David Fahrenkamp as guardian ad litem. The court's order stated only that "[t]he court being fully advised in the premises does hereby appoint David Fahrenkamp as Guardian Ad Litem for the minor child, ALEXIS BRUEGGEMAN." ¶ 4 In 2012 Nichols sued her mother, claiming that she used $79,507 of settlement funds for her own benefit rather than for Nichols's. The trial court ruled in Nichols's favor but limited recovery to $16,365, a 2007 Jeep Compass, and $10,000 in attorney fees. The court found that Nichols's mother was not liable for the entire $79,507 when Nichols had a "guardian ad litem who approved the estimates and expenditures."

¶ 5 Next Nichols initiated this lawsuit against defendant David Fahrenkamp and his law office, alleging that Fahrenkamp committed legal malpractice when he approved expenditures that were not in Nichols's interests. **Nichols alleged that Fahrenkamp acted negligently by failing to adequately monitor and audit her mother's requested expenditures and in failing to report any irregularities to the court.** She also claimed that throughout his time as guardian ad litem Fahrenkamp never met with her, consulted with her regarding her mother's expenditures, or even informed her that he had been appointed as her guardian

ad litem. ¶ 6 First in his motion to dismiss and later in his motion for summary judgment, Fahrenkamp contested these factual allegations. He claimed that he gave Nichols his business card when he was first appointed and that he met with her on three separate occasions during his appointment. Apart from his factual claims**, Fahrenkamp also asserted that guardians ad litem have quasi-judicial immunity so he was not liable for any negligence during his appointment**. ¶ 7 The circuit court of Madison County denied Fahrenkamp's motion to dismiss but granted his motion for summary judgment. After noting that no Illinois case has specifically held that guardians ad litem have quasi-judicial immunity, the circuit - 3 - court surveyed cases that involved other roles with similar responsibilities. Vlastelica v. Brend, 2011 IL App (1st) 102587, and Cooney v. Rossiter, 583 F.3d 967 (7th Cir. 2009), held that child representatives have immunity, and Heisterkamp v. Pacheco, 2016 IL App (2d) 150229, extended immunity to a court-appointed expert who assisted in a custody evaluation. Based on these cases, the circuit court determined that if Fahrenkamp acted according to the appointing court's directions then he was immune from liability. **Because the order appointing Fahrenkamp did not specify additional responsibilities, Fahrenkamp had the limited role of providing recommendations to the court regarding Nichols's best interests.** The circuit court concluded that he was immune from liability for his conduct in this capacity, so it granted summary judgment in Fahrenkamp's favor. ¶ 8 The appellate court reversed the circuit court's summary judgment order. 2018 IL App (5th) 160316. In Stunz v. Stunz, 131 Ill. 210, 221 (1890), this court described the "duty of the guardian ad litem, when appointed, to examine into the case and determine what the rights of his wards are, and what defense their interest demands, and to make such defense as the exercise of care and prudence will dictate." **Based on Stunz, the appellate court concluded that guardians ad litem have a duty to protect their wards' assets and interests.** The court determined that defendant Fahrenkamp had **"a duty to act as an advocate on behalf of plaintiff."** 2018 IL App (5th) 160316,

¶ 14. It added that immunizing guardians ad litem from tort suits would be inconsistent with this duty. ¶ 9 The appellate court also rejected Fahrenkamp's reliance on Vlastelica, 2011 IL App (1st) 102587. The appellate court distinguished Vlastelica because that dissolution of marriage case involved opposing parties who might sue or otherwise harass a guardian ad litem out of frustration with the

results of the proceedings. Id. ¶ 16. The underlying lawsuit here, however, involved the distribution of assets and only one party. The appellate court characterized the relationship between this guardian ad litem and ward as "equivalent to the relationship between a trustee and a beneficiary." Id. It found that, outside the antagonistic context created by litigating parents, guardians ad litem do not need protection from unwarranted harassment and do not require quasi-judicial immunity. Id. ¶¶ 16, 18. ¶ 10 Justice Goldenhersh dissented. Relying heavily on Vlastelica, the dissent agreed with Fahrenkamp that guardians ad litem do not serve as advocates for their - 4 - wards but act as agents of the court. Id. ¶ 25 (Goldenhersh, J., dissenting) (citing Vlastelica, 2011 IL App (1st) 102587, ¶¶ 21-23). Because they are "arms of the court," the dissent would find that guardians ad litem are entitled to quasi-judicial immunity. Id. The dissent also expressed concern that denying guardians ad litem immunity would discourage attorneys from accepting appointments as guardians ad litem. Id.

¶ 11 Fahrenkamp petitioned this court for leave to appeal, and we allowed that petition. Ill. S. Ct. R. 315 (eff. July 1, 2018). ¶ 12 ANALYSIS ¶ 13 The appellate court reversed the circuit court's order awarding summary judgment in Fahrenkamp's favor. Summary judgment is proper when "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2016). This court reviews a summary judgment order de novo. Forsythe v. Clark USA, Inc., 224 Ill. 2d 274, 280 (2007). In reviewing the motion, "this court will construe the record strictly against the movant and liberally in favor of the nonmoving party." Id. ¶ 14 **The only question on appeal is whether quasi-judicial immunity protects David Fahrenkamp from civil liability for his conduct within the scope of his appointment as Alexis Nichols's guardian ad litem**. Quasi-judicial immunity originates in the common-law principle that judges are immune from liability for the acts they perform as part of their judicial duties. See, e.g., 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, as this Court recognized when it adopted the doctrine, in Bradley v. Fisher, 13 Wall. 335

(1872)"); In re Mason, 33 Ill. 2d 53, 57 (1965); In re McGarry, 380 Ill. 359, 365-66 (1942); People ex rel. Chicago Bar Ass'n v. Standidge, 333 Ill. 361, 367 (1928).

¶ 15 This common-law immunity extends beyond the judges themselves to protect other actors in the judicial process. Rehberg v. Paulk, 566 U.S. 356, 366-67 (2012); - 5 - Briscoe v. LaHue, 460 U.S. 325, 335 (1983) (finding that trial witnesses have immunity for their testimony because "the common law provided absolute immunity from subsequent damages liability for all persons—governmental or otherwise—who were integral parts of the judicial process"); Butz v. Economou, 438 U.S. 478, 513 (1978) (holding that federal administrative law judges have absolute immunity). **In Cleavinger v. Saxner, 474 U.S. 193 (1985), the United States Supreme Court applied the "functional test" to determine whether an actor's role is sufficiently connected to the judicial process to merit this absolute immunity. That test considers "(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 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." Id. at 202 (citing Butz, 438 U.S. at 512). ¶ 16 The "functional test" requires the court to look past the title attached to an office or position and look to that position holder's role.** Fahrenkamp did not either receive or forfeit immunity simply by acquiring the title "guardian ad litem," especially because American authorities have not always used this phrase consistently. See, e.g., Fox v. Willis, 890 A.2d 726, 732 (Md. 2006) (observing that "there is little uniformity in the case law and statutes of other states with regard to the functions, duties, and immunities of 'guardians ad litem' "). **Rather than looking at the title "guardian ad litem" to determine whether Fahrenkamp has quasi-judicial immunity, the court must consider what function he performed**. Here, however, the parties do not agree what that function was.

¶ 17 Fahrenkamp characterizes the guardian ad litem's function based on the statutory regime created by the Illinois Marriage and Dissolution of Marriage Act (Marriage Act) (750 ILCS 5/101 et seq. (West 2016)). The Marriage Act provides three separate mechanisms for ensuring that courts adequately consider the interests of minors: a child's attorney, a child representative, and a guardian ad litem. Id. It describes those options as follows: - 6 - "(1) Attorney. The attorney

shall provide independent legal counsel for the child and shall owe the same duties of undivided loyalty, confidentiality, and competent representation as are due an adult client. (2) Guardian ad litem. The guardian ad litem shall testify or submit a written report to the court regarding his or her recommendations in accordance with the best interest of the child. The report shall be made available to all parties. The guardian ad litem may be called as a witness for purposes of crossexamination regarding the guardian ad litem's report or recommendations. The guardian ad litem shall investigate the facts of the case and interview the child and the parties. (3) Child representative. 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 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." Id. § 506(a). - 7 –

Of these three options, a child's attorney is least associated with the judicial process. The child's attorney is "independent" and owes the child client "undivided loyalty." Next is the child representative, who 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." 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." However, the child representative "shall possess all the powers of investigation as does a guardian ad litem" and is not bound by the child's expressed wishes when determining the child's best interests. The role of child representative is "a hybrid of a child's attorney [(750 ILCS 5/506(a)(1))] and a child's guardian ad litem." Cooney, 583 F.3d at 969.

¶ 18 **Among these three positions, guardian ad litem is the most associated with the judicial process.** The guardian ad litem provides the court with a report on the child's best interests. That report is available to all parties, and the guardian ad litem may testify as a witness. **These responsibilities clearly indicate that a guardian ad litem under the Marriage Act is not an "advocate" in the manner of either the child's attorney or a child representative.** ¶ 19 Fahrenkamp contends that he filled the role of a guardian ad litem as it is described in the Marriage Act. Although he concedes that he was not appointed under the Marriage Act, Fahrenkamp claims that the court that appointed him relied on its inherent authority. In In re Mark W., 228 Ill. 2d 365, 375 (2008), this court concluded that a circuit court had the inherent authority to appoint a guardian ad litem to report on the best interests of a mentally disabled parent. In re Mark W. described the guardian ad litem's role as the " 'eyes and ears of the court' and not as the ward's attorney." Id. at 374 (quoting In re Guardianship of Mabry, 281 Ill. App. 3d 76, 88 (1996)). Fahrenkamp argues that his appointment here relied on this authority and that a guardian ad litem appointed pursuant to In re Mark W. fulfills a similar function to a guardian ad litem under the Marriage Act.

¶ 20 Nichols provides a competing characterization of the guardian ad litem's function. She urges the court to ignore the Marriage Act's framework because this case does not involve any dissolution of marriage or custody dispute. Instead, the - 8 - case from which this lawsuit stems involved the distribution of a minor's assets. Nichols claims that Fahrenkamp was appointed under article XI of the Probate Act of 1975 (Probate Act) (755 ILCS 5/art. XI (West 2016)). Section 11-10.1(b) of the Probate Act provides that "[i]n any proceeding for the appointment of a standby guardian or a guardian the court may appoint a guardian ad litem to

represent the minor in the proceeding." Id. § 11-10.1(b). Additionally, section 27-3 states that a "guardian ad litem appointed under this Act shall file an answer, appear and defend on behalf of the ward or person not in being whom he represents." Id. § 27-3. ¶ 21 Like the appellate court, Nichols claims that Fahrenkamp's role as guardian ad litem was to serve as her "advocate." 2018 IL App (5th) 160316, ¶ 14. She relies on this court's decision in Stunz, 131 Ill. 210. In that case a widow had sought to partition land that was part of her deceased husband's estate. The husband's minor children from a previous marriage lived on that land, and the court had appointed a guardian ad litem to represent them in the partition proceedings. Initially the widow succeeded in selling the land, but later the minor children appealed and accused her of fraud. Id. at 211-15 ¶ 22 During the subsequent court proceedings, this court determined that the minors' guardian ad litem had abandoned his responsibilities to the children. The court explained: "It is the duty of the guardian ad litem, when appointed, to examine into the case, and determine what the rights of his wards are, and what defense their interest demands, and to make such defense as the exercise of care and prudence will dictate. He is not required to make a defense not warranted by law, but should exercise that care and judgment that reasonable and prudent men exercise, and submit to the court for its determination all questions that may arise, and take its advice and act under its direction in the steps necessary to preserve and secure the rights of the minor defendants. The guardian ad litem who perfunctorily files an answer for his ward, and then abandons the case, fails to comprehend his duties as an officer of the court." Id. at 221-22. The guardian ad litem in Stunz failed to fulfill his obligation to mount a legal defense of the ward's interests. Id. at 222. Nichols urges us to apply the same standard to Fahrenkamp. - 9 - ¶ 23 Nichols also relies on an out-of-state case—Simpson v. Doggett, 156 S.E. 771 (S.C. 1930). There the Supreme Court of South Carolina provided a similar account of the guardian ad litem. The South Carolina court described the guardian ad litem's "duty fully to protect the infant's interests in all matters relating to the litigation." Id. at 773. Moreover, Simpson explicitly stated that a guardian ad litem "may be punished for his neglect as well as made to respond to the infant for the damage sustained." Id.

¶ 24 Throughout the past 40 years, the duties of the guardian ad litem in Illinois have evolved. At the time of Stunz (1890), this court first described the guardian

ad litem's duty to raise a legal defense of the ward's interest. When the General Assembly enacted the Probate Act and passed section 11-10.1 of the Probate Act in 1979, it had a similar view of guardians ad litem. The Probate Act provided for the appointment of a guardian ad litem to "represent" the minor (755 ILCS 5/11-10.1(b) (West 2016) (added by Pub. Act 80-1415 (eff. Jan. 1, 1979))) and to "file an answer, appear and defend on behalf of the ward" (id. § 27-3 (added by Pub. Act 79-328 (eff. Jan. 1, 1976))). ¶ **25 In early cases under the Probate Act of 1975, guardians ad litem acted much like traditional attorneys.** For example, In re Estate of Cohn, 95 Ill. App. 3d 204, 206 (1981), involved a petition for guardianship under the Probate Act. The court appointed a guardian ad litem whose law office provided the minor with legal representation before both the trial and appellate courts. Id. The guardian ad litem in Roth v. Roth, 52 Ill. App. 3d 220, 227 (1977), also acted as an "advocate" for two children by delivering a closing argument and filing an appeal on the children's behalf. ¶ 26 Similarly, In re Estates of Azevedo, 115 Ill. App. 3d 260, 262 (1983), involved a dispute concerning legal fees for an attorney who, in different court proceedings, acted both as a minor's attorney under the then-existing version of the Marriage Act and as the child's guardian ad litem under the Probate Act. In 1981, when those proceedings began, section 506 of the Marriage Act did not contain the three-part division of roles that it does now. Instead it provided: " 'Representation of Child. The court may appoint an attorney to represent the interests of a minor or dependent child with respect to his support, custody and visitation. The court may also appoint such attorney to serve as the child's - 10 - guardian-ad-litem. The court shall enter an order for costs, fees and disbursements in favor of the child's attorney and guardian-ad-litem, as the case may be. The order shall be made against either or both parents, or against the child's separate estate.' " (Emphasis in original.) Id. at 263 (quoting Ill. Rev. Stat. 1981, ch. 40, ¶ 506).

The decision in In re Estates of Azevedo does not even hint that any conflict of interest arose from an individual contemporaneously acting as both attorney and guardian ad litem, because at the time these roles were largely coextensive. Instead the appeal concerned which statutory regime governed who paid the attorney fees. See also Layton v. Miller, 25 Ill. App. 3d 834, 839 (1975) (explaining that "clearly a guardian ad litem should be appointed to represent the minors, and no reason appears why it could not be the same attorney who was originally

appointed as guardian of their estate. However, the court should be careful that there be no conflicting interests between the minors and the person representing them."). ¶ 27 A law review article from 1977—Donald C. Schiller, Child Custody: Evolution of Current Criteria, 26 DePaul L. Rev. 241 (1977)—described how courts at the time utilized guardians ad litem to determine children's best interests. Schiller explained that as of 1977 "the guardian ad litem ha[d] no power greater than any other lawyer involved in the litigation" and that the guardian ad litem could "employ the same tools of litigation available to the primary parties in the case." Id. at 253-54. Those "tools" included depositions, document requests, calling and examining witnesses, and cross-examining other parties' witnesses. Id. at 254. ¶ 28 Schiller also described the then-existing "controversy over whether the guardian ad litem should make a written report, and if he does, whether the court should be permitted to read and consider it." Id. According to Schiller, Illinois courts had not addressed this question as of 1977. Id. He approved of the growing "movement" among states that had passed new legislation concerning these issues. Those statutes provided minors with attorneys who were not called "guardians ad litem," but they also allowed investigators to file reports with the court. Id. at 255-57.

¶ 29 Although in 1979 article XI of the Probate Act and the Marriage Act shared the Stunz view of guardians ad litem, the General Assembly has amended section 506 of the Marriage Act multiple times. **In 2000 the General Assembly passed Public - 11 - Act 91-410, § 5 (eff. Jan. 1, 2000). This bill amended section 506 of the Marriage Act and established the tripartite division between attorneys, child representatives, and guardians ad litem. That 2000 version of the** statute allowed the court to appoint a "guardian ad litem to address issues the court delineates." 750 ILCS 5/506(a)(2) (West 2000). In 2006, Public Act 94-640, § 5 (eff. Jan. 1, 2006) clarified the guardian ad litem's role to "testify or submit a written report." Now that section draws a clear distinction between guardians ad litem and children's attorneys, with child representatives occupying a middle ground. 750 ILCS 5/506 (West 2016). ¶ 30 **While the meaning of "guardian ad litem" in the Marriage Act has changed, article XI of the Probate Act has maintained its 1979 framework**. The text of section 11-10.1(b) has remained largely unchanged since it took effect in 1979. See Pub. Act 80-1415 (eff. Jan. 1, 1979). Likewise, the General Assembly has not amended section 27-3 since it passed that statute in

1975 (see Pub. Act 79-328 (eff. Jan. 1, 1976), and that section directly copied a section of the earlier Probate Act from 1939 (see Ill. Rev. Stat. 1939, ch. 3, ¶ 338). **As Nichols correctly points out, the text of article XI of the Probate Act continues to allow a court to appoint a "guardian ad litem" to "represent" a minor. See 755 ILCS 5/11-10.1(b) (West 2016**); Id. § 27-3. ¶ 31 Notably, the General Assembly has amended other sections of the Probate Act to reflect the newer usage of the phrase "guardian ad litem." Article XIa of the Probate Act—not to be confused with article XI—governs the appointment of guardians for adults with intellectual disabilities. Prior to 1995, section 11a-10 of the Probate Act allowed a court to appoint a guardian ad litem "to represent the respondent," just as section 11-10.1 currently provides for guardianship proceedings involving minors. (Emphasis added.) 755 ILCS 5/11a-10(a) (West 1994). However, in 1995 the General Assembly updated article XIa of the Probate Act to reflect the more common use of "guardian ad litem." Pub. Act 89-396, § 15 (eff. Aug. 20, 1995). After the 1995 amendment, section 11a-10(a) allowed the court to appoint a guardian ad litem "to report to the court concerning the respondent's best interests consistent with the provisions of this Section." 755 ILCS 5/11a-10(a) (West 1996); Pub. Act 89-396, § 15 (eff. Aug. 20, 1995); see also In re Guardianship of Mabry, 281 Ill. App. 3d at 88. - 12 - ¶ 32 Although the General Assembly has brought section 506 of the Marriage Act and section 11a-10 of the Probate Act into conformity, it has not done the same for section 11-10.1 of the Probate Act. As a result of this incongruity between different statutory regimes, 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. For example, in In re Estate of M.J.E., 2016 IL App (2d) 160457-U, a child's grandparents sought to be appointed the child's guardians under the Probate Act (755 ILCS 5/11-8 (West 2014)). The appellate court explicitly noted that the circuit court appointed the guardian ad litem "to interview the child and make a report." In re Estate of M.J.E., 2016 IL App (2d) 160457-U, ¶ 15. Similarly in In re Estate of Cadle, 2014 IL App (1st) 131700-U, ¶ 14, a child's father moved to terminate an order appointing the child's aunt as his guardian under the Probate Act. In recounting the facts of the case, the appellate court summarized the guardian ad litem's "report" that "recommended" the court find that the aunt's guardianship served the child's best interests. Id. ¶¶ 10, 14. ¶ 33 Because the texts of the Marriage Act and article XI of the Probate Act do

not use the term "guardian ad litem" in the same way, that title does not dictate what Fahrenkamp's role was as guardian ad litem in this case. This problem is particularly acute in this case because the version of the Marriage Act in effect when Fahrenkamp was appointed provided only that the court may appoint a "guardian ad litem to address issues as the court delineates." 750 ILCS 5/506(a)(2) (West 2016). ¶ 34 **Nor does the court's order in this case specify how it intended Fahrenkamp to act. The court's order states only that "[t]he court being fully advised in the premises does hereby appoint David Fahrenkamp as Guardian Ad Litem for the minor child**, ALEXIS BRUEGGEMAN." ¶ 35 **Nevertheless, we may still conclude that Fahrenkamp's role in this case corresponded to a guardian ad litem under the current version of the Marriage Act and In re Mark W.**

Most 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. See, e.g., In re Mark W., 228 Ill. 2d at 374 (citing In re Guardianship of Mabry, 281 Ill. App. 3d at 88); In re Estate of M.J.E., 2016 IL App (2d) 160457-U; - 13 - In re Estate of Cadle, 2014 IL App (1st) 131700-U. **In contrast, cases in which a guardian ad litem "represent[ed]" a ward as an advocate date to earlier in Illinois's history**. 755 ILCS 5/11-10.1 (West 2016); In re Estates of Azevedo, 115 Ill. App. 3d 260; In re Estate of Cohn, 95 Ill. App. 3d 204; Roth, 52 Ill. App. 3d 220; see also Rom v. Gephart, 30 Ill. App. 2d 199, 208 (1961). The more recent cases provide a more fitting context for viewing the court's order here than outdated cases like In re Estates of Azevedo or Gephart. ¶ 36 The cases on which the parties rely support our conclusion. Nichols relies on Stunz and Simpson. Simpson is an almost 90-year-old case from South Carolina that even that state's supreme court undermined in Fleming v. Asbill, 483 S.E.2d 751, 756 (S.C. 1997). In holding that guardians ad litem in custody disputes have quasi-judicial immunity, Fleming described how guardians ad litem in South Carolina had changed throughout the twentieth century. As in the above discussion of Illinois law, the South Carolina court explained that "[t]he role of guardians ad litem in the 1990's is not the same as the role they played in the 1920's. Their role has changed significantly in recent decades. Whereas in the past, the guardian ad litem served in almost a trustee-like capacity, seeking to specifically advocate the pecuniary interests of the ward, a present-day guardian ad litem in a private custody dispute functions as a representative of the court appointed to assist it in protecting the best interests

of the ward." Fleming, 483 S.E.2d at 754. ¶ 37 Although it is an Illinois case, Stunz, 131 Ill. 210, is an infrequently cited case from the nineteenth century. At that time the phrase "guardian ad litem" applied to an attorney who filed an answer on behalf of a minor, determined the ward's rights, and made legal arguments on that ward's behalf. Id. at 221. In the nearly 130 years since this court decided Stunz, however, another use of the phrase "guardian ad litem" has developed. ¶ 38 **Fahrenkamp rightly relies on this court's description of the guardian ad litem in the 2008 case In re Mark W., 228 Ill. 2d at 374. In In re Mark W. we explained 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." Id**. This is entirely consistent with the function of a guardian ad litem under the current Marriage Act as an investigator and a "witness" and with - 14 - the circuit court's order in this case. 750 ILCS 5/506(a)(2) (West 2016). **Fahrenkamp's involvement in this case was limited to reviewing Nichols's mother's requests for disbursements of funds and reporting to the court whether he approved or disapproved of each disbursement. Therefore his role as guardian ad litem corresponded to the use of that phrase in the Marriage Act and In re Mark W.** ¶ 39

Nichols insists that the circuit court would not have relied on the Marriage Act or In re Mark W. because this was not a dissolution of marriage case. She contends that the circuit court must have intended Fahrenkamp to fill the role of a guardian ad litem under article XI of the Probate Act because article XI is the section of the Probate Act regarding minors and this was a probate case involving a minor. ¶ 40 However, this was not a proceeding for the appointment of a guardian. Section 11-10.1 of the Probate Act does not state that it applies to every proceeding involving a minor's property rights. Instead it provides that "[i]n any proceeding for the appointment of a standby guardian or a guardian the court may appoint a guardian ad litem to represent the minor in the proceeding." (Emphasis added.) 755 ILCS 5/11-10.1 (West 2016). This phrase limits the applicability of section 11-10.1. ¶ 41 In contrast, **In re Mark W. allows the court to appoint a guardian ad litem based on its inherent authority, apart from any statutory provision**. 228 Ill. 2d at 374. As exemplified by In re Estate of M.J.E., 2016 IL App (2d) 160457-U, and In re Estate of Cadle, 2014 IL App (1st) 131700-U, a court may appoint a guardian ad litem to report on a ward's best interests, regardless of whether the underlying

proceedings involve the Probate Act or not. **Therefore, we see no reason to presume that the circuit court relied on section 11-10.1 of the Probate Act when it appointed Fahrenkamp. For these reasons, we find that Fahrenkamp's role was analogous to a guardian ad litem under the Marriage Act or In re Mark W. ¶ 42**

Although no Illinois court has specifically considered whether this position merits quasi-judicial immunity, other state supreme courts have granted immunity to actors who fulfill a comparable function. For example, in Kimbrell v. Kimbrell, the Supreme Court of New Mexico applied quasi-judicial immunity to a guardian ad litem who served as a " 'best interests attorney' " and made recommendations to the court on the ward's best interests. 2014-NMSC-027, ¶ 10, 331 P.3d 915; see - 15 - Fleming, 483 S.E.2d at 756; McKay v. Owens, 937 P.2d 1222, 1231 (Idaho 1997); Barr v. Day, 879 P.2d 912 (Wash. 1994) (en banc). But accord Collins v. Tabet, 806 P.2d 40, 47-48 (N.M. 1991) (concluding that the guardian ad litem would be entitled to quasi-judicial immunity if his role was limited to helping the court assess the reasonableness of a medical malpractice settlement but that additional fact-finding was necessary to determine whether that particular guardian ad litem acted as an advocate); see also Briscoe, 460 U.S. at 335-36 (finding police officers immune from liability for their testimony as witnesses). ¶ 43 Federal appellate courts have also found that guardians ad litem are immune when their function is to report to the court on a child's best interests. In Cooney, the United States Court of Appeals for the Seventh Circuit held that child representatives under Illinois's Marriage Act have absolute immunity. 583 F.3d 967. In the course of its discussion of child representatives, the Seventh Circuit accepted that guardians ad litem also have quasi-judicial immunity. Id. at 970. ¶ 44 Partially in reliance on Cooney, the Tenth Circuit observed the "widespread recognition" that quasi-judicial immunity protects guardians ad litem. Dahl v. Charles F. Dahl, M.D., P.C. Defined Benefit Pension Trust, 744 F.3d 623, 630 (10th Cir. 2014). This "widespread recognition" did not involve simply the title "guardian ad litem" but also the guardian ad litem's role as witness and reporter. Cooney, 583 F.3d 967; Cok v. Cosentino, 876 F.2d 1, 3 (1st Cir. 1989) (finding immunity because a "GAL typically gathers information, prepares a report and makes a recommendation to the court regarding a custody disposition"); Gardner v. Parson, 874 F.2d 131, 146 (3d Cir. 1989) (explaining that although guardians ad

litem are not immune when they function as advocates, a "guardian ad litem would be absolutely immune in exercising functions such as testifying in court, prosecuting custody or neglect petitions, and making reports and recommendations to the court in which the guardian acts as an actual functionary or arm of the court, not only in status or denomination but in reality"); see also Hughes v. Long, 242 F.3d 121, 127 (3d Cir. 2001); Myers v. Morris, 810 F.2d 1437, 1466 (8th Cir. 1987), abrogated on other grounds by Burns v. Reed, 500 U.S. 478 (1991).

¶ 45 **Although the Illinois Appellate Court has not specifically ruled that guardians ad litem have immunity, it has held that child representatives are protected.** In Vlastelica, the court cited Cooney's discussion of the relationship between - 16 - guardians ad litem and child representatives. 2011 IL App (1st) 102587, ¶¶ 21-23 (citing 750 ILCS 5/506(a)(2), (3) (West 2010)). The Vlastelica court then applied the **Cleavinger factors to** evaluate the child representative's function and determined that the representative aids the court in determining the child's best interests. Id. ¶¶ 24-26 (citing Golden v. Nadler, Pritikin & Mirabelli, LLC, No. 05 C 0283, 2005 WL 2897397, at *10 (N.D. Ill. Nov. 1, 2005)). The court concluded that child representatives need judicial immunity to protect them from potentially litigious parents. See also Davidson v. Gurewitz, 2015 IL App (2d) 150171 (repeating Vlastelica's holding that child representatives are immune from liability for conduct within the scope of their appointment). ¶ 46 **As explained above, the case for finding that the Marriage Act's guardians ad litem have quasi-judicial immunity is even stronger than the case for child representatives**. Whereas child representatives have some degree of independence from both the child's wishes and the court, the guardian ad litem is the " 'eyes and ears of the court.' " In re Mark W., 228 Ill. 2d at 374 (quoting In re Guardianship of Mabry, 281 Ill. App. 3d at 88). **The court in Vlastelica could not conclude that child representatives have immunity unless it also presumed that guardians ad litem do as well.**1 ¶ 47 Nichols urges us to reject all these authorities because they involved custody disputes, dissolution of marriage proceedings, or similar contexts in which multiple parties engaged in contested litigation. In contrast, this case involves the distribution of a minor's assets. Nichols contends that when a case involves only one party, guardians ad litem do

not face the risk of lawsuits from unsatisfied parents and, therefore, do not need immunity from liability. ¶ 48

The facts of this case clearly demonstrate the flaw in Nichols's claim. According to Nichols, Fahrenkamp's role as guardian ad litem required him to accuse her mother of neglecting Nichols's best interests. Because Fahrenkamp did not challenge her mother's expenditures Nichols accused him of malpractice and filed this lawsuit. Even though the underlying proceeding here did not involve the adversarial process, the stakes were high, and the issues were sensitive ones. Courts appoint guardians ad litem in cases "involving the support, custody, visitation, allocation of parental responsibilities, education, parentage, property interest, or general welfare of a minor or dependent child." 750 ILCS 5/506(a) (West 2016). Even without opposing parties, such proceedings are often emotionally fraught and potentially upsetting. **Just as in child custody or dissolution proceedings, in probate cases "[e]xperts asked by the court to advise on what disposition will serve the best interests of a child in a custody proceeding need absolute immunity in order to be able to fulfill their obligations 'without the worry of intimidation and harassment from dissatisfied parents.' " Vlastelica, 2011 IL App (1st) 102587, ¶ 21 (quoting Cooney, 583 F.3d at 970). ¶ 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.**

Additionally, this case demonstrates why it is important for lower courts to make abundantly clear what each person's role is. 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. See 755 ILCS 5/11-10.1(b) (West 2016); id. § 27-3; 750 ILCS 5/506 (West 2016); see also 705 ILCS 405/2-17 (West 2016). Reconciling all these provisions would help prevent further confusion.

¶ 50 CONCLUSION ¶ 51 The circuit court ruled correctly when it granted summary judgment in Fahrenkamp's favor. We reverse the appellate court's decision and affirm the judgment of the circuit court.

We reverse the appellate court's decision and affirm the judgment of the circuit court.

¶ 52 Appellate court judgment reversed. ¶ 53 Circuit court judgment affirmed.

1Nothing in this opinion should be construed as holding that child representatives also have quasi-judicial immunity. This issue is not before the court, and we express no opinion on it. - 17 –

(705 ILCS 405/2-17) (from Ch. 37, par. 802-17)
Sec. 2-17. Guardian ad litem.
(1) Immediately upon the filing of a petition alleging that the minor is a person described in Sections 2-3 or 2-4 of this Article, the court shall appoint a guardian ad litem for the minor if:
(a) such petition alleges that the minor is an abused or neglected child; or
(b) such petition alleges that charges alleging the commission of any of the sex offenses defined in Article 11 or in Sections 11-1.20, 11-1.30, 11-1.40, 11-1.50, 11-1.60, 12-13, 12-14, 12-14.1, 12-15 or 12-16 of the Criminal Code of 1961 or the Criminal Code of 2012, have been filed against a defendant in any court and that such minor is the alleged victim of the acts of defendant in the commission of such offense.
Unless the guardian ad litem appointed pursuant to this paragraph (1) is an attorney at law, he shall be represented in the performance of his duties by counsel. The guardian ad litem shall represent the best interests of the minor and shall present recommendations to the court consistent with that duty.
(2) Before proceeding with the hearing, the court shall appoint a guardian ad litem for the minor if:
(a) no parent, guardian, custodian or relative of the minor appears at the first or any subsequent hearing of the case;
(b) the petition prays for the appointment of a guardian with power to consent to adoption; or
(c) the petition for which the minor is before the court resulted from a report made pursuant to the Abused and Neglected Child Reporting Act.
(3) The court may appoint a guardian ad litem for the minor whenever it finds that there may be a conflict of interest between the minor and his parents or other custodian or that it is otherwise in the minor's best interest to do so.
(4) Unless the guardian ad litem is an attorney, he shall be represented by counsel.
(5) The reasonable fees of a guardian ad litem appointed under this Section shall be fixed by the court and charged to the parents of the minor, to the extent they are able to pay. If the parents are unable to pay those

fees, they shall be paid from the general fund of the county.

(6) A guardian ad litem appointed under this Section, shall receive copies of any and all classified reports of child abuse and neglect made under the Abused and Neglected Child Reporting Act in which the minor who is the subject of a report under the Abused and Neglected Child Reporting Act, is also the minor for whom the guardian ad litem is appointed under this Section.

(6.5) A guardian ad litem appointed under this Section or attorney appointed under this Act shall receive a copy of each significant event report that involves the minor no later than 3 days after the Department learns of an event requiring a significant event report to be written, or earlier as required by Department rule.

(7) The appointed guardian ad litem shall remain the child's guardian ad litem throughout the entire juvenile trial court proceedings, including permanency hearings and termination of parental rights proceedings, unless there is a substitution entered by order of the court.

(8) The guardian ad litem or an agent of the guardian ad litem shall have a minimum of one in-person contact with the minor and one contact with one of the current foster parents or caregivers prior to the adjudicatory hearing, and at least one additional in-person contact with the child and one contact with one of the current foster parents or caregivers after the adjudicatory hearing but prior to the first permanency hearing and one additional in-person contact with the child and one contact with one of the current foster parents or caregivers each subsequent year. For good cause shown, the judge may excuse face-to-face interviews required in this subsection.

(9) In counties with a population of 100,000 or more but less than 3,000,000, each guardian ad litem must successfully complete a training program approved by the Department of Children and Family Services. The Department of Children and Family Services shall provide training materials and documents to guardians ad litem who are not mandated to attend the training program. The Department of Children and Family Services shall develop and distribute to all guardians ad litem a bibliography containing information including but not limited to the juvenile court process, termination of parental rights, child development, medical aspects of child abuse, and the child's need for safety and permanence.

(Source: P.A. 100-689, eff. 1-1-19; 101-81, eff. 7-12-19.)

(750 ILCS 5/506) (from Ch. 40, par. 506)

Sec. 506. Representation of child.

(a) Duties. In any proceedings involving the support, custody, visitation, allocation of parental responsibilities, education, parentage, property interest, or general welfare of a minor or dependent child, the court may, on its own motion or that of any party, appoint an attorney to serve in one of the following capacities to address the issues the court delineates:

(1) Attorney. The attorney shall provide independent legal counsel for the child and shall owe the same duties of undivided loyalty, confidentiality, and competent representation as are due an adult client.

(2) Guardian ad litem. The guardian ad litem shall testify or submit a written report to the court regarding his or her recommendations in accordance with the best interest of the child. The report shall be made available to all parties. The guardian ad litem may be called as a witness for purposes of cross-examination regarding the guardian ad litem's report or recommendations. The guardian ad litem

shall investigate the facts of the case and interview the child and the parties.

(3) Child representative. 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 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.

(a-3) Additional appointments. During the proceedings the court may appoint an additional attorney to serve in the capacity described in subdivision (a)(1) or an additional attorney to serve in another of the capacities described in subdivision (a)(2) or (a)(3) on the court's own motion or that of a party only for good cause shown and when the reasons for the additional appointment are set forth in specific findings.

(a-5) Appointment considerations. In deciding whether to make an appointment of an attorney for the minor child, a guardian ad litem, or a child representative, the court shall consider the nature and adequacy of the evidence to be presented by the parties and the availability of other methods of obtaining information, including social service organizations and evaluations by mental health professions, as well as resources for payment.

In no event is this Section intended to or designed to abrogate the decision making power of the trier of fact. Any appointment made under this Section is not intended to nor should it serve to place any appointed individual in the role of a surrogate judge.

(b) Fees and costs. The court shall enter an order as appropriate for costs, fees, and disbursements, including a retainer, when the attorney, guardian ad litem, or child's representative is appointed. Any person appointed under this Section shall file with the court within 90 days of his or her appointment, and every subsequent 90-day period thereafter during the course of his or her representation, a detailed invoice for services rendered with a copy being sent to each party. The court shall review the invoice submitted and approve the fees, if they are reasonable and necessary. Any order approving the fees shall require payment by either or both parents, by any other party or source, or from the marital estate or the child's separate estate. The court may not order payment by the Department of Healthcare and Family Services in cases in which the Department is providing child support enforcement services under Article X of the Illinois Public Aid Code. Unless otherwise ordered by the court at the time fees and costs are approved, all

fees and costs payable to an attorney, guardian ad litem, or child representative under this Section are by implication deemed to be in the nature of support of the child and are within the exceptions to discharge in bankruptcy under 11 U.S.C.A. 523. The provisions of Sections 501 and 508 of this Act shall apply to fees and costs for attorneys appointed under this Section.
(Source: P.A. 99-90, eff. 1-1-16.)

Public-Domain Citation System Paragraph Numbers Courts that have adopted public-domain citation systems add paragraph numbers, generally in the left margin, as location markers. These numbers should not be considered part of the text and should not be quoted, nor should they be considered as text for purposes of determining where text begins. Do not indicate their omission, such as with asterisks or empty brackets.

888 N.E.2d 15 (2008)
228 Ill. 2d 365

In re MARK W., a Minor (The People of the State of Illinois, Appellant, v. Delores W. et al., Appellees).

No. 104168.
Supreme Court of Illinois.

April 3, 2008.

*16 Lisa Madigan, Attorney General, Springfield, Richard A. Devine, State's Attorney, Chicago (Deborah Ahlstrand, Assistant Attorney General, Chicago, James E. Fitzgerald, Annette Collins, Nancy Faulls, Nancy Grauer Kisicki, Assistant State's Attorneys, of counsel), for the People.

Adam M. Stern, of the Law Office of Lynch & Stern, Oak Park, for appellee Amy B.

Robert F. Harris, Kass A. Plain, Janet L. Barnes, Office of the Cook County Public Guardian, Chicago, for the minor.

OPINION

Justice BURKE delivered the judgment of the court, with opinion:

At issue in this appeal is whether the circuit court of Cook County erred during a hearing on termination of parental rights when it appointed a guardian *ad litem* for a mentally disabled mother who already had a plenary guardian of the person. The appellate court concluded that the appointment of the guardian *ad litem* rendered the termination proceeding "fundamentally flawed" and reversed the judgment of the circuit court terminating the mother's parental rights. 371 Ill. App. 3d 81, 308 Ill. Dec. 656, 862 N.E.2d 589. For the reasons that follow, we reverse the judgment of the appellate court and remand the cause to that court for further proceedings.

Background

In August of 1997, the circuit court of Cook County entered an order pursuant to section 11a-12 of the Probate Act of 1975 (755 ILCS 5/11a-12 (West 2006)) appointing Amy B. plenary guardian of the person for her daughter, Delores W. The order indicated that Delores was "mentally handicapped" with "mild to moderate retardation" and that she functioned at a third-grade *17 level. Thereafter, in July of 1998, Delores gave birth to a son, Mark W.

In April of 1999, when Mark was approximately nine months old, the Illinois Department of Children and Family Services (DCFS) received a report that Delores had shoved a plastic toy into Mark's mouth and throat, that she had hit him on the head with a television remote control several times, and that she had attempted to choke Mark when he continued to cry. Mark was taken into protective custody and placed in foster care with his grandmother, Amy.

On April 8, 1999, the State filed a petition for adjudication of wardship pursuant to section 2-13 of the Juvenile Court Act of 1987 (705 ILCS 405/2-13 (West 1998)) and a motion for temporary custody (see 705 ILCS 405/2-9, 2-10 (West 1998)). The petition and motion alleged that Mark was neglected due to an injurious environment (see 705 ILCS 405/2-3(1)(b) (West 1998)) and that he was abused because he faced a substantial risk of physical injury (see 705 ILCS 405/2-3(2)(ii) (West 1998)).

On April 9, 1999, the circuit court awarded temporary custody of Mark to DCFS. Mark remained in the care of Amy until July of 1999, when he was removed from Amy's care because of concerns about her parenting skills and fears that Mark was at risk of being harmed. According to documents generated by DCFS, Mark had what appeared to be burns on his stomach and toe that Amy was unable to explain. Mark was placed with foster parents from July of 1999 to June of 2000. He was then placed with a foster parent, Michelle N., with whom he remains to the present day.

After several continuances, the State's petition for adjudication of wardship was set for trial on October 3, 2000. On that date, however, the circuit court was informed that, despite several previous attempts to retain representation, Delores did not have an attorney. Aware that she was disabled, the court expressed an intent to appoint a bar attorney as both attorney and guardian *ad litem* for Delores. The case was then passed so that the bar attorney for the day, Raymond Morrissey, could speak with Delores and Amy. When the case was recalled, Morrissey told the court the following:

"Your Honor, Ray Morrissey. I am the bar attorney today, and I have attempted to speak with the mother along with her guardian. The guardian is not present at this time. She has made it known emphatically clear that she does not want me to represent her daughter as attorney or guardian, and that she wants to hire a private attorney for her daughter.

* * *

* * * I have talked to the mother, and I also explained to the guardian that there may be a conflict between what she feels is in the best interest of her daughter and what I feel is the best interest, and then she stopped me and she said: I want to hire a private attorney for my daughter.

* * *

I have no problem with accepting appointment as the guardian. I am just not sure if she [Amy] as a legal guardian would have a right to hire a private attorney for her daughter."

After listening to Morrissey's statement, and after questioning Delores, the circuit court stated that it would give Amy time to hire private counsel. The court then appointed Morrissey guardian *ad litem* for Delores.

On October 10, 2000, the circuit court entered an order amending the petition for adjudication of wardship to include an allegation that Mark was dependent due to *18 the physical or mental condition of his parent, guardian or custodian. See 705 ILCS 405/2-4 (West 1998). On November 27, 2000, following an adjudicatory hearing (see 705 ILCS 405/2-21 (West 1998)), the circuit court found that Mark was a dependent child, due to the mental condition of his mother. A dispositional hearing was held on March 29, 2001 (see 705 ILCS 405/2-22 (West 1998)), and Mark was made a ward of the court.

Shortly thereafter, in June of 2001, the appellate court filed its decision in *In re K.C.,* 323 Ill.App.3d 839, 257 Ill. Dec. 119, 753 N.E.2d 314 (2001). *In re K.C.* held that the State must name a plenary guardian of a parent as a party-respondent in a petition for adjudication of wardship. In order to comply with the decision, on March 15, 2002, the circuit court vacated the adjudicatory and dispositional orders that had previously been entered in the case. The State's petition for adjudication of wardship was then amended to add Amy as a respondent and she was given proper notice of the proceedings.

On December 9, 2002, the circuit court revisited the issue of Delores' representation, asking Morrissey if he would accept appointment as both attorney and guardian *ad litem* for Delores. Morrissey declined, stating that such an appointment would create a conflict of interests:

"I would object for a couple of reasons. Firstly, I was discharged as her attorney. My independent standing all the way through, and I was hoping I had made it clear every time I appeared on the case, I was just appointed as her guardian, not as her attorney and guardian. Correct, I was appointed as her attorney and guardian but I was fired by Amy [B.]. So for me to be reappointed I think is a conflict on the case.

Also, if your Honor saw fit to appoint me on the case today and we did proceed, there were a whole different set of issues that I have to deal with. In this particular case there's a strong conflict, as we say, bifercation [*sic*] between my role as guardian and my role as attorney. I would be advocating two contradictory positions. I don't think that would be in the best interest of my client at this time. So, I'd ask the matter be passed for appointment of private attorney."

Following Morrissey's comments, the court appointed attorney Mark Kusatzky as Delores' counsel. Morrissey continued as Delores' guardian *ad litem.*

In January of 2003, the circuit court held a second adjudicatory hearing and found that Mark was abused and neglected. Following a second dispositional hearing in March 2003, the court found that Delores, Amy, and Mark's father[1] were all unable and unwilling for reasons other than financial circumstances to care for Mark. The court made Mark a ward of the court and appointed the DCFS guardian administrator as his guardian. In January of 2004, the court held a permanency planning hearing and found that Delores had not made any progress toward the goal of returning home. The court then entered a permanency goal of substitute care pending termination of parental rights.

On April 27, 2004, the State filed a supplemental petition for appointment of a guardian with the right to consent to adoption, alleging that Delores was unfit and that it would be in Mark's best interests to terminate parental rights. The termination hearing began on November 9, 2004. Neither Delores nor Amy appeared in court at any time during the hearing. *19 However, both women were represented by their attorneys and Morrissey was present as guardian *ad litem* for Delores.

During the unfitness portion of the termination hearing, evidence was introduced which showed that Delores had failed to participate in DCFS's various assessment and reunification services and had failed to make progress toward reunification with Mark. Evidence was also introduced which showed that Amy had repeatedly prevented Delores from following her service plans, that she had failed to provide consent, as Delores' plenary guardian, for Delores to receive various services,[2] that she had been hostile to service providers, and that her behavior had impeded efforts to reunify Delores with Mark.

At the close of the unfitness portion of the termination proceeding, the attorneys for Delores and Amy argued against termination of Delores' parental rights. Morrissey made a brief statement to the contrary, asserting that Delores' parental rights should be terminated. As evinced by a review of the record as a whole, Morrissey's position was that, in light of assessments made by DCFS, the only way Delores could be reunited with Mark would be if she participated in an assisted living program that provided her with the necessary support and services for raising Mark. Amy, however, refused to permit Delores to participate in such a program. Thus, in order to have a chance of reuniting with her child, Delores would have to curtail, and perhaps sever, her relationship with Amy. Faced with the options of Delores ending her connection with Mark, a child with whom she had an attenuated relationship, or severing her connection with her mother, a woman with whom Delores was inextricably bound, Morrissey concluded it would be in Delores' best interests to terminate her parental rights.

In April 2005, the circuit court found Delores unfit based upon her failure to maintain a reasonable degree of interest, concern, or responsibility as to Mark's welfare (see 750 ILCS 50/1(D)(b) (West 2000)) and based upon her failure to make reasonable progress toward reunification (see 750 ILCS 50/1(D)(m) (West 2000)). Thereafter, the court found it was in Mark's best interests to terminate Delores' parental rights. On July 12, 2005, the circuit court entered an order finding Delores unfit, terminating her parental rights and appointing the DCFS guardian administrator as guardian with the right to consent to adoption.

Amy appealed. Before the appellate court she raised four issues: (1) Delores' due process rights were violated because Morrissey recommended that her parental rights be terminated; (2) the circuit court's findings at the termination of parental rights hearing were against the manifest weight of the evidence; (3) the circuit court did not have jurisdiction to terminate Delores' parental rights because Mark was illegally removed from Amy's care in 1999; and (4) the circuit court committed reversible error when it barred certain witnesses from testifying. The appellate court did not reach these issues, however, choosing instead to consider, *sua sponte,* whether the circuit court's appointment of Morrissey as guardian *ad litem* was appropriate.

The appellate court held that, following Amy's appointment as Delores' plenary guardian of the person, Morrissey's appointment as guardian *ad litem* was unauthorized *20 under either the Juvenile Court Act or the Probate Act. The appellate court further held that the

termination of parental rights hearing was "fundamentally flawed" and the judgment terminating Delores' parental rights had to be reversed, both because Morrissey revealed confidential information obtained during his initial conversation with Amy and Delores and because he was operating under an actual conflict of interest during the proceedings. One justice dissented, concluding that any error during the termination hearing was harmless, as the evidence overwhelmingly established Delores' unfitness as a parent. 371 Ill.App.3d at 102, 308 Ill. Dec. 656, 862 N.E.2d 589 (O'Mara Frossard, J., dissenting). We granted the State's petition for leave to appeal. 210 Ill.2d R. 315.

Analysis

Two principal issues are raised by the appellate court's decision in this case: (1) Does the circuit court have the authority, as a general matter, to appoint a guardian *ad litem* for a mentally disabled parent during a termination of parental rights hearing when the parent already has a plenary guardian of the person? and (2) Assuming the circuit court has such authority, must the judgment of the circuit court terminating Delores' parental rights in this case nevertheless be reversed because Morrissey revealed confidential information and was operating under a conflict of interest? We address these issues in turn.

A guardian *ad litem* functions as the "eyes and ears of the court" and not as the ward's attorney. *In re Guardianship of Mabry,* 281 Ill.App.3d 76, 88, 216 Ill. Dec. 848, 666 N.E.2d 16 (1996), citing *In re Marriage of Wycoff,* 266 Ill.App.3d 408, 415-16, 203 Ill. Dec. 338, 639 N.E.2d 897 (1994). The traditional role of the guardian *ad litem* is not to advocate for what the ward wants but, instead, to make a recommendation to the court as to what is in the ward's best interests. *Mabry,* 281 Ill. App.3d at 88, 216 Ill. Dec. 848, 666 N.E.2d 16. The role of the guardian *ad litem* is thus in contrast to the role of the plenary guardian of the person appointed pursuant to the Probate Act. Under section 11a-17 of the Probate Act, the plenary guardian makes decisions on behalf of the ward and must, in general, conform those decisions "as closely as possible to what the ward, if competent, would have done or intended under the circumstances." 755 ILCS 5/11a-17(e) (West 2000). See also *In re Marriage of Burgess,* 189 Ill. 2d 270, 278-79, 244 Ill. Dec. 379, 725 N.E.2d 1266 (2000) (guardian must generally "make decisions on behalf of a ward in accordance with the ward's previously expressed wishes").

In the case at bar, the appellate court concluded that the circuit court had no authority, under either the Juvenile Court Act or the Probate Act, to appoint a guardian *ad litem* for Delores. Before this court, the State points to various statutory provisions which, it contends, support by implication the circuit court's authority to appoint a guardian *ad litem*. The State acknowledges, however, that no provision speaks directly to the situation presented here. At the same time, Amy acknowledges that no statutory provision expressly forbids the appointment of a guardian *ad litem*. The question, then, is whether in the absence of controlling statutory authority, the circuit court has the authority to make such an appointment. We believe it does.

Delores was adjudicated a disabled person under the Probate Act in 1997. A disabled person is viewed as "a favored person in the eyes of the law" and is entitled to vigilant protection. *In re Estate of Wellman,* 174 Ill. 2d 335, 348, 220 Ill. Dec. 360, 673 N.E.2d 272 (1996) ("[t]he *21 trial court protects the disabled person as its ward, vigilantly guarding the ward's property and viewing the ward as a favored person in the eyes of the law"). Once a person is adjudicated disabled, that person remains under the jurisdiction of the court, even when a plenary guardian of the person has been

appointed. *In re Estate of Nelson,* 250 Ill.App.3d 282, 286-87, 190 Ill. Dec. 212, 621 N.E.2d 81 (1993). The court has a duty to judicially interfere and protect the ward if the guardian is about to do anything that would cause harm. *Nelson,* 250 Ill.App.3d at 287, 190 Ill. Dec. 212, 621 N.E.2d 81. To fulfill this duty, the court's authority is not limited to express statutory terms. As our appellate court has held:

"When, as in this case, a court is charged with a duty to protect the interests of its ward, we believe that by implication it has such powers, although not expressly given by the statute vesting the court with jurisdiction over the ward, as are necessary to properly discharge that duty * * *." *Nelson,* 250 Ill.App.3d at 287-88, 190 Ill. Dec. 212, 621 N.E.2d 81 (recognizing the authority of the circuit court to appoint a guardian *ad litem* to investigate an allegation that a ward was neglected).

See also *In re Serafin,* 272 Ill.App.3d 239, 244, 208 Ill. Dec. 612, 649 N.E.2d 972 (1995) ("The circuit court is charged with a duty to protect the interests of its ward and has, by statute and otherwise, those powers necessary to appoint a guardian *ad litem* to represent the interests of the respondent during the court's exercise of its jurisdiction").

In accordance with this precedent, and given Delores' status as a disabled person entitled to the utmost protection of the courts, we have little difficulty concluding that the circuit court had the authority to appoint a guardian *ad litem* to make a recommendation to the court as to what was in Delores' best interests.

The appellate court, however, was also critical of the circuit court's appointment of Morrissey as guardian *ad litem* because the court did not first revoke Amy's letters of office. 371 Ill.App.3d at 97-98, 308 Ill. Dec. 656, 862 N.E.2d 589. As noted, neither the Juvenile Court Act nor the Probate Act addresses the situation presented here, and we think it would be unwise to impose a requirement, as a matter of law, that the circuit court must revoke the plenary guardian's letters of office in situations such as this. The facts of this case illustrate the point.

At various times during the proceedings in this case, the circuit court expressed concern about Amy's decisions not to permit Delores to participate in reunification services with DCFS. At one point, for example, the court noted,

"If the record before me were clear that [Amy] is making a decision about D[e]lores because she feels that D[e]lores simply cannot handle the parenting, is not capable of managing with a child, I would have complete respect for that. * * * [But] [t]here have been things that have been said throughout the course of both of these proceedings, Mark and Paula's[3] that cause me some concern that while that may be a factor[,] * * * there may be other factors as well that [are] causing [Amy] to have perhaps clouded judgment on the issue.

* * *

My concern is that Ms. Amy [B.], as a result of the removal of Mark, has become so disenchanted with our system *22 and has become so disaffected by the system that she has clouded judgment when it comes to what is best for D[e]lores."

While noting that Amy's decisionmaking appeared to be "clouded by her unhappy relationship with the agency and with our court system," the circuit court at the same time stated that it had no reason to believe that Amy was not providing adequately for

Delores' day-to-day care. The court also made it clear that it did not want to drive a wedge between Amy and Delores because doing so would be harmful to Delores' interests.

Appointing a guardian *ad litem* without first revoking the plenary guardian's letters of office was appropriate in these circumstances. Simply because the circuit court may find it desirable, in a particular case, to appoint a guardian *ad litem* to obtain a recommendation regarding a ward's best interests, it does not follow that the plenary guardian of the ward is unfit or must be discharged. Indeed, where as here, the plenary guardian is the ward's own parent, discharging the guardian could be contrary to the ward's best interests. We conclude, therefore, that there is no need, as a matter of law, to revoke the plenary guardian's letters of office before appointing a guardian *ad litem* in situations such as presented here.

The appellate court concluded that the appointment of Morrissey as guardian *ad litem* was unnecessary in this case, stating: "we find no evidence in the record of a need for the juvenile court to appoint a GAL to protect Delores W.'s interests." 371 Ill.App.3d at 96, 308 Ill. Dec. 656, 862 N.E.2d 589. In so finding, the appellate court made no mention of the circuit court's concerns regarding Amy's decisionmaking. Nor did the appellate court acknowledge the many instances when Amy prevented Delores from engaging in reunification services, refused to sign releases of information, was antagonistic toward the agencies and individuals working with the family, and compromised Delores' chances for reunification with Mark. In our view, there is ample evidence of record to support the circuit court's appointment of Morrissey as guardian *ad litem* during the termination proceeding.

The appellate court also concluded, however, that the circuit court erred in appointing Morrissey because he violated the attorney-client privilege and the rules of professional conduct. According to the appellate court, Morrissey "violated Delores W.'s attorney-client privilege and the attorney's rule of confidentiality because he used privileged and confidential information to make arguments and to take positions in the juvenile court that were adverse to Delores W.'s interests." 371 Ill.App.3d at 102, 308 Ill. Dec. 656, 862 N.E.2d 589.

The appellate court did not find that Morrissey disclosed, or attempted to disclose, confidential information in court or elsewhere. Rather, the appellate court's position was that, based on statements he made in court, Morrissey must necessarily have obtained confidential information during his initial conversation with Delores and Amy on October 3, 2000, and that he used this information to advocate a position adverse to Delores' interests. As the appellate court stated:

"After receiving instructions from Judge Coleman, Morrissey had an attorney-client conference with Amy B. and Delores W. The record does not reveal what was discussed during the attorney-client conference. However, Morrissey obtained sufficient information during the attorney-client conference with Amy B. and Delores W. to conclude that what he thought was in Delores W.'s best interest differed from what Delores W. *23 and Amy B. thought was in Delores W.'s best interest. After the October 3, 2000, attorney-client conference, *Morrissey stated on the record that he had a conflict,* and, therefore, he was not appointed by Judge Coleman as Delores W.'s attorney but as her GAL."[4] (Emphasis added.) 371 Ill.App.3d at 99, 308 Ill. Dec. 656, 862 N.E.2d 589.

In other words, according to the appellate court, Morrissey obtained confidential information from Delores and Amy on October 3, 2000, under the guise of an attorney-client conversation, immediately formed a personal opinion based on this information regarding what would be in Delores' best interests, and then stated to the court that his personal opinion was at odds with what Delores and Amy believed was in Delores' best interests. From this, the appellate court concluded that Morrissey should not have accepted appointment as guardian *ad litem* and that he violated the attorney-client privilege and rules of professional responsibility in doing so. We disagree.

After speaking with Delores and Amy, Morrissey did not tell the circuit court that he had conflict. Rather, he stated the following:

"I have talked to the mother, and I also explained to the guardian that there *may* be a conflict between what she feels is in the best interest of her daughter and what I feel is the best interest, and then she stopped me and she said: I want to hire a private attorney for my daughter." (Emphasis added.)

The most reasonable reading of this statement is that Morrissey simply described, in a general manner, his role as potential attorney and guardian *ad litem* to Delores and Amy. As the circuit court had also done, Morrissey explained to Amy that his role would be independent of her, and that there might come a time when they would disagree as to Delores' best interests. At that point, Amy stopped the conversation and nothing further was discussed. This reading comports with Morrissey's additional statement to the court that he had only "attempted to speak with the mother along with her guardian." In addition, unlike the appellate court's interpretation, our reading of the record comports with the realities of the situation: it is unlikely that Morrissey formed an opinion regarding what would be in Delores' best interests ☐ a person he had never met before ☐ based on a single conversation at the courthouse.

In any event, and most importantly, at no time during the circuit court proceedings did Amy object to Morrissey's appointment, and at no time were any factual findings made by the circuit court regarding Morrissey's conversation with Delores and Amy. On this record, it would be speculative at best to conclude that the conversation held on October 3, 2000, included confidential information, or that it fell within the type of communication protected by the attorney-client privilege. See, *e.g., In re Himmel,* 125 Ill. 2d 531, 541, 127 Ill. Dec. 708, 533 N.E.2d 790 (1988) (the attorney-client privilege exists, where, *inter alia,* legal advice of any kind is sought from a professional legal adviser in his capacity as such, and the communication at issue relates to that purpose). We decline to hold that Morrissey violated the attorney-client privilege or the rules of professional conduct based on speculation.

In finding that Morrissey had an actual conflict of interest, the appellate court also *24 referenced Morrissey's statements on December 9, 2002, when he declined appointment as Delores' counsel. As the record makes clear, Morrissey did not say he had an actual conflict based on his having served as both attorney and guardian *ad litem.* Rather, he stated there was a potential for conflict, which would only be realized if he were appointed Delores' attorney. Morrissey was never appointed Delores' attorney. Consequently, we conclude that Morrissey was not operating under a conflict of interests, and the appellate court erred in holding to the contrary.

Finally, we note that the Cook County public guardian, as attorney for Mark W. and appellee in this case, has asked that in addition to reversing the appellate court's

judgment, we also "review the juvenile court's findings and affirm the termination of parental rights order." The public guardian stresses the time-sensitive nature of child custody proceedings and notes that Mark W. has been in the juvenile court system for over eight years.

We understand the public guardian's request to be that we consider the four issues raised by Amy in her initial appeal from the circuit court that were left unaddressed by the appellate court. We note, however, that the State, as appellant before this court, neither has briefed these issues nor raised them at oral argument. Further, in its prayer for relief, the State has requested that the cause be remanded to the appellate court, stating: "Given the manner in which the Appellate Court addressed only the issue that it saw, without addressing the issues raised by [Amy], the People understand that, despite the fact that this appeal involves the interests of a child, this matter must be remanded to the Appellate Court with directions to address any issues raised by Amy's appellate court brief that are not resolved by this Court's opinion." Under these circumstances, we conclude that remand to the appellate court is appropriate.

Nevertheless, we share the public guardian's concern regarding the time-sensitive nature of this proceeding. Accordingly, we direct the appellate court to file its judgment in this matter within 60 days of the issuance of this court's mandate.

Conclusion

For the foregoing reasons, the judgment of the appellate court is reversed. The cause is remanded to that court to address those issues that were initially raised by Amy in her appeal from the judgment of the circuit court terminating Delores' parental rights. The appellate court is directed to file its judgment in this matter within 60 days of the issuance of this court's mandate.

Appellate court judgment reversed; cause remanded with directions.

Chief Justice THOMAS and Justices FREEMAN, FITZGERALD, KILBRIDE, GARMAN, and KARMEIER concurred in the judgment and opinion.

NOTES

[1] Mark's father did not appeal the termination order and is not a party to this appeal.

[2] From the outset of the proceedings, Morrissey took the position that he had no authority, as guardian *ad litem,* to provide consents to receive services or releases for information on Delores' behalf. His role was solely to apprise the court as to what he believed was in Delores' best interests with respect to Mark.

[3] Paula was another child of Delores who was subject to juvenile court proceedings. See 371 Ill.App.3d at 104, 308 Ill. Dec. 656, 862 N.E.2d 589 (O'Mara Frossard, J., dissenting).

[4] Contrary to the appellate court's statement, Morrissey declined appointment as Delores' attorney because Amy did not want him to represent her. Morrissey's position was that, as plenary guardian of the person, it was Amy's right to select Delores' counsel.