No. _____

IN THE
SUPREME COURT OF ILLINOIS

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

PETITION FOR LEAVE TO APPEAL

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PRAYER FOR LEAVE TO APPEAL

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

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

JUDGMENT BELOW

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

POINTS RELIED UPON FOR REVIEW

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

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

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

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

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

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

STATEMENT OF FACTS

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

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

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

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

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

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

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

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

(A 23.)

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

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

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

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

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

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

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

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

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

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

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

ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Id.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

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CERTIFICATE OF SERVICE

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

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

/s/ Kevin P. Green

CERTIFICATE OF COMPLIANCE

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

/s/ Kevin P. Green