No. 123990

IN THE
SUPREME COURT OF ILLINOIS

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

APPELLANTS' REPLY BRIEF

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POINTS AND AUTHORITIES

ARGUMENT

I. The Appellate Court's Decision Does Not Maintain the Status Quo and Conflicts with the Public Policy for Quasi-Judicial Immunity.

The choice plaintiff presents to the court—protect children or shield attorneys (Pl. Br. 18)—is a false choice, which blurs the distinction between attorneys serving as "arms of the court" and attorneys representing parties in court. The appellate court's decision that a court-appointed guardian *ad litem* ("GAL") is not protected by quasi-judicial immunity from claims of negligence conflicts with the public policy behind the common law immunity; disrupts the status quo by converting a GAL from an "arm of the court" to a child's attorney; results in uncertain duties for GALs; dissuades attorneys from serving as GALs; and overlooks that plaintiff had at least four avenues to pursue meaningful relief for her claims. The appellate court decision should be reversed.

A. Finding quasi-judicial immunity applies to a guardian *ad litem* maintains the status quo because it does not convert a guardian *ad litem* from an "arm of the court" to a child's attorney; nor does it strip children of protection or meaningful recovery when a guardian of the child's person or estate dissipates settlement funds.

1. The appellate court's decision converts a guardian *ad litem* from the "arm of the court" to a child's attorney.

Plaintiff contends that the appellate court's decision "maintains the status quo" by simply holding an attorney liable to his client for malpractice. Pl. Br. 18-23. Plaintiff's argument, however, relies on a faulty premise that GALs are automatically appointed to serve as attorneys for minors and to advocate as if the minor is their client. See, *e.g.*, Pl. Br. 21 ("His role was to represent one side in the litigation ***."); *id.* ("[H]e was supposed to be an advocate ***."); *id.* at 24 (comparing Fahrenkamp's[1] appointment to

[1] Defendants are collectively referred to herein as "Fahrenkamp."

situation in which "an attorney was appointed by a court to represent a client"); *id.* at 24 (immunity would mean the GAL's "clients *** have no recourse if their attorneys failed them"); *id.* at 26 (immunity unwarranted because all "attorneys stand in a fiduciary relationship to their clients and are officers of the court"); *id.* at 29 (quoting Ill. R. Prof'l Conduct (2010) R. 1.14(a), (b) (eff. Jan. 1, 2010), titled, "Client Under a Disability"); *id.* at 34 (quoting Ill. R. Prof'l Conduct (2010), Preamble (eff. Jan. 1, 2010), which lists various functions a lawyer serves "[a]s a representative of clients").

Adopting plaintiff's premise alters the status quo by reversing the well-established law in Illinois that "[a] guardian *ad litem* functions as the 'eyes and ears of the court' and *not as the ward's attorney*." (Emphasis added.) *People v. Delores W. (In re Mark W.)*, 228 Ill. 2d 365, 374 (2008) (quoting *In re Guardianship of Mabry*, 281 Ill. App. 3d 76, 88 (4th Dist. 1996); 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 ***. [GALs] are considered as agents *** of the court."). See also *Cooney v. Rossiter*, 583 F.3d 967, 970 (7th Cir. 2009) ("[GALs] are arms of the court, much like special masters, and deserve protection from harassment by disappointed litigants just as judges do.").

Plaintiff's statement that "there were no specific actions and duties 'assigned to defendant by the probate court'" (Pl. Br. 29) highlights that the trial court did not *expressly* expand Fahrenkamp's duties to include serving as plaintiff's attorney. Finding such duties implicit in every appointment runs contrary to the status quo.

2. The cases cited by plaintiff do not support plaintiff's attempt to convert a guardian *ad litem* into an attorney for the child.

Plaintiff argues "the law is clear" that "GALs are required to act as advocates for their minor clients." Pl. Br. 29, 30-31 (citing *Rom v. Gebhart*, 30 Ill. App. 2d 199 (1st

Dist. 1961); *Layton v. Miller*, 25 Ill. App. 3d 834 (5th Dist. 1975); *Cushing v. Greyhound Lines Inc.*, 2013 IL App (1st) 103197; *Ott v. Little Company of Mary Hospital*, 273 Ill. App. 3d 563 (1st Dist. 1995); *Roth v. Roth*, 52 Ill. App. 3d 220 (1st Dist. 1977)); see also Pl. Br. 42 (citing *Will v. Northwestern University*, 378 Ill. App. 3d 280 (1st Dist. 2007)).

None of these cases address immunity or justify expanding a GAL's implicit duties. Instead, they emphasize a GAL's role in assisting the court with its duties.

Plaintiff quotes paragraph 62 of *Cushing* out of context for the proposition that "the court noted that it considered GAL Ammendola as an attorney for the child." Pl. Br. 31. This quote, however, is from the opinion's *procedural history* and refers to a statement by the trial court. It also appears this trial judge appointed GAL Ammendola to serve in dual roles. *Cushing*, 2013 IL App (1st) 103197, ¶ 90 (GAL explaining "she was appointed by Judge Zwick to be the minor's guardian ad litem *and* attorney *and* had been named as a representative plaintiff in the lawsuit" (Emphasis added.)). A different trial judge in the case later clarified the GAL's role: "'The official role of the guardian ad litem is not to advocate for what the ward wants but instead to make its recommendation to the court as to what is in the ward's best interest.'" *Id.* ¶ 176 (quoting J. Locallo).

Moreover, in *Cushing*, which was a wrongful death and negligent infliction of emotional distress action brought by a minor, the court referenced a separate lawsuit filed against the GAL alleging fraud, legal malpractice, aiding and abetting an unlawful act, and loss of society. *Id.* ¶ 124. Plaintiff omits that this separate lawsuit against the GAL was dismissed with prejudice because "certain officers of the court who perform quasi-judicial duties, such as GALs are afforded absolute immunity from civil liability for claims arising from actions taken in the course of their official duties." *Zvunca v. Motor*

Coach Industries International, Inc., No. 08 C 4507, 2009 U.S. Dist. LEXIS 15408, *9 (N.D. Ill. Feb. 26, 2009). See also *Cushing*, 2013 IL App (1st) 103197, ¶¶ 125, 129, 130.

In *Ott*, the judge thought the child's medical malpractice claim should be settled, appointed a GAL, adopted his recommendation to settle, and ordered the GAL to effectuate the settlement over the co-guardians' objections. 273 Ill. App. 3d at 568-70. The appellate court affirmed: "The court[] [has] authority to appoint a guardian *ad litem* for its ward to effectuate and implement a court order made subsequent to a finding of best interest of the ward, when the previously appointed conservatrix of the ward's estate refused to do so ***." *Id.* at 572. Accord *Will*, 378 Ill. App. 3d at 294 (if guardian "refuses to carry out the settlement in contradiction to the court's determination, the court may appoint a guardian *ad litem* to settle the case on the minor's behalf").

Neither *Ott* nor *Will* included any claim that the GAL improperly performed his duties. Furthermore, the First District subsequently clarified the limited scope of these decisions: "*Ott* and *Will* *** approved the use of a guardian *ad litem* where the trial court needed a neutral assessment of a proposed settlement for a minor that was being 'obstructed' by the minor's representative." *Cushing*, 2013 IL App (1st) 103197, ¶ 351. "*Ott* and *Will* 'should not be read as an open invitation for trial courts to appoint GALs to replace parties and take over their cases, without any showing of obstructionism or other behavior exceeding the normal adversarial process.'" *Id.* ¶ 354. *Ott* and *Will*, where GALs were appointed to assist the court in determining and effectuating what was in the child's best interest, *highlight* a GAL's role as the "arm of the court."

Plaintiff's references to *Layton*, *Roth*, and *Rom* are equally unhelpful. In *Layton*, no GAL was appointed prior to the dismissal of a custody petition. 25 Ill. App. 3d at

835-37. The appellate court reversed the dismissal based on its concerns that the minors involved might need assistance, noted the absence of the guardian of the estate from the lawsuit, and advised the court to exercise its discretion to appoint a GAL. *Id.* at 838-39.

In *Roth*, the trial court chose not to adopt the GAL's recommendation that the mother should have sole custody and granted joint custody instead. 52 Ill. App. 3d at 223. On appeal by the mother, the appellate court affirmed, finding "the court acted within its discretion," and noting that GALs are appointed "*to assist the court* in arriving at the child's best interest." (Emphasis added.) *Id.* at 226, 227.

In *Rom*, the appellate court affirmed the trial court's setting aside of a default judgment against a minor in a personal injury action after the minor's father failed to answer the complaint. 30 Ill. App. 2d at 201-06, 211. The case refers to the father as a GAL, though no guardian of the person or estate appears to have been appointed. Nonetheless, no one sued the father/GAL. The court explained that the GAL should "call the rights of the minor to the attention of the court," and showed that an adverse order could be set aside if a GAL failed to perform his duties. *Id.* at 208. See *infra*, § I.A.5.

Cushing, *Ott*, *Will*, *Layton*, *Roth*, and *Rom* do no negate the principle that a GAL is the court's agent, serving as its eyes and ears to assist it in fulfilling *its* duty to protect the best interest of its ward. *In re Mark W.*, 228 Ill. 2d at 374. Nor do these cases support expanding the role of a GAL from an arm of the court to a ward's attorney.

3. Immunity for guardians *ad litem* should not vary based on the nature of the proceeding.

Plaintiff argues the appellate court maintained the status quo by stating its holding did not apply to GALs in dissolution or custody cases. Pl. Br. 19-20. Plaintiff cites no prior case, however, holding a GAL immune *only* in dissolution or custody proceedings.

Plaintiff argues the distinction is appropriate because GALs in custody and divorce proceedings do not serve in comparable roles as GALs in proceedings involving assets of a minor. Pl. Br. 20-21. Plaintiff assumes that "[u]nlike a child custody or dissolution proceeding, a probate proceeding in which a mother is applying to take money out of her child's settlement does not involve adult adversaries on both sides of the litigation." Pl. Br 19; see also *id.* at 36 (assuming that in divorce and custody matters, "a GAL's recommendation is certain to be to the detriment of one of the adversarial parties," but in proceedings involving settlement distributions, "it is not at all clear that a GAL's recommendation will invite litigation" because "[i]deally, there will be no conflict between the ward and her parent or guardian"). Thus, plaintiff contends, a GAL involved in distributing assets does not face the risk of "dissatisfied parents." Pl. Br. 21.

Plaintiff's assumptions do not withstand scrutiny. It is easy to imagine a scenario outside of a custody or divorce proceeding involving two parents who disagree, either with each other or the child, as to how the child's settlement funds should be distributed. It is equally easy to imagine a child or parent accusing the GAL of advocating for the other parent rather than the child in this scenario. In fact, plaintiff cites *Davidson v. Gurewitz*, 2015 IL App (2d) 150171, where a father claimed the "child representative" in the divorce proceeding "effectively served as [his ex-wife's] advocate." Pl. Br. 20. *This is the same claim plaintiff has against her GAL*. See Pl. Br. 22 ("Here, the allegation is that Defendant was acting for the interest of the parent, and against the interest of the minor he was supposed to represent."). Similarly, in a custody proceeding, a GAL's recommendation to enter a joint custody plan agreed-to by the parents will not result in dissatisfied parents, but could easily result in a dissatisfied child who opposed the plan.

Plaintiff does not explain why a GAL should be immune when the claim is made by a parent, or arises from a divorce proceeding, but not immune from the same claim simply because it is asserted by a child, or arises from a proceeding involving the child's assets.

These examples show the fallacy of plaintiff's logic, which overlooks that every recommendation by a GAL has the potential to invite litigation, even in "uncontested" proceedings, meaning there is always a threat from dissatisfied *parties*. Thus, the policy underlying immunity—to allow GALs to perform their duties without the threat of harassing litigation by dissatisfied parties—applies with equal force to claims by parents or children in custody, divorce, probate, or other proceedings involving GALs. See *Peterson v. Molepske*, 580 N.W.2d 289, 296 (Wis. 1998) (from a public policy standpoint, it is better to have immunity to encourage the unbiased and objective GAL "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").

A rule making immunity contingent on the type of proceeding or whether it is the parent or the child that will potentially be dissatisfied with the GAL's action creates a confusing and uncertain standard for GALs, who face dissatisfied parties in all cases. Accordingly, contrary to plaintiff's assertion, courts have found immunity for GALs outside the context of divorce and custody, including in proceedings involving a ward's assets, settlement, and incompetence. See, *e.g.*, *Jones v. Brennan*, 465 F.3d 304, 307-08 (7th Cir. 2006) (GALs immune from allegations of maladministration of estate because they are "agents of the probate court"); *Ditkowsky v. Stern*, No. 14 C 375, 2014 U.S. Dist. LEXIS 54878, *11 (N.D. Ill. Apr. 21, 2014) (GALs in incompetency proceeding immune from claims related to actions within course of their appointed duties); *Estate of Leonard*

v. Swift, 656 N.W.2d 132, 141 (Iowa 2003) (GAL in involuntary conservatorship immune from suit alleging negligent performance of duties); *Dalenko v. Wake County Department of Human Services*, 578 S.E.2d 599, 604 (N.C. Ct. App. 2003) (GAL in incompetence proceeding immune from claim that she failed to advocate for ward's best interest); *McKay v. Owens*, 937 P.2d 1222, 1232 (Id. 1997) (GAL immune from legal malpractice lawsuit related to determination that settlement of personal injury suit was in minor's best interest); *Babbe v. Peterson*, 514 N.W.2d 726, 726 (Iowa 1994) (GAL for incarcerated individual in quiet title lawsuit immune from legal malpractice suit); *Tindell v. Rogosheske*, 421 N.W.2d 340 (Minn. Ct. App. 1988), *aff'd* 428 N.W.2d 386 (Minn. 1988) (GAL immune from suit by former ward alleging he failed to investigate if a settlement of suit for unpaid child support was in ward's best interest).

4. Eliminating immunity for guardians *ad litem* does not ensure that a child's interests are protected.

Plaintiff argues the appellate court's decision "ensure[s] that the interests of children are protected." Pl. Br. 18. As the dissent explained, however, the decision "runs contrary both to sound authority and is impractical in practice in our trial courts," which could lead to "adverse practical consequences." Pet. A 12, 14, ¶¶ 23, 26 (Goldenhersh, J., dissenting). Because the appellate court's finding is contrary to "existent authority and sound reasoning" (*id.* ¶ 26), it is premature to accept plaintiff's assertion that the warnings of "'chilling effects' and other adverse consequences have already been proven incorrect" (Pl. Br. 36-37). Accordingly, children's interest are not necessarily better protected if attorneys are dissuaded from acting as GALs because of uncertain duties and liability, or if the exercise of their judgment in advising the court is clouded by potential

liability. See Pet. A. 15, ¶ 27 (describing potential consequences of majority opinion that "are adverse to the effective administration of justice in such an important area").

5. Maintaining the status quo of immunity for a guardian *ad litem* does not bar plaintiff from meaningful recovery related to the dissipation and misuse of her settlement funds by her mother/guardian of her person and estate.

Plaintiff contends that granting GALs immunity "would strip children of a meaningful remedy when a GAL fails to protect their interest," arguing that plaintiff "cannot get a remedy for her mother's actions in taking money that rightfully belonged to [plaintiff]." Pl. Br. 35. The law, however, provides several remedies plaintiff could have utilized (and did utilize) after reaching the age of majority on August 21, 2010. E 2.

First, after reaching the age of majority, plaintiff acknowledged under oath: "I have received all information regarding Merrill Lynch Account [holding the settlement funds] and have access to same. I have read the foregoing Final Report and hereby waive all notice to which I may be entitled. Further, I am in agreement to closing the estate." E 93. After receiving and reviewing the financial account, plaintiff could have objected to the Final Report based on the allegedly improper prior disbursements (according to plaintiff, at the time of the Final Report, plaintiff had been kicked out of her house by her mother for about eight months). Pl. Br. 11; C 149. Following entry of the final order, plaintiff also could have filed an appeal, as was the procedural posture in many of the cases cited by plaintiff. See, *e.g.*, *Cushing*, 2013 IL App (1st) 103197, ¶ 1; *Will*, 378 Ill. App. 3d at 487; *Ott*, 273 Ill. App. 3d at 564; *Roth*, 52 Ill. App. 3d at 221.

Second, within two years after reaching the age of majority, plaintiff could have moved the trial court to set aside the final order and prior disbursement orders and sought repayment pursuant to section 2-1401 of the Code of Civil Procedure. See 735 ILCS 5/2-

1401(a), (c) (party may obtain relief from final orders and judgments within two years after entry, and "[t]ime during which the person seeking relief is under legal disability or duress or the ground for relief is fraudulently concealed shall be excluded in computing the period of 2 years.")[2]; see also *In re Guardianship of Heinz*, 160 Ill. App. 3d 233 (3d Dist. 1987) (affirming trial court's order that vacated disbursement order entered over two years prior to motion and required reimbursement by former guardian of the estate).

Here, the probate court entered its final order on September 2, 2010. E 94. Plaintiff hired an attorney in 2011. Pl. Br. 10. It is undisputed that plaintiff had learned of her mother's alleged misappropriations by July 18, 2012, the date she filed the lawsuit against her mother. Pet. A 22. Thus, within two years after turning 18, plaintiff could have moved to set aside the probate court orders, which could have avoided the subsequent trial court's hesitation to "second guess or go behind any orders that were entered approving expenditures to [the mother] in [the probate] file." Pet. A 24.

Third, plaintiff could, and did, sue her mother—the appointed guardian of plaintiff's person and estate—for conversion, unjust enrichment, fraudulent misrepresentation, breach of fiduciary duty, and constructive trust. Pet. A 22. Plaintiff incorrectly asserts that she "could not pursue all of her claims against her mother" because the trial court found "the mother immune" from certain claims and held "the damages Plaintiff could recover from her mother for her mother depleting Plaintiff's settlement had to be limited." Pl. Br. 35, 42. The court made no such findings. Instead, plaintiff pursued all of her claims to trial, and a judgment was entered for plaintiff on her

[2] See also *Girman v. County of Cook*, 103 Ill. App. 3d 897, 898 (1st Dist. 1981) (typically limitations period tolled during plaintiff's infancy). *Cf.* 735 ILCS 5/13-212(c) (expressly excluding minority as "legal disability" that tolls medical malpractice limitations period).

conversion claim. Pet. A 22, 25-26. The court ruled against plaintiff on her claims of unjust enrichment, fraudulent misrepresentation, breach of fiduciary duty, and constructive trust because "she did not sustain her burden of proof." Pet. A 25. The court barred some recovery sought by plaintiff, relying on the fact that "[a]ll withdrawals during the time [plaintiff] was a minor child were through orders entered by the probate court." Pet. A 22-23. These orders "allowed estimated expenses and set a future monthly budget to [plaintiff's mother]" (Pet. A 23) and did "not require [plaintiff's mother] to provide receipts or otherwise account for the sums at any point" (Pet. A 23). The court also relied on the order approving the final report, and the fact that, after turning 18, plaintiff reviewed the account and agreed the probate file should be closed. Pet. A 24.

Fourth, if plaintiff believed the trial court erred, she could have filed an appeal.

Accordingly, someone in plaintiff's position is not stripped of meaningful remedies for recovery simply because a GAL is immune from negligence claims. See also Pet. 14-15.

B. No statutory authority is required to find quasi-judicial immunity, and plaintiff's public defender analogy is inapplicable: immunity does not arise from being appointed, but by serving as an arm of the court.

1. Statutory authority is not required for immunity.

Plaintiff suggests a GAL is not entitled to immunity "[i]n the absence of a specific statutory grant of immunity." Pl. Br. 27. See also Am. Br. 2-8 (the legislature has never declared GALs entitled to immunity in the Illinois Marriage and Dissolution of Marriage Act (750 ILCS 5/101 *et seq.*) or the Probate Act of 1975 (755 ILCS 5/1-1 *et seq.*)).

It is immaterial whether immunities are set forth in the Illinois Marriage and Dissolution of Marriage Act or the Probate Act of 1975 because Fahrenkamp was not

appointed under either act.[3] Rather, Fahrenkamp was appointed pursuant to the court's inherent power. *In re Mark W.*, 228 Ill. 2d at 375 ("To fulfill this duty [of protecting the ward], the court's authority is not limited to express statutory terms.*** '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.'" (Emphasis added.)) (quoting *In re Serafin*, 272 Ill. App. 3d 239, 244 (2d Dist. 1995)).

Moreover, immunities arise from both statutes and the common law, and judicial/ quasi-judicial immunity is a common law immunity. See *In re McGarry*, 380 Ill. 359, 365 (1942) (judicial immunity is "as old as the common law"); *Moncelle v. McDade*, 2017 IL App (3d) 160579, ¶ 18 ("The common-law doctrine of judicial immunity was first laid down centuries ago"); *Frank v. Garnati*, 2013 IL App (5th) 120321, ¶ 8 (prosecutorial immunity based on "same considerations that underlie the common-law immunities of judges ***.") (quoting *Imbler v. Pachtman*, 424 U.S. 409, 420 (1976)); *Vlastelica v. Brend*, 2011 IL App (1st) 102587, ¶¶ 21-22 (child representatives shielded by common law judicial immunity); *Davidson*, 2015 IL App (2d) 150171, ¶ 13 (same).

Plaintiff suggests common law immunity is incompatible with *Johnson v. Halloran*, 312 Ill. App. 3d 695 (1st Dist. 2000), *aff'd* 194 Ill. 2d 493 (2000), which found

[3] This is not a dissolution proceeding and the Probate Act of 1975 only provides for appointment of GALs in proceedings (a) to admit a will to probate (755 ILCS 5/6-12); (b) to consent to distribution of a decedent's estate on summary administration (755 ILCS 5/9-8); (c) to appoint a guardian or standby guardian (755 ILCS 5/11-10.1); (d) to adjudicate disability of persons over 18 years old (755 ILCS 5/11a-1 *et seq.*); (e) to provide an accounting for a deceased ward's large estate (755 ILCS 5/13-5); (f) to sell, mortgage, or lease real estate or mineral development (755 ILCS 5/20-5, 20-20); or (g) to sell real estate for less than $2,500 (755 ILCS 5/25-4). It is unclear how the appellate court's ruling should be applied to GALs appointed under each of these statutes.

public defenders were not immune from malpractice actions until the legislature conferred immunity. Pl. Br. 25-26. But *Johnson* addressed sovereign immunity, not judicial immunity. Illinois abolished sovereign immunity in the 1970 Illinois Constitution, thereby requiring that sovereign immunity "be predicated upon a specific statutory enactment." 194 Ill. 2d at 499. The legislature remains free to abolish or modify the common law of quasi-judicial immunity. See, *e.g.*, *Unzicker v. Kraft Food Ingredients Corp.*, 203 Ill. 2d 64, 82-83 (2002) ("The legislature's intent in passing the statute was to modify the common law rule of joint and several liability."). Yet it has not done so despite numerous decisions conferring quasi-judicial immunity to GALs and child representatives, including in *Davidson*, 2015 IL App (2d) 150171; *Brend*, 2011 IL App (1st) 102587; *Cooney*, 583 F.3d at 970; *Scheib v. Grant*, 22 F.3d 149, 157 (7th Cir. 1994); and *Offutt v. Kaplan*, 884 F. Supp. 1179, 1191 (N.D. Ill. 1995).[4]

2. Public defenders are not arms of the court, but attorneys who represent defendants *qua* attorneys.

Plaintiff argues that all attorneys are officers of the court, and because public defenders only have immunity conferred by statute, immunity does not arise by "the mere fact that an attorney was appointed by a court to represent a client." Pl. Br. 24-27.

Fahrenkamp does not contend quasi-judicial immunity should apply to every attorney simply because they are "officers of the court," or to every attorney appointed to represent a client as an attorney. Rather, quasi-judicial immunity arises when an individual is acting as an agent or arm of the court, and GALs "are considered as agents

[4] Requiring immunities to arise only from statutes would undo immunity for GALs and child representatives in divorce and custody proceedings, contrary to *amicus curiae*'s contention that "this Court should not make a sweeping ruling regarding immunity in all cases involving guardians *ad litem* and child representatives." Am. Br. 10.

*** of the court." *Clarke*, 393 Ill. at 430. Fahrenkamp was not appointed as an attorney to represent a client, but as a GAL to assist the court with its duties over the ward. *In re Mark W.*, 228 Ill. 2d at 374 ("A guardian *ad litem* functions as the 'eyes and ears of the court' and not as the ward's attorney."). Furthermore, neither party contends public defenders are agents or "arms of the court" entitled to quasi-judicial immunity. The First District's distinction between public defenders and child representatives also applies to GALs, who have fewer duties than child representatives:

> "A public defender generally must 'abide by a client's decisions concerning the objectives of representation' [citation] and 'follow the lawful instructions of [his] client.' [Citation.] By contrast, a child representative appointed pursuant to section 506(a)(3) is not required to provide independent legal counsel to the child and is not bound by the express wishes of the child, but rather he must advocate what he finds to be in the child's best interests ***." *Brend*, 2011 IL App (1st) 102587, ¶ 36.

C. Quasi-judicial immunity does not violate the certain remedy provision of the Illinois Constitution.

Plaintiff argues that conferring quasi-judicial immunity on Fahrenkamp "is contrary to the goals set forth in Section 12 of the Illinois Constitution, which states, 'Every person shall find a certain remedy in the laws for all injuries and wrongs which he receives to his person, privacy, property, or reputation.'" Pl. Br. 27 (quoting Ill. Const. 1970, art. I, §12). Plaintiff acknowledges that this "certain remedy" provision "would not protect Plaintiff from a clear statutory immunity" (Pl. Br. 27), but fails to explain why a common law immunity should be treated differently. Taking plaintiff's argument to its conclusion would eradicate all common law immunities, including judicial immunity.

Moreover, in a case cited by plaintiff, *Bilyk v. Chicago Transit Auth.*, 125 Ill. 2d 230 (1988), this court explained that immunities do not violate the "certain remedy"

provision when they "simply restrict[] the liability of one category of defendants," "restrict the class of potential defendants from whom a plaintiff may seek a remedy," or "elevat[e] the standard of care for tort liability from ordinary negligence to willful and wanton negligence." *Id.* at 237, 245, 246, 247.[5] These are the precise results of immunity for a GAL's negligence. Further, such immunity does not deprive a plaintiff of remedies related to her mother's dissipation of her settlement funds "because the plaintiff could seek relief from other persons." *Bilyk,* 125 Ill. 2d at 246; see *supra*, § I.A.5.

D. Quasi-judicial immunity applies even if public funds are not affected.

Plaintiff argues: "This Court has refused to extend existing immunities when only private funds are implicated and not public funds (as would be the case for judicial immunity, which shields judges and thereby the public from suit)." Pl. Br. 28 (citing *Bilyk*, 125 Ill. 2d at 238). Plaintiff's reference to *Bilyk* is misleading. The court did not "refuse[] to extend existing immunities." Pl. Br. 28. Instead, it determined that a statute conferring immunity on the CTA for third-party criminal acts (with no immunity to similar private carriers) was constitutional. *Bilyk,* 125 Ill. 2d at 237, 238 (explaining that "provisions which differentiate between municipal and private corporations as to tort liability have been held reasonable and valid classifications under the equal protection and special legislation clauses," and finding rational "the legislature's decision as to how to best allocate the funds available to subsidize public transportation").

Furthermore, the policy for judicial and quasi-judicial immunity is not to protect public funds from liability. Such policy concerns are addressed in the State Lawsuit

[5] See also *id.* at 245 (the "'certain remedy' provision has been interpreted as an expression of political philosophy rather than as a specific mandate").

Immunity Act, which caps tort damages. See 745 ILCS 5/1; 705 ILCS 505/8(d). Rather, judicial and quasi-judicial immunity are meant to promote the efficient, honest, and effective administration of the court system by allowing the court, and arms of the court, to provide candid advice and make decisions without fear that the conduct "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.

II. If Quasi-Judicial Immunity Shields Guardians *Ad Litem* from Negligence Claims, Summary Judgment was Warranted.

A. Plaintiff alleged Fahrenkamp failed to perform his duties with no allegation that he acted beyond the scope of his duties.

Plaintiff claims summary judgment was not proper because of "genuine issues of fact as to whether Fahrenkamp acted with reasonable care." Pl. Br. 35. Plaintiff argues at length about Fahrenkamp's duties upon his GAL appointment, contending his duties included investigating each distribution request and bringing questionable requests to the court's attention. See Pl. Br. 29-31. Regardless of the specific nature of his duties, however, plaintiff's complaint only alleged Fahrenkamp was negligent in performing his duties. C 25-30; see also Pl. Br. 39 ("[T]here was clearly sufficient evidence showing there was a genuine issue of material fact *as to whether Defendant reasonably complied with his duties*." (Emphasis added.)). There are no allegations of willful or wanton conduct, self-dealing, or conduct exceeding these duties. C 25-30.

Accordingly, even if factual disputes exist about whether Fahrenkamp failed to *adequately perform* his duties, absolute or qualified immunity should protect Fahrenkamp from plaintiff's claims, which do not allege acts outside the scope of these duties. See, *e.g.*, *Jones*, 465 F.3d at 308 (GALs absolutely immune unless "they step outside the

scope of their agency and engage in self-dealing"); *Dickman v. Office of the State's Attorney*, No. 16 C 9448, 2018 U.S. Dist. LEXIS 43043, *20 (N.D. Ill. Mar. 16, 2018) (defendant immune because "[p]laintiffs have not alleged that [defendant] committed any wrongdoing outside the course of her duties"); *Pirila v. Jantzen*, No. A03-149, 2003 Minn. App. LEXIS 1157, *3 (Ct. App. Sep. 16, 2003) (unpublished) ("Although we are sympathetic to appellant's frustration with the apparent non-performance of respondents in this case, we disagree that appellant's claims involve acts that fall outside of the scope of the statutory responsibilities of guardians ad litem and hence outside the scope of their absolute immunity."); *Billups v. Scott*, 571 N.W.2d 603, 604 (Neb. 1997) (GAL immune from allegation by ward that GAL neglected to properly investigate, interview, and subpoena witnesses, and otherwise represent ward's best interests).

B. Plaintiff's use of Illinois Supreme Court Rule 907 would strip all guardians *ad litem* and child representatives of immunity.

After spending 43 pages arguing immunity for GALs is limited to custody and divorce proceedings, plaintiff argues GALs in custody, divorce, and probate proceedings have the same duties based on Illinois Supreme Court Rule 907 (eff. Mar. 8, 2016). Pl. Br. 44-47. Fahrenkamp questions whether Rule 907 applies to GALs outside of child custody or allocation of parental responsibilities proceedings. *See* Ill. S. Ct. R. 900(a) (eff. March 8, 2016) (purpose of Rules 900 *et seq*. is to aid in cases affecting custody or allocation of parental responsibilities and "ensure the coordination of custody or allocation of parental responsibilities matters filed under different statutory Acts").

Plaintiff contends Fahrenkamp is subject to the duties set out in Rule 907 based on Rule 900(b)(2), which references article XI of the Probate Act of 1975. Pl. Br. 43-44 (quoting Ill. S. Ct. R. 900(b)(2) (eff. Mar. 8, 2016) ("Rules 900 through 920, except as

stated therein, apply to all child custody or allocation of parental responsibilities proceedings initiated under *** [various statutes], and guardianship matters involving a minor under article XI of the Probate Act of 1975.")).[6]

Article XI of the Probate Act of 1975, however, makes only one reference to the appointment of a GAL: "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*." (Emphases added.) 755 ILCS 5/11-10.1(b). Fahrenkamp was not appointed in a proceeding for the appointment of a guardian, but to assist the court in approving a settlement and subsequent disbursements requested by the court-appointed guardian. Thus, Illinois Supreme Court Rule 907 (eff. Mar. 8, 2016) does not apply here.

Despite the language of the rules and statute discussed above, plaintiff argues that Rule 907 "creates a duty for attorneys representing children in any capacity, including as a guardian *ad litem*," and that this "judicial imposition of duty" "cannot be limited by common law principles." Pl. Br. 47. Even if Rule 907 applies to Fahrenkamp, the rule prescribes duties; it does not eliminate existing common law immunities for claims of negligent performance of those duties. Adopting plaintiff's logic would strip all child representatives and GALs of immunity from claims of negligent performance of duties.

III. It is Appropriate to Apply a Finding of Immunity Retroactively.

Plaintiff argues that, because a new statutory immunity could not be conferred on public defenders retroactively, a finding of immunity for GALs should not be retroactive.

[6] Rule 900(a) suggests the last clause of Rule 900(b)(2) should be read as part of the "initiated under" language in the first clause of the rule.

Pl. Br. 26; see also Am. Br. 11-12 (arguing against retroactive application based on rules for determining if a new statute applies retroactively, which looks to legislative intent).

This court should utilize the test set forth in *Tosado v. Miller*, 188 Ill. 2d 186 (1999), which explained that an opinion is presumed to apply both retroactively and prospectively, and provided three factors to examine: (1) whether the decision establishes a new principle of law, either by overruling clear past precedent on which litigants may have relied or by deciding an issue of first impression whose resolution was not clearly foreshadowed; (2) whether, given the purpose and history of the new rule, its operation will be hindered or promoted by prospective application; and (3) whether retroactive application will produce substantial inequitable results. *Id.* at 196-97. Applying these factors, retroactive application of a finding of immunity is warranted.

First, a finding of immunity for GALs does not overrule any statute or clear past precedent on which litigants may have relied. Rather, it explains the extent of judicial and quasi-judicial immunity arising from centuries-old common law. Further, to the extent such a finding is an issue of first impression, it is foreshadowed by the existent case law. See *Davidson*, 2015 IL App (2d) 150171, ¶ 11, *appeal denied,* 400 Ill. Dec. 385 (Jan. 20, 2016) ("[T]he common law affords defendant absolute immunity from suit related to his court-appointed duties as child representative."); *Brend*, 2011 IL App (1st) 102587, ¶¶ 20-21, *appeal denied,* 356 Ill. Dec. 805 (Nov. 30, 2011) (common law quasi-judicial immunity provides absolute immunity for child representatives); *Heisterkamp*, 2016 IL App (2d) 150229, ¶ 11, *appeal denied,* 406 Ill. Dec. 322 (Sept. 28, 2016) (immunity for court-appointed experts advising on best interests of child); *Cooney*, 583 F.3d at 970 ("Guardians ad litem *** are absolutely immune from liability for damages

when they act at the court's discretion."); *Scheib*, 22 F.3d at 157 ("We believe that the Illinois Supreme Court would find this reasoning persuasive and grant a court-appointed GAL absolute immunity ***."). See also *supra*, § I.B.1 (discussing lack of legislation prohibiting immunity following these judicial decisions); Pet. A 14, ¶ 26 (Goldenhersh, J., dissenting) ("existent authority and sound reasoning" indicates immunity warranted).

Second, the purpose of quasi-judicial immunity is to protect those serving as the "arm of the court" for the purposes of effective judicial administration. This purpose is not served if the immunity applies differently for previously-appointed GALs.

Third, substantial inequity will not result from applying immunity retroactively, because it maintains the status quo and, further, parties injured by a GAL's negligence may seek various relief and remedies. See *supra*, §§ I.A.1, I.A.5.

CONCLUSION

Fahrenkamp respectfully prays that this court reverse the appellate court, affirm the trial court's order entering summary judgment for Defendants, and enter such other or further relief as the court deems just and proper.

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CERTIFICATE OF COMPLIANCE

I certify that this Appellants' Reply Brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, 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

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 January 30, 2019, a copy of the foregoing Appellants' Reply Brief was 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 electronic mail to the following counsel for plaintiff/appellee on January 30, 2019:

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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