

# The G.A.L. Appointment

Are You Protected?

Hon. Donald Bernardi  
Circuit Judge (retd.)



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- A Guardian Ad Litem is appointed by the Court in a variety of cases involving minors, and adults with disabilities
- These include; estate, dissolution , parentage, juvenile and guardianship proceedings (minor and adult)

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## G.A.L. or Defense Attorney

- A GAL appointment in juvenile delinquency cases has a different purpose than the role of an attorney appointed as a defense attorney for the minor.
- The Illinois Supreme Court discussed this in Juvenile delinquency cases in In Re Austin at 2012 IL 111194.
- The Court said, "...we find there is an inherent conflict between the professional responsibilities of a defense attorney and a GAL"

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### G.A.L. vs Defense Attorney

- Thus, in Austin the Supreme Court said the minor should be represented by defense counsel, however, if there is no parent to represent the best interests of the minor the Court may appoint a GAL.
- Therefore, the GAL undertakes the role of a concerned parent in the hearing.

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### The Order of Appointment

- These are examples of the language used for appointments in McLean County
- The following was in probate where the minor will receive property (the order in a minor guardianship case in probate has this same language):  
*"to represent said beneficiaries in this proceeding, to be and appear upon the hearing of the Petition for Probate, in this Court as noticed and defend the rights and interests of said beneficiaries in this case."*
  - The appointment in abuse and neglect simply says:  
*"\_\_\_\_\_ attorney is appointed guardian ad litem."*
  - Finally, it is not unusual that the appointment is a docket entry simply stating that:  
*"\_\_\_\_\_ is appointed GAL for the minor/ disabled adult etc."*

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### Statutes providing for appointment

- In abuse and neglect cases at 405/2-17. Guardian ad litem:  
*"The guardian ad litem shall represent the best interests of the minor and shall present recommendations to the court consistent with that duty."*
- In probate where an heir or legatee is a minor or a person with a disability the statute provides at 755 ILCS 5/6-12:  
*"... the hearing on the petition to admit the will, the court may appoint a guardian ad litem to protect the interests of the ward with respect to the admission or denial, or to represent the ward at the hearing..."*

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## Statutes

- In the Estates statute dealing with foreclosure there is a provision for those not in being is at 755 ILCS 5/20-5:

*"the court shall appoint some competent and disinterested person as **guardian ad litem** to appear for and represent such interest in the proceeding and to defend the proceeding on behalf of the person not in being"*

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## Statutes

- In addition, the probate act provides another description of GAL duties at 755 ILCS 5/27-3 which states:

*"Duties of a guardian ad litem. 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."*

There is similar language in the act on mineral rights at 765 ILCS 515/5."

- 755 ILCS 5/11a-10 provides for GAL appointments for adults with disabilities and states:

*"The court shall appoint a **guardian ad litem** to report to the court concerning the respondent's best interests consistent with the provisions of this Section"*

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## Statutes

- The most comprehensive description of duties is found in the Dissolution of marriage act at 750 ILCS 5/506:

*"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"*

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## Statutes

- In Probate for guardians for adults with disabilities:*
- *In any proceeding for the appointment of a guardian or a standby guardian the court may appoint a guardian ad litem to represent the person with a disability in the proceeding. See 755 ILCS 5/11a-10.2*
  - Finally, in 755 ILCS 5/11-10.1, on minor guardianships:  
*"In any proceeding for the appointment of a standby guardian or a guardian the court may appoint a guardian ad litem to represent the minor in the proceeding."*

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## Summary of Duties

Thus, to summarize, the duties vary and include:

1. "represent" the person
2. "represent the best interests"
3. "protect the interests of the ward"
4. "represent such interest...and defend the proceeding"
5. "file an answer, appear and defend on behalf of the ward"

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## Does the language used matter?

This issue is at the heart of the recent case from our Supreme Court in Alexis Nichols F/K/A Alexis Brueggeman V. Davaj Fahrenkamp et al. 2019 IL 123990.

This case began when the plaintiff suffered injuries in a motor vehicle accident and received a settlement.

Due to her age, the probate court appointed her mother as guardian to administer her estate and appointed the defendant as her guardian ad litem.

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In  
Fahrenkamp

Following the accident case, the plaintiff minor sued the mother claiming she used funds for herself that should have been dedicated to her.

This resulted in a partial recovery for the minor, however some funds were denied because the GAL had approved them in the earlier case.

Thereafter, the minor sued the GAL to recover the balance, this became the third in a series of cases involving the same parties where the Supreme Court had to construe the meaning of the trial court's original GAL appointment order.

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In  
Fahrenkamp

- The circuit court agreed with the GAL that he enjoyed quasi-judicial immunity and was not liable for negligence.
- The Appellate Court reversed, finding that the GAL had a duty to protect his ward's assets and advocate on behalf of the minor.

• The Supreme Court recognized that quasi-judicial immunity extended beyond Judges to others in the Judicial Process.

The question is whether it applied to this GAL, thus protecting him from liability.

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Fahrenkamp

The Supreme Court surveyed our statutes and looked to the Marriage and Dissolution act to the three possible appointments for the minor facing the Judge:

- 1. Child's attorney
- 2. The child's representative
- 3. The guardian ad litem

The court reasoned that among these, the GAL is most closely associated with the judicial process.

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## Fahrenkamp

- Before the Supreme Court, the defendant GAL took the position that his appointment is most like that of GAL in dissolution proceedings. Therefore, he argued his obligation was to recommend what is in the best interests of the minor.
- The Plaintiff argued that the appointment was most like that in probate which required that the GAL appear and defend the ward

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## The Court's Analysis

The Court looked at the history of the GAL appointment in both statutory and case law and found that it is evolving.

Under the probate act of 1975 the GAL acted much like an attorney. However, under the recent amendments to that act, and to the marriage and dissolution act, the meaning is changing.

For example:

The 1995 amendment to the probate act involving disabled adults now says: the court may appoint a GAL "to report to the court concerning the respondent's best interests consistent with the provisions of this section" 755 ILCS 5/11a-10a.

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## The Court's Analysis

The Court notes that the most recent amendments leave only section 11 – 10.1 of the probate act with an inconsistent obligation for appointed GAL's which continues to require the GAL to:

"represent the minor in the proceeding."

In light of these amendments the Court suggested that the role of the GAL in the 21<sup>st</sup> century has become that of a **reporter or witness and not that of an advocate.**

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## The Court's Analysis

- The Court opined that since the statutes are not consistent in their roles for the GAL, it must look at the appointment in this case to resolve liability.

However, the appointment states only:

- "the court being fully advised in the premises does hereby appoint David Fahrenkamp as Guardian Ad Litem for the minor child, Alexis Brueggeman."

The Supreme Court concluded the appointment most closely resembled that in a marriage and dissolution case and adopted that meaning.

- This meant that Mr. Fahrenkamp was charged with making recommendations to the court in the best interests of the minor.

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## The Court's Ruling

- The Supreme Court then held that,

- **"a guardian ad litem who submits recommendations to the court on the child's best interest is protected by quasi-judicial immunity"**

This finding provides the greatest protection for the GAL.

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## Remedy

- In Fahrenkamp, the Supreme Court concluded,
- "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." (emphasis added)

Whenever possible, both the Court and GAL appointees should be aware of the language of the order, and it is most beneficial to the appointee if the GAL is cloaked with quasi-judicial immunity.

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# Remedy

- The advice from the supreme court to the circuit court in these cases is as follows,
- "it should specify the appointee's role in the order of appointment." (emphasis added)

Thus, the greatest protection to the GAL may be accomplished if the order provides the following:

" \_\_\_\_\_ be and is hereby appointed Guardian ad Litem for the minor/ disabled adult, \_\_\_\_\_ to submit recommendations to the court regarding the minor's/ disabled adult's best interests"



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