The Filing of Court Pleadings by Guardian Ad Litem

In general, attorneys look to the statutes for reference. In Illinois, The Illinois of Marriage and Dissolution of Marriage Act ("the Act" or "IMDMA") is the legislative guide for determining if Guardian Ad Litem (hereinafter also "GAL") may, in fact, file pleadings in Court. Specifically, 750 ILCS 5/506 is entitled representation of child. Section 506(a), entitled "duties" is the starting part for guidance. Three (3) different positions are listed therein. One is attorney for the child who owes "the same duty of undivided loyalty, confidentially, competent representation as are due to an adult client." The second is the child representative who "shall have the same authority and obligation to participate in the litigation as does an attorney for a party and shall possess all the powers of investigation as does a Guardian Ad Litem." The third entity is the Guardian Ad Litem. This person "shall testify or submit a written report to the Court regarding his or her recommendations in accordance with the best interest of the child… may be called as a witness for purposes of cross examination regarding [his or her] report… [and] shall investigate facts of the case and interview the child and the parties." *See 750 ILCS 5/506*. However, nowhere does it say that a Guardian Ad Litem may file any pleadings. Thus, we then look to case law for such reference.

Nichols v Fahrenkamp 2018 IL App. (5th) 160316 was decided July 9, 2018. Fahrenkamp was appointed the Guardian Ad Litem of a minor, Alexis Nichols in a probate guardianship case pursuant to 755 ILCS 5/11-3. When she was a minor, Alexis was injured in an accident and received a settlement. Her mother became the guardian and was in charge of the money. David Fahrenkamp was appointed her Guardian Ad Litem. Alexis received $600,000.00 when she was 11 years old. In 2012, Alexis sued her mother claiming that she had withdrawn $79,507.00 that was not used for the benefit of Alexis. On April 17, 2013, during the trial, the Judge summarily asked, "and where was the GAL in all of this?" As such, Judgment was entered in favor of Alexis and against her mother but not for the full amount taken. She then filed a legal malpractice action against the GAL. Fahrenkamp claimed that he had absolute immunity similar to the Guardian Ad Litem in a divorce case. The Appellate Court disagreed with that and cited an Illinois Supreme Court Opinion entitled *McCarthy v. Cain*, 301 Ill. 534. (1922) for the proposition "that a Guardian Ad Litem should examine the case, determine what the rights are of his wards, what defense their interests demands, and then make such defense as the exercise of care and prudence would dictate. 'The Guardian Ad Litem who perfunctorily files an answer for his ward and then abandons the case fails to comprehend his duties as an officer of the court'." See *McCarthy*, 301 Ill. at 539.

At the time *McCarthy* was decided, Section 506 was not in existence. In dealing with the immunity issue, the *Fahrenkamp Court* clearly distinguished *Heisterkamp v Pacheco*, 2016 IL App (2d) 150229. In that case, Dr. Fran Pacheco was appointed to do a custody evaluation and was sued by the person who did not get the evaluation in his or her favor. The Illinois Appellate Court for the Second District held that if a person is Court appointed and acts within the scope of the 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 cloaked with the same immunity as the Court." *Id*. Since that was not the purpose of the appointment in *Fahrenkamp*, Mr. Fahrenkamp did not have that immunity. A

Petition for Leave to Appear to the Illinois Supreme Court was granted November 28, 2018. However, the question remains if there is a situation in which the Guardian Ad Litem believes that a pleading should be filed, may he or she do so? For example, if a child is obviously physically abused may the GAL file a petition for an order of protection? May the GAL file the motion in the divorce case to restrict the parenting time of a parent? What if the GAL learns that a college fund established for the benefit of the child had been taken by one of the parents? May the GAL file a petition to get the money refunded? The answer does not appear to be statutory. Therefore, we must look to case law. *In Re the Marriage of Apperson* at 215 Ill. App. 3d 378 (1991) provides some legal authority. That case involved a petition to modify custody of two children, "at the close of the evidence, the Guardian Ad Litem for the minors recommended the custody of both minors be placed with petitioner [the father]" The older boy had changed his mind about wanting to live with his father a few days before the trial and said he wanted to live with his mother because she would get him a dog, a basketball hoop, and new gym shoes. "Prior to entry of a written order regarding the change of custody, a motion for reconsideration of the Order was filed on behalf of Timothy by an independent attorney." *Id*. The basis of the motion was that the Guardian Ad Litem could not represent both boys because they had an internal conflict in that one wanted to live with each parent. The trial court said that Timothy had no standing to request a reconsideration of the Order. The mother was arguing that the minors in custody proceedings were similar to minors in abuse proceedings and thus entitled to their own lawyer. "The record shows a Guardian Ad Litem was appointed for both minors as provided by section 506 of the Act… Timothy was a witness in an in chambers hearing before the trial court. The Guardian Ad Litem, as Timothy's representative, was a party to the action and, thus, **the one to present in the trial court a motion for reconsideration of the judgment** (emphasis added)." If the Guardian Ad Litem could have filed a motion for reconsideration, then, s/he had the right to file pleadings similar to an attorney for the child and a child representative even though 750 ILCS 5/506 (a)(2) does not specifically authorize the filing of pleadings. *Griesmeyer v LaRosa* is a First District opinion (December 1998) at 302 Ill. App. 3d 905. The mother, Nathalie, on behalf of her daughter, Ryan, a minor, filed a petition to establish the paternity of Ryan. The defendants were Brian Griesmeyer, her first husband, Ryan being born during that marriage, and her current husband, Thomas LaRosa. Brian filed a motion to dismiss. The trial court denied it. An appeal was taken immediately. The question was "whether or not the fact that a minor child was unrepresented by an attorney and Guardian Ad Litem in an ultimately contested dissolution proceeding in which the wife had originally disputed the husband's paternity, precludes the re-litigation of the issue of parentage in a subsequent action brought by the wife on behalf of said minor child." The Appellate Court found that in the divorce case there was a court-appointed Guardian Ad Litem representing the minor during that dissolution proceeding. Therefore, the Appellate Court reversed the Circuit Court's Order denying the Motion to Dismiss. The trial court cited an Illinois Supreme Court Opinion entitled *Simcox v Simcox*, 131 Ill. 2d 491 (1989). Simcox was a similar case in which a child was born during the marriage. After the divorce, the mother filed a paternity action seeking to declare that her ex-husband was not the father and that someone else was. She filed that on behalf of the minor. The Illinois Supreme Court held that the dissolution judgment did not constitute a bar to the paternity action filed by the minor because the child was not a party "or privy to the dissolution proceedings." The Griesmeyer court said that unlike *Simcox*, in the

divorce case there, the public guardian had been appointed to represent the interest of the minor.

In Re the Parentage of Mayberry, 222 ILL. App. 3d. 1008 (1991) is a Second District Opinion in which a parentage action was settled without an acknowledgment of paternity and the payment of a sum of money but "no monies were allocated or set aside for the minor. Under these circumstances, the court found that 'the minor was neither a party to the prior action nor were her interests adequately represented.'" That is a discussion of the case in *Griesmeyer*. In *Mayberry*, the minor was neither a party to the agreement nor "in her own proper person by a guardian, nor a Guardian Ad Litem." *Id*. In a case entitled *Majidi v Palmer*, 175 Ill. App. 3d. 679 (1988), a putative father filed for declaratory judgment for parentage. The trial court dismissed it. The Appellate Court remanded the matter "for the appointment of a guardian ad litem who was ordered 'to file a petition to determine paternity if she finds that such action is in the best interests of this child'." That is a discussion of *Majidi* in *Griesmeyer*. The *Griesmeyer* court went on to say that "the appointment of a Guardian Ad Litem is not a mere formality… as the representative of a minor, the Guardian Ad Litem is a party to the action… the duty of a Guardian Ad Litem is to call the rights of the minor to the attention of the Court to represent their interest and claim for them such protection as under the law they are entitled." citing *Rom v Gephart*, 30 Ill. App. 2d. 199 (1922). The Court in *Griesmeyer* held "we believe that the re-litigation of the minor's paternity in the parentage petition is barred by the prior, uncontested judgment of dissolution where the minor was represented by a Guardian Ad Litem during the dispute over the minor's paternity." *Id*. It appears that the Appellate Court opinions impose upon Guardians Ad Litem a duty to actually be a representative of and to protect the interest of the minor. Therefore, in order to do that in some cases, they would have to file pleadings which the appellate court permits even though 750 ILCS 5/506 (a)(2), omits that as one of the duties of the GAL.

The Illinois Supreme Court provided some relevant authority *In Re the Marriage of De Bates* at 212 Ill. 2d. 489 (2004). In this case, the mother had custody of the child. In a change of custody petition, the child and the parents went through a psychological evaluation. The Court appointed a psychologist who recommended custody to the father. The Judge had appointed a child representative. The mother attempted to cross-examine that person but was denied that by the trial Court. She then argued that 5/506 was unconstitutional because it deprived her of her due process right to cross-examine a witness. The Appellate Court held that the mother had presented no evidence to rebut the report and therefore the inability to cross-examine the child representative was a harmless error. The statute was stricken as unconstitutional, as applied, and a change of custody to the father was affirmed. Beginning at headnote 6, the Illinois Supreme Court discusses due process and the private interest involved in this case being the right of parents to companionship, care, custody, and management of their children. That is a fundamental liberty interest protected under the constitution and thus Norma, the mother, is entitled to cross-examine the child representative who is empowered to make a recommendation after reviewing the facts and circumstances of the case. The child representative is also to conduct his own investigation. Norma should have been permitted to cross-examine the witness about what he observed, his training, his experience, the contacts between him and the parties and the child, the existence of any

bias, or the tendency to see the favor of one gender of parent over the other. Thus, the statute is unconstitutional as applied to Norma. However, the Court determined that the failure to cross-examine in light of all the other witnesses and all the other evidence was harmless error and would not have changed the result. Custody wound up with the father.

In conclusion, Guardians Ad Litem do, in fact, have the right and the duty to file pleadings to protect the interest of the child (also "ward"). The Guardian Ad Litem is frequently described as the "eyes and ears" of the Court. Therefore, it is important for the GAL to bring something attention of the Court is the parents do not.