

# Trial Briefs

The newsletter of the Illinois State Bar Association's Section on Civil Practice & Procedure

## Orders of Protection Cases Often Involve Surprises

BY GARY L. SCHLESINGER & RACHAEL BERNAL

The general rule of pleading is that one must state sufficient facts to support a cause of action. Illinois is a fact pleading state, not a notice pleading state.<sup>1</sup>

The form complaint in an order of protection case, utilized by everyone in Lake County and probably throughout the state, fails to comply with 735 ILCS 5/2-603(b). "Each separate cause of action upon which a separate recovery might be had shall be stated in a separate count or counterclaim, as the case may be and each count, counterclaim, defense or reply,

shall be separately pleaded, designated and numbered, and each shall be divided into paragraphs numbered consecutively, each paragraph containing, as nearly as may be, a separate allegation."<sup>2</sup>

The form complaint is not divided into counts. There are prayers for relief throughout the document interspersed with various allegations all preprinted and marked by checkmarks in little boxes except for the paragraph that sets forth the specifics of what the Defendant allegedly

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## Discovery and the Circle of Trust Knowledge

BY JUDGE EUGENE DOHERTY

The purpose of discovery is the transmission of knowledge from one party to the other. But what constitutes "knowledge" of information sufficient to trigger the duty to disclose? As is discussed below, the knowledge imputed to a litigant can come from a wide circle ... we'll call it the "Circle of Knowledge." Whether known by the litigant or not, information known within his or her Circle of Knowledge must be disclosed.

**Individual's knowledge.** It is fairly

obvious that an individual responding to discovery is expected to disclose what he or she knows. Supreme Court Rule 213 in relation to interrogatories provides that answers must be "sworn." In the context of affidavits, we are used to treating verification as requiring personal knowledge of the affiant.<sup>1</sup> The Supreme Court's form interrogatories provides a verification stating that the answers are "true, correct and complete to the best of his/her knowledge and

belief." This language does not appear to limit to disclosure to the party's *personal* knowledge, as might be the case with an affidavit.

**Attorney's knowledge.** Knowledge in the discovery context extends explicitly to things known by the party's attorney. It has long been true that an "interrogatory is directed to the actual knowledge and information available to both counsel and litigant."<sup>2</sup> The attorney is, then,

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did. That part is prepared by the Petitioner, usually with the help of the people in room D-100, now on the fifth floor of the new tower court building, and sometimes with the help of a lawyer.

Frequently, there is a catch-all paragraph in the narrative about all the bad things that the Defendant did going back months or years. Sometimes, there is no such paragraph and the Petitioner attempts to testify about that. Defendant's counsel, being up to date on the rules of evidence and the Code of Civil Procedure, objects to the new narrative material presented orally in testimony that is not in the petition. That objection is brought pursuant to the belief that one may not bring in evidence any allegations outside the four corners of the petition.<sup>3</sup>

However, that may not be the law. The Illinois Supreme Court in March 1991 in *Gonzalez v. Thorek Hosp. & Med. Ctr.*, 143 Ill. 2d 28, held "that a complaint is framed once facts are pled that that reasonably inform the opposing party of the nature of the claim or defense which he is called upon to counter, no matter how inartfully or imprecisely that information is presented." Therefore, may one testify to facts that are not alleged in the complaint?

The second district decided *Sandberg v. Brian* on July 18, 2018. It is found at 2018 IL App (2d) 180082. In that case, the parties were never married but they did have a son in common who was born August 1, 2005. The mother obtained an ex-parte emergency order of protection against the father. At the hearing to extend that 21-day order into a plenary order of protection, the mother testified to the allegations contained in her petition and then to some items that were not in her petition. The plenary order of protection was entered. The father did a motion to reconsider. That was denied. Then the father appealed.

In paragraph 18 of the opinion, the court acknowledged that proceedings under the Domestic Violence Act are governed by the Code of Civil Procedure. That quote recognizes that no complaint is

bad in substance that reasonably informs the Defendant of the nature of the claim that he or she is called on to meet.<sup>4</sup>

In paragraph 19 of the opinion, the court quotes section 214 of the Domestic Violence Act entitled "Order of Protection; Remedies." The appellate court held in paragraph 20 that the Petitioner "has the burden to establish by a preponderance of the evidence that abuse has occurred."<sup>5</sup>

In paragraph 21 of the opinion, the court cites some of the allegations in the petition for the order of protection in which the mother alleged that the child was terrified of the father. "It is clear that the allegations in the petition focused specifically on J.B.'s fear of Brian. Therefore, those allegations were specific enough to reasonably inform Brian of the nature of the claim against him."<sup>6</sup>

In paragraph 22 of the petition, the court refers to section 214 of the Domestic Violence Act. Brian specifically objected to testimony that he had pushed the son and hit him in the head with a cell phone which was nowhere alleged. In paragraph 22, the court wrote, because section 214 of the Domestic Violence Act requires that:

"the trial court shall consider the nature, frequency, severity, pattern, and consequences of the respondent's past abuse of the petitioner or any family or household member as well as the danger that any minor child will be abused or neglected. Therefore, the trial court was not only allowed to consider the evidence that Brian had recently pushed J.B. and hit him in the head with a cell phone, it was required to do so. For these reasons, we find that the trial court did not err in allowing Jessica to testify about allegations that were not contained in her petition for an emergency order of protection. *Citation omitted.*"<sup>7</sup>

Unless and until the Defendant was to do discovery prior to the hearing to extend the emergency order of protection into a

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plenary, the Defendant would not know what the testimony would be and therefore is at a grave disadvantage in attempting to fashion a defense and gather his or her own evidence and witnesses.

Therefore, the better practice may be to agree to an extension of the emergency and do discovery before having the hearing on the plenary. Either by interrogatories or deposition the Petitioner could be asked to specify everything that he or she will testify to at the hearing. However, if the discovery does not list everything and the Petitioner attempts to testify to something not provided

in discovery, given paragraph 22 of the Sandberg opinion, I suspect the trial court will have to let that testimony in regardless.

It is going to be exceedingly easy now for Respondents in order of protection cases to be blindsided or have to defend things that are not specified in the petition if those items testified to fall within section 214 of the Domestic Violence Act. ■

1. *People ex rel. Fahner v. Carriage Way West, Inc.*, 430 N.E.2d 1005, 1008-09 (Ill. 1981); see also *Hadley v. Doe*, 34 N.E.3d 549, 556 (Ill. 2015).
2. 735 ILCS 5/2-603.
3. 735 ILCS 5/2-603; 735 ILCS 5/2-612; see also *Gonzalez v. Thorek Hosp. & Med. Ctr.*, 143 Ill. 2d 28, 36 (Ill. 1991).
4. 735 ILCS 5/2-612 (b) and *Chandler v. Illinois Central Railroad Company*, 207 Ill. 2d 331, at 348 (2003).
5. *Best v. Best*, 223 Ill. 2d 342, 348 (2006).” Sandberg v. Brian, 2018 IL App (2d) 180082, ¶ 20 (Ill. App. Ct. 2nd Dist. 2018).
6. *Sandberg v. Brian*, 2018 IL App (2d) 180082 at ¶ 21.
7. *Sandberg*, at ¶ 22.

## Discovery and the Circle of Trust Knowledge

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squarely within the Circle of Knowledge. When information known to the attorney is disclosed in a party’s discovery responses, the party will be verifying the completeness of a response which extends to matters which may not be personally known to the litigant. Verification of information which is personally *unknown* to the signer makes verification in the discovery context much different than it is in most others.

**Corporate knowledge.** As we know, a corporation is a fictional entity, and as part of that fiction it is treated in many respects as a person; however, a real person must act for the corporation. The “real person” who verifies discovery answers for a corporation is “an officer, partner, or agent, who shall furnish such information as is available to the party.”<sup>3</sup> The individual answer on behalf of a corporate entity “must supply the information which is imputedly available to the corporation.”<sup>4</sup> An agent answering discovery on behalf of a corporation “must take reasonable steps to search the ‘corporate memory’ by: (1) investigating the contents of the corporation’s records, and (2) trying to ascertain the knowledge of other corporate agents.”<sup>5</sup> In other words, the responding agent must search throughout the Circle of Knowledge for responsive information.

Supreme Court Rule 214, governing

requests for production of documents or tangible things, is consistent with this approach. “A party may be required to produce documents which are in the possession of third parties, where he has custody or control of those documents.”<sup>6</sup> Furthermore, Rule 214 makes explicit that a “A party who has knowledge of documents, objects or tangible things responsive to a previously served request must disclose that information to the requesting party whether or not the actual documents, objects or tangible things are in the possession of the responding party.”

Perhaps the most extensive reach of the Circle of Knowledge is in regard to requests to admit the necessity and sufficiency of medical treatment and related bills. In *Szczeblewski v. Gossett*, 342 Ill. App. 3d 344, 795 N.E.2d 368 (5th Dist. 2003), the plaintiff submitted requests to admit regarding medical services to the defendant, asking him to admit their causal connection to the occurrence, their necessity, and the reasonableness of their cost. The defendant responded that he lacked sufficient knowledge to respond, suggesting that the answer required him to give a “medical opinion” he was not qualified to give.<sup>7</sup> The appellate court held that the defendant’s “knowledge” extended to (unnamed and presumed) “agents” within his liability

insurance company:

To ensure that the laudable purpose of Rule 216 is accomplished, a party has a good-faith obligation to make a reasonable effort to secure answers to requests to admit from persons and documents within the responding party’s reasonable control. In this case that would include the defendant’s attorney and insurance company investigators or representatives. We believe that this finding reflects the long-accepted practice of trial attorneys in the courts of Illinois.<sup>8</sup>

These cases show perhaps the widest Circle of Knowledge. It extends beyond the individual client to the attorney; beyond the attorney to the insurance representative; and beyond the insurance representative to the far reaches of the insurance company, where there may be persons with the ability to answer.

**Extended knowledge is necessary, but not sufficient.** The foregoing shows that, in the interest of full and fair disclosure, the scope of knowledge that is subject to discovery and disclosure goes well beyond the mind of an individual party. What about the situation in which the individual party is unavailable to sign the discovery response, but there is material information known by someone in the Circle of Knowledge? Is that information still to be disclosed? The answer

is apparently no—because only the party may sign the response:

There may be situations where counsel may be compelled to enter an appearance despite the inability to locate a client. For example, an insurer may have a duty to defend its insured and would be potentially at risk of liability for failing to comply with its duty to defend its insured against a default. This situation would leave counsel hired by the insurer in a difficult position with respect to discovery when its insured cannot be located. Nevertheless, these policy issues are properly addressed to the consideration of the supreme court. We must abide by the rules as they are currently written.<sup>9</sup>

This decision is entirely consistent with Supreme Court Rules, which require responses to be signed by the party. Still, in an area of the law which interprets the burden of disclosure broadly, these cases reflect a very narrow interpretation of the

capacity to make disclosure. The contrast is stark: persons far removed from the party must contribute their knowledge to the party's response, but that information cannot be effectively disclosed (or a request to admit answered) by anyone but the party. This can lead to admissions being made by default even where information is known which might bring a matter into contention. A more reasoned approach might be to give trial courts the ability to excuse the party's personal verification in an appropriate case, but for now this is where the law has settled. The Circle of Knowledge means everything to the response, but nothing to the signature requirement. ■

1. See, e.g., S. Ct. R. 191.
2. *Smith v. Realcoa Construction Co., Inc.*, 13 Ill. App. 3d 254, 259, 300 N.E.2d 855, 859 (1st Dist. 1973).
3. S. Ct. R. 213(d).
4. *Campen v. Executive House Hotel, Inc.*, 105 Ill. App. 3d 576, 587, 434 N.E.2d 511, 518 (1st Dist. 1982).
5. *Id.*
6. *Central National Bank in Chicago v. Baime*, 112 Ill. App. 3d 664, 669, 445 N.E.2d 1179, 1183 (1st Dist. 1982).
7. *Szczeblewski v. Gossett*, 342 Ill.App.3d at 346-47, 795 N.E.2d at 370.
8. *Szczeblewski v. Gossett*, 342 Ill.App.3d at 349, 795 N.E.2d at 372; see also *Oelze v. Score Sports Venture, LLC*, 401 Ill. App. 3d 110, 126, 927 N.E.2d 137, 151 (1st Dist. 2010).
9. *Brookbank v. Olson*, 389 Ill. App. 3d 683, 689, 907 N.E.2d 426, 431 (1st Dist. 2009); see also *Holzmilller v. Clark Equipment Co.*, 100 Ill. App. 3d 687, 689-90, 427 N.E.2d 342, 344 (1st Dist. 1981) (same rule applies to interrogatory responses).

# Illinois Supreme Court Rules Delayed Lakefront Trail Repair by Park District Does Not Rise to Willful and Wanton Misconduct

BY NDREA L. KMAK & KIMBERLY A. DAVIS

The Illinois Supreme Court recently issued a ruling in *Cohen v. The Chicago Park District*<sup>2</sup> that examined the application of certain sections of the Tort Immunity Act<sup>3</sup> ("Act") in an injury case. Generally, the purpose of this Act is to protect local public entities and employees from tort liability arising from the operation of government.<sup>4</sup>

In this case, the court focused on two sections of the Tort Immunity Act. The first, section 3-107(a), provides blanket immunity for certain roadways. The statute states:

Neither a local public entity nor a public employee is liable for an injury caused by a condition of: (a)

Any road which provides access to fishing, hunting, or primitive camping, recreational, or scenic areas and which is not a (1) city, town or village street (2) county, state or federal highway or (3) a township or other road district highway.<sup>4</sup>

The second section the court examined was 3-106. This provision states:

Neither a local public entity nor a public employee is liable for an injury where the liability is based on the existence of a condition of any public property intended or permitted to be used for recreational

purposes, including but not limited to parks, playgrounds, open areas, buildings or other enclosed recreational facilities, unless such local entity or public employee is guilty of willful and wanton conduct<sup>5</sup> proximately causing such injury.<sup>6</sup>

On July 7, 2013, Plaintiff was riding his bike on the Lakefront Trail<sup>7</sup> in Chicago, Illinois. He approached a pedestrian on the trail and intended to pass him on the left. Plaintiff moved his bike towards the middle of the path to pass the pedestrian, the front tire of his bike caught on a crack in the concrete. Plaintiff fell to the ground and

injured his shoulder. The sidewalk crack was about three to four inches at its widest, two to three inches deep, and ran in the direction of travel along the path for about three to four feet.<sup>8</sup>

Plaintiff gathered himself and rode his bike home. He did not notify the defendant of the accident when it occurred. The following week, he rode his bike along the same stretch of path and noticed the crack had been repaired.<sup>9</sup>

The Chicago Park District is the owner of the Lakefront Trail, and is responsible for its maintenance. It conducts an annual inspection every spring, where it identifies repairs to be made and requests bids from a list of contractors to perform the work. The Park District was notified of the crack at issue in this case as early as May 2013.<sup>10</sup> An employee inspected the crack, but did not take steps to immediately repair it with in-house employees, nor did the Park District barricade the path or otherwise mark the crack for warning to users. On June 10, 2013, the annual request for repair bids was circulated to the Park District's contractors, and on July 10, 2013, the crack in the pavement was repaired.

The Park District moved for summary judgment against Plaintiff, alleging that it was afforded immunity from this suit under sections 3-107 and 3-106 of the Act. The circuit court agreed and granted the motion.<sup>11</sup>

The appellate court reversed. The first district found that section 3-107 of the act "was intended only to apply to roads providing access to primitive, undeveloped recreational areas,"<sup>12</sup> and did not apply to the Lakefront Trail. That is, even if the Lakefront Trail was considered an "access road," it did not provide access to a "primitive" recreational or scenic area" so section 3-107 did not apply.<sup>13</sup> Therefore, the Park District should not be afforded immunity under section 3-107 of the Act. The first district also found that the circuit court's decision to grant the Park District's motion for summary judgment pursuant to Section 3-106 was inappropriate, because it could not be said that the Park District's conduct was not willful and wanton as a matter of law.

In reviewing the circuit court's grant of

summary judgment *de novo*, the court first focused on the application of section 3-107. It acknowledged that section 3-107 does not define the word "road," and adopted the Highway Code's definition of "road" as a public way that permits travel by devices such as motorcycles, cars, and trucks.<sup>14</sup> In doing so, the court reasoned that the Highway Code was enacted prior to the Tort Immunity Act, the statutes use same or similar terminology throughout, and that comparison of the statutes suggests that the legislature intended for the Highway Code definitions to apply to this Act.<sup>15</sup> In the definition of "road" in this case, the Lakefront Trail was therefore not a "road" within the meaning of section 3-107(a), because it was not open to public, motorized traffic, and the Park District was not afforded immunity under this Section.

The court also reviewed the lower courts' application of Section 3-106 to the Lakefront Trail. Specifically, the appellate court assessed whether the Park District's conduct was willful or wanton,<sup>16</sup> using two cases to aid in its analysis. It acknowledged that while the question of willful and wanton conduct is generally a question for the jury, discovery in this case had been completed and the information contained in pleadings and affidavits would have constituted all of the evidence before the court.<sup>17</sup>

In the first of two cases, *Lester v. Chicago Park District*, plaintiff alleged he was injured when the Park District "insufficiently and without proper materials" filled ruts and holes in a softball field.<sup>18</sup> Plaintiff claimed that said conduct was willful and wanton on the part of the Park District. The court in *Lester* disagreed, finding that while the Park District may have been negligent in the repair of the ruts and holes, it nonetheless took affirmative steps to try to repair the field.<sup>19</sup> This conduct did not rise to the level of willful and wanton negligence, and the Park District was protected by section 3-106.

In *Palmer v. Chicago Park District*, plaintiff alleged he fractured his leg when his foot caught in the loop of a metal fence that had fallen at a park, while trying to stop his child from running into the street.<sup>20</sup> The fence was thirty feet long, three feet high, and had been lying along the edge of the

play lot for three months.<sup>21</sup> The first district emphasized the obvious and extraordinary danger posed by the long, fallen, metal fence, and concluded that plaintiff stated a cause of action for willful and wanton misconduct on the part of the Park District, who took "no corrective action" to repair the fence or warn patrons about it.<sup>22</sup>

After analyzing this precedent, the supreme court here determined that the facts presented in this Lakefront Trail case were more like those presented in *Lester*. It noted that in analyzing whether conduct is willful and wanton, the "nature of the danger" must also be considered.<sup>23</sup> While the risk of injury from a crack on the path was real, it did not rise to the level of an extraordinary risk such as a long metal fence lying on the ground at a park.<sup>24</sup>

Further, unlike the *Palmer* case, the Park District took corrective measures in the instant case to repair the crack in the pavement, without unusual delay.<sup>25</sup> Finally, the court recognized that while the Park District could have done more to notify patrons of the crack in the pavement or repair it faster using in-house employees, considering the actions that the Park District did take to be "willful and wanton" conduct would "render that standard synonymous with ordinary negligence."<sup>26</sup> Accordingly, the supreme court reversed the first district and found that the circuit court's entry of summary judgment in favor of the Park District was proper.

Justice Kilbride filed a dissenting opinion. He agreed with the majority that Section 3-107(a) did not afford the Park District absolute immunity.<sup>27</sup> However, he opined that the issue of whether its actions were willful and wanton under section 3-106 of the Act should have been an issue of fact left to a jury.<sup>28</sup> Justice Kilbride reasoned that the parties disputed the exact date on which the Park District learned of the crack, but agreed that it was no earlier than May 2013.<sup>29</sup> He also reasoned that summary judgment is inappropriate where, as in this case, jurors could draw divergent inferences from undisputed facts, or differ on the weight to be given to the relevant factors of a legal standard.<sup>30</sup>

The Tort Immunity Act is important for

both sides of a claim or lawsuit to consider. As evidenced in the Illinois Supreme Court's ruling here, the applicability of the different sections to a case may not be clear when reading the plain language of the Act. This decision further cautions local public entities about potential liability exposures that do not fall within the protections of the Act, and informs Plaintiffs of certain nuanced scenarios where liability could be assessed against a local entity. ■

1. 2017 IL 121800.
2. 745 ILCS 10/.
3. 745 ILCS 10/1-101.1(a).
4. 745 ILCS 10/3-107(a).
5. Willful and wanton conduct in this Section is defined as "a course of action which shows an actual or deliberate intention to cause harm or which, if not intentional, shows an utter indifference to or conscious disregard for the safety of others or their property." 745 ILCS 10/1-210.
6. 745 ILCS 10/3-106.
7. 2017 IL 121800 at ¶ 9. See also *Corbett v. County of Lake*, 2017 IL 121536, ¶ 21 (describing such a path as a "shared use trail" in that it is physically separated from the roadway and intended for use by bicycles and other non-motorized forms of transportation, including pedestrians, disabled persons in wheelchairs, and in-line skaters).
8. *Id.* at ¶ 7.
9. *Id.* at ¶ 8.
10. *Id.* at ¶ 11.
11. *Id.* at ¶ 13.
12. 2016 IL App (1st) 152889, ¶40.
13. 2017 IL 121800 at ¶ 20.

14. *Id.* at ¶ 21.
15. *Id.* at ¶ 22.
16. See 745 ILCS 10/1-120 (defining willful and wanton conduct as a course of action which shows an actual or deliberate intention to cause harm or which, if not intentional, shows an utter indifference to or conscious disregard for the safety of others or their property).
17. *Fooden v. Board of Governors of State Colleges and Universities*, 48 Ill.2d 580, 587 (1971).
18. 159 Ill. App. 3d 1054, 1056 (1st Dist. 1987).
19. *Id.* at 1060.
20. 277 Ill. App. 3d 282, 287 (1st Dist. 1995).
21. *Id.* at 284.
22. *Id.* at 288-89.
23. 2017 IL 121800 at ¶ 31.
24. *Id.*
25. *Id.* at ¶ 32.
26. *Id.* at ¶ 33.
27. *Id.* at ¶ 40.
28. *Id.*
29. *Id.* at ¶ 43.
30. *Seymour v. Collins*, 2015 IL 118432, ¶42.

# May a Guardian Ad Litem Under the Illinois Marriage and Dissolution of Marriage Act File Pleadings?

BY GARY L. SCHLESINGER

750 ILCS 5/506 is entitled representation of child. Subparagraph (a) is titled "Duties." Three different positions are listed. 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, number 2 in the statute, is the guardian ad litem. He or she "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." Nowhere does it say that this guardian ad litem may file any pleadings.

*Nichols v. Fahrenkamp*, 2018 IL App. (5<sup>th</sup>) 160316, is a case 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 when she was 11 years old. In 2012, Alexis sued her mother claiming that she had withdrawn \$79,507 that was not used for the benefit of Alexis. On April 17, 2013, during the trial, the judge asked, "And where was the GAL in all of this?"

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."

Does what the Illinois Supreme Court said in *McCarthy*, apply to the guardian ad litem appointed pursuant to 5/506? At the time *McCarthy* was decided, 1922, 5/506 did not exist.

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.” Since that was not the purpose of the appointment in *Fahrenkamp*, Mr. *Fahrenkamp* did not have that immunity. A petition for leave to appeal to the Illinois Supreme Court was granted November 28, 2018. Ultimately, the supreme court did reverse the appellate court citing the *Heistercamp* case and holding that the GAL in probate court also has absolute immunity.

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? What could Mr. *Fahrenkamp* file had it decided to?

The answer does not appear to be statutory. Therefore, we must go to case law.

*In re the Marriage of Apperson* is at 215 Ill. App. 3d 378 (1991). 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 Reebok 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.” 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, he or she 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 from 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.”

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 cite *Rom v. Gephart*, 30 Ill. App. 2d. 199 (1922), saying 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.”

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."

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.

That brings us to the case of *In re the Marriage of De Bates* decided by the Illinois Supreme Court in 2004 and found at 212 Ill. 2d. 489.

In that 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.

My conclusion is that contrary to the practice in Lake County Illinois, guardians ad litem do have the right and the duty to file pleadings to protect the interest of the ward. The guardian ad litem is frequently described as the eyes and ears of the court. However, going further, if something should be brought to the attention of the court and neither of the parents does do so, it then becomes incumbent and mandatory for the GAL to do so.

I need to give great thanks in developing this article to Beth McCormick of the Beermann Firm in Chicago who started all of this with an article in the Chicago Daily Law Bulletin in the summer of 2015.■