

complaint as to defendants Richard Tognarelli and Bonnie Levo, both in their individual and corporate capacities. On March 17, 2011, the trial court (Judge Stephen P. McGlynn) granted a motion for summary judgment in favor of defendant Daniel J. Cody. The arguments of all three of these defendants centered primarily on a lack of duty owed to Robert L. Goodman III.

¶ 3

FACTS

¶ 4

Probate Court Case

¶ 5 Robert L. Goodman, Jr., the father of the minor in this case, died on July 2, 1996. His life was insured, and his son was the beneficiary of those policies. At the time of his death, Robert L. Goodman, Jr., and Brenda Goodman, the minor's mother, were divorced. Brenda Goodman lived in Tuscaloosa, Alabama, while the decedent lived in St. Clair County. Both parents maintained joint custody of the minor child, Robert L. Goodman III. The decedent's last will, which was drafted after the divorce, expressed his wishes that his parents, Robert L. Goodman, Sr., and Willie O. Goodman, be appointed as guardian and trustee of the minor child. In the will, Robert L. Goodman, Jr., made it clear that he did not want his ex-wife, Brenda, to be placed in charge of his estate for the benefit of their minor child.

¶ 6 In keeping with their son's wishes, the decedent's parents hired attorney Richard Tognarelli and his law firm to pursue the establishment of a trust for their grandson over which they proposed to be the trustees. Specifically, the grandparents filed a petition for guardianship of the minor—both of the person and of the estate—on August 23, 1996. In the petition, the grandparents alleged that they had custody of the minor. Brenda Goodman protested this request and asked that their motion be dismissed.

¶ 7 It appears from probate estate documents included in the record on appeal that a guardian *ad litem* was appointed by the trial court on October 7, 1996. That guardian is attorney Dennis J. Watkins. Watkins testified that he had minimal experience in guardian

ad litem matters and that he was approached by attorney Tognarelli in the halls of the courthouse and asked if he would be interested in taking on this task. No one inquired into Watkins's experience in these matters before his appointment as the guardian *ad litem* for Robert L. Goodman III.

¶ 8 A hearing was held on the grandparents' guardianship petition on November 20, 1996. Brenda was represented by an attorney with the Land of Lincoln Legal Assistance Foundation. The trial court agreed with Brenda that she was able to act in a trusted capacity, apparently because she had been granted joint legal custody of the minor child. The court dismissed the petition for guardianship of the person filed by the grandparents, but reserved ruling on their petition for guardianship of the estate, pending additional investigation into how much money was at stake. The court additionally ordered that Brenda Goodman "shall continue to make the day to day financial decisions concerning Robert Goodman, III pending further order of the Court." The trial court also ordered the guardian *ad litem*, Dennis J. Watkins, to gather the assets of the estate.

¶ 9 After the denial of the grandparents' petition to be established as the guardians of the person on behalf of the minor, Richard Tognarelli continued to be listed in the probate court file as an attorney of record in the case. He attended hearings and was sent copies of pleadings filed by the parties and orders filed by the court. We do not know why Tognarelli continued to monitor the case, nor do we know if the petition for guardianship of the minor's estate remained viable. From testimony of the guardian *ad litem* (GAL) and attorney Daniel J. Cody, it is believed that he reviewed the trust document that was ultimately approved by the trial court. It would be logical that Tognarelli drafted the original trust document, and it is alleged in a pleading filed by the GAL that Tognarelli and the GAL cowrote the original trust document. However, Daniel J. Cody, the attorney who later represented Brenda Goodman in this matter, testified that he, Cody, drafted both the original version and the

amended version that was ultimately executed.

¶ 10 The estate assets were from two sources. At the time of his death, Robert L. Goodman, Jr.'s life was insured by Ohio State Life Insurance Co. for \$108,739.70. He also had death benefits payable by FCE Health and Welfare Fund in the amount of \$50,000. The only beneficiary of both policies of insurance was the minor son.

¶ 11 On February 12, 1997, guardian *ad litem* Dennis J. Watkins filed a petition seeking to determine the allocation of the funds. Watkins alleged that he and Richard Tognarelli prepared the trust agreement for Brenda Goodman's approval. Brenda Goodman objected to the proposed trust and refused to sign the trust. Additionally, he alleged that Brenda was making monetary demands related to the anticipated care of her minor child. Dennis J. Watkins's petition sought direction from the court as to what amount of money should be given to Brenda Goodman.

¶ 12 Brenda Goodman retained counsel—attorney Daniel J. Cody—to represent her in this matter. Attorney Cody entered his appearance on February 18, 1997. Brenda Goodman's response to the petition to determine the allocation of funds outlined the joint custody arrangement that was in effect at the time the minor's father died. With the parents sharing joint custody of the minor, the minor split his residential time between the parents. The minor was living with his father at the time of his death. Brenda proposed that the court enter an order granting her money to buy a home in Alabama, and also granting her a monthly stipend of \$1,000 to be used for the minor's ongoing care. Given these demands, the primary purpose of Daniel J. Cody's involvement in the case was to draft a trust to obtain custody and control of the minor's financial interests on behalf of Brenda Goodman, as the minor's legal guardian.

¶ 13 The probate court never officially appointed a guardian of the person and/or of the estate of Robert L. Goodman III.

¶ 14 On February 18, 1997, the court entered an order outlining additional terms to be included in the trust document. The court did not utilize the first draft of the document but did find that "the current Trust Agreement proposed to the Court is acceptable." In addition to the terms in the original document, the court ordered the addition of provisions pursuant to which Brenda Goodman would receive \$5,000 plus closing costs for a down payment on a home and either \$1,000 per month or the amount of monthly investment interest, whichever amount was less. The court required the addition of a provision that each time the minor exercised summer visitation in Illinois, his grandparents would receive \$300. The court ordered the insurance companies to turn the life insurance proceeds over to the guardian *ad litem* and ordered the GAL to immediately invest those funds. Finally, the court stated that the "Trust dispersals may be reviewed at the end of two years."

¶ 15 Administration of the Trust

¶ 16 On March 17, 1997, the trust agreement was filed with the probate court. Dated March 13, 1997, the trust document incorporated the changes required by the court. Both versions of the trust granted the trustee broad and sole discretion in disbursing monies for the best interests of the minor over and above the monthly stipend granted to his mother. The trustee, Dennis J. Watkins, was to be compensated for his actual time and labor expended in the administration of the trust at the hourly rate of \$125. The agreement was signed by Brenda Goodman as trustor and Dennis J. Watkins as trustee.

¶ 17 The investment of the funds occurred on March 18, 1997. The amount invested on that date was \$147,370.87. Apparently, of that total, \$126,000 was to be invested in three different funds through A.G. Edwards. The anticipated annual income from this investment was listed as \$5,131, far less than the monthly \$1,000 established by the court as the maximum. The balance of the money was invested in a one-year certificate of deposit and in a money market type of checking account.

¶ 18 After the passage of several years, an Alabama attorney representing Brenda Goodman sought information from the GAL. Dennis J. Watkins responded in writing and referenced a letter that he sent the attorney in 2004 outlining the outgoing funds from the minor's trust. While the 2004 letter is not part of the record, the record contains what appears to be a printout of what funds were disbursed from A.G. Edwards. The following represents the amounts paid to Brenda Goodman from the A.G. Edwards investment account:

1997	\$ 1,000.00
1998	16,718.75
1999	24,520.00
2000	23,300.00
2001	23,000.00
2002	24,500.00
2003	21,684.70
2004 (through 8/04)	<u>10,500.00</u>
TOTAL	\$145,223.45

By a second letter to the Alabama attorney, dated March 17, 2005, Dennis J. Watkins stated that A.G. Edwards had paid Brenda Goodman her monthly stipend in October, November, and December of 2004, and in January of 2005—an additional \$4,000. Dennis reported that he had been paid attorney fees totaling \$26,693.75 from the A.G. Edwards accounts and the trust checking account from the fall of 1996 until the date of this letter—which averages \$3,559.16 per year. He detailed payments to Brenda Goodman out of the trust checking account that apparently were not included in the amounts paid out of the A.G. Edwards account:

1996	\$ 500.00 (Christmas expenses)
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1997	13,294.00 (monthly \$1,000 plus real estate costs) ¹
1998	1,000.00 (money to replace stolen money)
1999	650.00 (money to replace stolen money)
2000	6,500.00 (vacation, Christmas, school clothes)
2001	0.00
2002	800.00 (vacation and travel expenses)
2003	0.00
2004	3,000.00 (Christmas)
2005	<u>1,000.00</u> (monthly stipend)
TOTAL	\$26,744.00

Additionally, Dennis J. Watkins reported that he had removed money from the A.G. Edwards accounts over the years to pay the minor's grandparents \$1,800 (presumably the \$300 ordered by the court each time he visited them). A total of \$500 was disbursed to pay attorney fees of the grandparents. State and federal income taxes totaling \$4,245.58 were also paid out of the A.G. Edwards account. From the verbiage chosen by Watkins in drafting this letter, we do not know if the income tax liability was owed by the estate, by Brenda Goodman, or by the grandparents.

¶ 19 Details about the reason for disbursing funds to Brenda Goodman over and above the maximum monthly \$1,000 stipend are not fully known.² GAL Dennis J. Watkins testified

¹At first, Dennis J. Watkins paid the monthly stipend to Brenda Goodman out of the trust checking account, but he eventually processed the paperwork to turn that monthly duty over to A.G. Edwards at the end of August 1998.

²The A.G. Edwards financial documents clearly reflect monthly income far less than the court-authorized maximum amount of \$1,000 per month dispersal. The record establishes that no effort was made by any party or attorney or by the court to ensure that the order of the

that he told her several times that by removing so much principal from the trust, the funds would run out before the intended time—when her son reached adulthood. Watkins testified that Brenda Goodman would wear him down with repeated phone calls and that he would eventually acquiesce to her monetary demands.

¶ 20 A couple of disbursements directed by the GAL to be made by A.G. Edwards from its account were recorded, along with the provided reason for the disbursements. We know from discovery documents produced to plaintiff's attorney from A.G. Edwards that on April 14, 1998, Dennis J. Watkins asked A.G. Edwards to issue Brenda Goodman a check for \$1,500 to be utilized as a down payment for a vehicle. On December 1, 1998, Watkins asked A.G. Edwards to issue her a check for \$2,500 to buy Christmas gifts and to send the minor on a trip to see his grandparents. With respect to the undocumented disbursements, Watkins testified that he simply did not keep good records.

¶ 21 As of March 17, 2005, all that remained of the original investment was \$645.³

¶ 22 Early Procedural History

¶ 23 The grandparents hired a new attorney and filed a suit on behalf of the minor against Dennis J. Watkins, A.G. Edwards & Sons, Inc., Regions Bank, and Regions Financial Corp. seeking an accounting, injunctive relief, and the removal of Dennis J. Watkins as the trustee, and seeking relief in trover and conversion related to alleged false billings of attorney fees by Dennis J. Watkins. The factual allegations for each count of the complaint alleged that the court's order requiring the establishment of the trust did not allow GAL Dennis J.

court was being followed.

³We are reporting the amounts withdrawn and/or paid out from the A.G. Edwards and checking accounts as included in the record, but have no means by which to confirm the accuracy of the amounts listed due to the GAL's acknowledged problems with the record-keeping.

Watkins to disburse money to Brenda Goodman in excess of the amounts specified in the court order. Furthermore, the grandparents argued that the court order never authorized the GAL to bill the trust for attorney fees.

¶ 24 Regions Bank immediately sought a summary judgment on the basis that the checking account was closed out on March 29, 2005, and that there were no present accounts held on behalf of the minor. The trial court entered a summary judgment for the bank on January 26, 2006.

¶ 25 On January 2, 2007, the grandparents filed a first amended complaint, adding attorney Daniel J. Cody as a defendant and adding counts against the GAL and the other remaining A.G. Edwards defendants for breach of fiduciary duty and negligence.

¶ 26 Second Amended Complaint

¶ 27 On March 5, 2009, the grandparents filed a second amended complaint, adding one negligence count against Richard Tognarelli, his partner, Bonnie Levo, and their law firm.

¶ 28 The counts against attorney Daniel J. Cody allege negligence, breach of fiduciary duty, and aiding and abetting.

¶ 29 In the negligence count, the grandparents alleged that Cody and Tognarelli, Levo, and their law firm breached their duty to Brenda Goodman (in the case of Cody) and to the grandparents (in the case of Tognarelli, Levo, and their law firm) to represent them with skill and care. Specifically, the grandparents alleged that these defendants were negligent by failing to follow the court's February 18, 1997, order in drafting the trust, by inserting the provision allowing unlimited discretionary disbursements from the trust (and by not advising the court or other parties of this provision), and by either not objecting to or not ascertaining the fact that GAL Dennis J. Watkins was professionally uninsured.

¶ 30 The allegations of the breach of fiduciary duty count against attorney Cody mirror the negligence allegations with the addition of the allegation that Cody failed to inform Brenda

Goodman that the discretionary disbursement provision in the trust could result in the corpus being depleted before anticipated.

¶ 31 In the aiding and abetting count against attorney Cody, the grandparents alleged that he knowingly conspired with and aided and abetted Brenda Goodman in wrongfully converting the trust corpus to her own possession and use, contrary to his duty to the court and contrary to the interests and rights of the minor.

¶ 32 Judgment for A.G. Edwards Defendants

¶ 33 On November 22, 2010, the A.G. Edwards defendants filed their motions for summary judgment, which were largely based upon the argument that they owed no duty to act other than in furtherance of the trust provisions. By court order dated March 17, 2011, the court entered a summary judgment in favor of all three A.G. Edwards defendants. The grandparents do not appeal from this judgment order.

¶ 34 Motion to Dismiss Filed by Defendants Tognarelli and Levo

¶ 35 On April 20, 2009, Tognarelli, Levo, and their law firm filed a motion to dismiss the complaint on the basis that it failed to state a cause of action. The grandparents claimed that the minor was the third-party beneficiary to the attorney-client relationship Tognarelli and Levo had with the grandparents. Tognarelli and Levo argued that they owed no duty to the minor because they represented the grandparents; that their petition for guardianship was dismissed by court order on November 20, 1996; that the court approved a trust agreement not drafted by Tognarelli & Levo, which by its terms imposed no duties upon Tognarelli & Levo to monitor the trust disbursements or report the status of the trust to the court; and finally, that the minor was legally represented by his guardian *ad litem*.

¶ 36 In response to the motion to dismiss filed by Tognarelli and Levo, the grandparents claimed that these arguments were illogical because the attorneys were hired for the sole purpose of obtaining guardianship over the person and estate of the minor—that the entire

purpose of their representation revolved around the minor.

¶ 37 The trial court granted the motion of Tognarelli and Levo on July 28, 2009, with prejudice.

¶ 38 Summary Judgment Motion Filed by Attorney Cody

¶ 39 Attorney Daniel J. Cody originally filed his motion for summary judgment on December 13, 2007, and he renewed the motion on July 19, 2010. In addition to the argument that he did not represent the minor, and therefore owed no duty to him, Daniel J. Cody also argued that the breach of fiduciary duty claim was duplicative of the malpractice claim. Cody argued that the failure in the element of duty to a nonclient minor occurred because Illinois courts, in addressing malpractice claims, have not extended the obligation of the attorney beyond the client to third parties, unless fraud or collusion is at issue. Cody also argued that the trust was approved by the court, and that the revised trust which included the additional provisions ordered by the court was reviewed by all attorneys involved, and therefore, the allegations of negligence contained within the second amended complaint could not be proven. With respect to the appointment of the guardian *ad litem* and the alleged duty he owed to the minor, Cody argued that once the GAL was appointed, he was divested of any ability or authority to act on behalf of the minor. Cody did not seek summary judgment on the aiding and abetting count of the complaint.

¶ 40 On March 17, 2011, the trial court granted Cody's motion for summary judgment as to the negligence and breach of fiduciary duty counts of the complaint.

¶ 41 LAW AND ANALYSIS

¶ 42 Order Dismissing Tognarelli and Levo and Their Firm

¶ 43 When the trial court is presented with a motion to dismiss a case for failure to state a cause of action pursuant to section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615 (West 2008)), the court must determine whether the complaint sets forth sufficient facts

that, if established, could entitle the plaintiff to relief. *Bryson v. News America Publications, Inc.*, 174 Ill. 2d 77, 86, 672 N.E.2d 1207, 1214 (1996). The trial court must accept all well-pleaded facts in the complaint as true and draw reasonable inferences from those facts that are favorable to the plaintiff. *Id.* at 86, 672 N.E.2d at 1213. Because the trial court is not being called upon to judge any witness's credibility or to weigh facts, on appeal we review the matter *de novo*. *Jackson v. Michael Reese Hospital & Medical Center*, 294 Ill. App. 3d 1, 9, 689 N.E.2d 205, 211 (1997).

¶ 44 To prevail in a legal malpractice case, the plaintiff must establish that the attorneys who have been sued owed the plaintiff "a duty of due care arising from the attorney-client relationship, that the defendants breached that duty, and that as a proximate result, the client suffered injury." *Tri-G, Inc. v. Burke, Bosselman & Weaver*, 222 Ill. 2d 218, 225-26, 856 N.E.2d 389, 394 (2006). To make the determination that a legal duty existed, the court must conclude that the parties were in a relationship with each other of a type "that the law imposed upon the defendant an obligation of reasonable conduct for the benefit of the plaintiff." *Gale v. Williams*, 299 Ill. App. 3d 381, 384, 701 N.E.2d 808, 810 (1998). The question of whether the parties were in this type of relationship is for the court to determine as a matter of law. *Reynolds v. Decatur Memorial Hospital*, 277 Ill. App. 3d 80, 85, 660 N.E.2d 235, 238-39 (1996).

¶ 45 We reach the same conclusion as the trial court, but we approach the situation from a slightly different perspective. Tognarelli was hired by the grandparents. The grandparents sought to be named the guardians of the minor child, and thus were asking the court to place them in charge of the minor's trust. The court ruled against this possibility after the minor's mother sought to dismiss the grandparents' petition, establishing that she had joint legal and physical custody of the minor. Whatever monitoring Tognarelli did in reviewing the trust and appearing at some court hearings after dismissal of the petition to have the grandparents

named as the minor's guardian was likely a means by which he could keep the grandparents informed. Although their petition was no longer before the court, the custody and control of the estate was still before the court, and in those matters, the grandparents remained concerned on a personal level. Consequently, we conclude that, by no longer actively representing the grandparents' interests in probate court and never achieving a guardianship status for the grandparents which would have involved and had a bearing on the minor's best interests, Tognarelli, Levo, and their firm did not owe a duty to the minor child as to the trust or its management.

¶ 46 Order Granting Cody Summary Judgment

¶ 47 On appeal, courts review summary judgment orders *de novo*. *Myers v. Health Specialists, S.C.*, 225 Ill. App. 3d 68, 72, 587 N.E.2d 494, 497 (1992). A summary judgment is intended as a vehicle to determine whether a factual question exists—not to resolve questions of fact. *Martens v. MCL Construction Corp.*, 347 Ill. App. 3d 303, 312, 807 N.E.2d 480, 487 (2004) (citing *Gilbert v. Sycamore Municipal Hospital*, 156 Ill. 2d 511, 517, 622 N.E.2d 788, 792 (1993)). The court must consider all pleadings, depositions, admissions, and affidavits on file to decide if there is any issue of material fact. *Myers*, 225 Ill. App. 3d at 72, 587 N.E.2d at 497. If material facts are in dispute, then the trial court is required to "view all evidence in the light most favorable to the nonmoving party and draw all reasonable inferences from the facts presented in favor of the nonmovant." *Martens*, 347 Ill. App. 3d at 312, 807 N.E.2d at 487 (citing *In re Estate of Hoover*, 155 Ill. 2d 402, 410-11, 615 N.E.2d 736, 739-40 (1993)). While in general, a summary judgment is a quick way to put an end to a lawsuit or a portion thereof, the use of summary judgments is considered to be a drastic method of concluding litigation, and they should only be granted if the facts and issues raised by the party seeking the judgment are free from doubt. *Loyola Academy v. S&S Roof Maintenance, Inc.*, 146 Ill. 2d 263, 272, 586 N.E.2d 1211, 1215 (1992); *Colvin v.*

Hobart Brothers, 156 Ill. 2d 166, 169-70, 620 N.E.2d 375, 377 (1993).

¶ 48 A mere factual possibility is insufficient to defeat a summary judgment motion. *Wilmere v. Stibolt*, 152 Ill. App. 3d 642, 648, 504 N.E.2d 916, 919 (1987). In considering the motion, the court was not required to ignore evidence or inferences negative to plaintiff's position. *Yacko v. Curtis*, 339 Ill. App. 3d 299, 302, 789 N.E.2d 1274, 1276 (2003).

¶ 49 Negligence Count—Attorney-Client Relationship Between Cody and the Minor. Cody contended that his only duty was owed to his client, the minor's mother, Brenda Goodman. Consequently, he argued that he was not ethically allowed to split his allegiances and represent the minor as well as the minor's mother. Cody also claimed that the minor could not have been the intended, or unintended, third-party beneficiary of the attorney-client relationship with Brenda Goodman.

¶ 50 Negligence Allegations of Complaint

¶ 51 Looking specifically to the allegations in the negligence count of the second amended complaint, plaintiff alleges that Cody directly owed the minor a duty. There is scant reference to the fact that Cody's client was, in actuality, the minor's mother, Brenda Goodman. There is no allegation that the minor was a third-party beneficiary of the attorney-client relationship between Cody and his mother, Brenda Goodman. Specifically, the complaint alleges that Cody failed to follow the court order, inserted language in the trust which allowed the GAL to make unlimited corpus disbursements, failed to inform the court, the minor, or the other lawyers about this discretionary language, failed to competently represent the minor, failed to conduct a duly diligent inquiry into Dennis J. Watkins's appointment as GAL, and allowed the GAL's appointment when he knew or should have known that the GAL was uninsured.

¶ 52 Analysis

¶ 53 Duty and Third-Party Beneficiary. We first address whether attorney Daniel J. Cody

owed the minor child a duty. While represented by an attorney with the Land of Lincoln Legal Assistance Foundation, Inc., Brenda Goodman successfully argued against the petition for guardianship filed by the grandparents. After the trial court had already appointed Dennis J. Watkins as the guardian *ad litem* for the minor, Brenda Goodman hired attorney Cody, who appeared and responded to the GAL's petition to determine the allocation of the minor's funds, as Brenda had refused to sign the trust agreement. We glean from the probate court records that attorney Cody was successful in getting the GAL to agree to, and the court to approve, Brenda's request for funds to be used as a down payment for a home, plus a monthly \$1,000 stipend for expenses.

¶ 54 In support of Cody's argument that he did not owe a duty to the minor, he argues that Illinois law does not support a third-party beneficiary claim in a legal malpractice setting. Cody cites *Pelham v. Griesheimer* in support of his position.

¶ 55 In *Pelham v. Griesheimer*, 92 Ill. 2d 13, 16, 440 N.E.2d 96, 97 (1982), there had been an underlying divorce between the plaintiffs' parents. The divorce was granted in 1971 when the plaintiffs were minors. *Id.* In the divorce decree, the father was ordered to maintain life insurance policies with his four children named as primary beneficiaries. *Id.* The plaintiffs' father subsequently remarried and changed the beneficiary of this \$10,000 life insurance policy to his new wife. *Id.* The father died in 1976, and his wife collected the insurance proceeds. *Id.* The children sued their mother's attorney for malpractice alleging that he owed the children a duty with respect to enforcement of the life insurance beneficiary change. *Id.* at 16-17, 440 N.E.2d at 97-98.

¶ 56 The plaintiffs contended that they should be considered to be the direct third-party beneficiaries of the contract between their mother and her attorney. *Id.* at 17, 440 N.E.2d at 98. The trial court held that because there was no attorney-client relationship between the plaintiffs and the defendant there could not be a cause of action for legal malpractice. *Id.* at

16, 440 N.E.2d at 97. The appellate court affirmed on the same basis—lack of privity. *Id.* at 19, 440 N.E.2d at 99. The supreme court also affirmed but on a different basis. The supreme court found that privity was "not an indispensable prerequisite" to the establishment of a duty in a legal malpractice case. *Id.* In so holding, the court stated that the plaintiffs still must prove facts showing that they are in the nature of a third-party intended beneficiary. *Id.* at 21, 440 N.E.2d at 99-100.

"Analogizing the scope of the duty to the concept of a third-party direct beneficiary serves the purpose of limiting the scope of the duty owed by an attorney to nonclients. The key consideration is the attorney's acting at the direction of or on behalf of the client to benefit or influence a third party." *Id.* at 21, 440 N.E.2d at 100. As the court explained, if the purpose for which the attorney was hired was adversarial, the attorney cannot have his loyalty divided by also owing a duty to a nonclient. *Id.* at 22-23, 440 N.E.2d at 100.

¶ 57 Cody misreads *Pelham*. *Pelham* does not stand for the proposition that an attorney cannot owe a duty to a nonclient. The *Pelham* case was decided on the facts as pled, which failed the "intent to directly benefit" test. *Id.* at 23, 440 N.E.2d at 100-01. While the court noted that divorces are generally adversarial in nature, it did not rule out a different outcome, even in a divorce under facts different than those presented in *Pelham*. *Id.* at 24, 440 N.E.2d at 101.

¶ 58 In this case, a successful suit could stand in either contract or tort if the minor proved "that the primary purpose and intent of the attorney-client relationship" between Cody and Brenda Goodman was to benefit the minor. The funds in issue were held in trust for the minor's benefit. The purpose of Brenda Goodman's relationship with attorney Cody was to secure Brenda's access to the estate funds, to be utilized for the minor's benefit. The purpose for which Brenda Goodman hired Cody was not adversarial in nature with regard to the

minor.

¶ 59 We hold that there was a genuine factual question regarding Cody's duty to the minor, as a third-party beneficiary of the relationship Cody had with Brenda Goodman. Therefore, the trial court's entry of summary judgment on this issue was erroneous.

¶ 60 Guardian ad litem. We also find Cody's argument, that he cannot be held liable for malpractice once the GAL was appointed to represent the minor, to be incorrect. The appointment of the GAL, as contemplated by the Probate Act section quoted by Cody as proof that he owed the minor no duty, is inapposite. The GAL bore the responsibility to represent the minor in all legal proceedings. In the context of access to the minor's funds and representation of the minor's mother and guardian, the duty owed by Cody and the GAL could certainly have overlapped and coexisted but served different aspects of the process, albeit with the same goal of access to funds for the minor's benefit.

¶ 61 In support of this argument, Cody cites the case of *Ott v. Little Co. of Mary Hospital*. *Ott v. Little Co. of Mary Hospital*, 273 Ill. App. 3d 563, 564, 652 N.E.2d 1051, 1052 (1995), involved alleged medically negligent obstetrical care by the defendants which harmed the minor child, Jamie Lynn Ott. Upon the minor's delivery by Caesarean section, she aspirated meconium, requiring intensive care in a neonatal unit. The minor suffered severe and permanent injuries. *Id.* at 565, 652 N.E.2d at 1053. At a pretrial conference, the judge to which the case was assigned initiated settlement discussions. *Id.* at 567, 652 N.E.2d at 1054. The plaintiffs made a demand of \$4.5 million. *Id.* The judge suggested to the defendants that the case could be settled for \$2 million present cash value. *Id.* Later, when the judge informed the plaintiffs of his suggestion, they objected on the basis that they had not authorized the judge to act on their behalf in negotiating a settlement. *Id.* at 567-68, 652 N.E.2d at 1054-55. The defendants subsequently offered the suggested amount. *Id.* at 568, 652 N.E.2d at 1055. The judge conveyed this settlement offer to the plaintiffs, who promptly

rejected the offer. *Id.* At the court hearing the next day, the court stated that the case was settled for \$2 million—an amount that the judge found to be satisfactory, and that a guardian *ad litem* would be appointed to approve the settlement for the minor. *Id.* The plaintiffs again rejected the settlement. *Id.* at 569, 652 N.E.2d at 1055. The court appointed a guardian *ad litem* who it charged with the obligation of reviewing all medical documentation and determining whether the proposed settlement was in the minor's best interests. *Id.* At the conclusion of his review, the GAL concurred with the judge's opinion and found that the minor's best interests were served by the proposed settlement. *Id.* at 570, 652 N.E.2d at 1056. The trial court approved the report and directed the GAL to draw up the settlement documents. *Id.* Plaintiffs appealed arguing that the settlement and resulting dismissal order were improper as coerced and that they deprived plaintiffs of the right to trial, improperly removed control of the minor's litigation from her parents/guardians and placed control in the hands of the GAL, and approved an inadequate settlement. *Id.* The appellate court affirmed. *Id.* at 578, 652 N.E.2d at 1061.

¶ 62 The appellate court explained that every minor plaintiff is a legal ward of the court if litigation is involved. *Id.* at 571, 652 N.E.2d at 1056 (citing *Burton v. Estrada*, 149 Ill. App. 3d 965, 976, 501 N.E.2d 254, 262 (1986)). The court bears a duty and broad discretion to protect this minor's interests. *Id.* In addition to this duty, the Probate Act of 1975 (Probate Act) mandates that a court approve or reject any settlement agreement proposed for the minor. *Id.*; 755 ILCS 5/19-8 (West 1992). Therefore, a guardian of the estate of a minor is without power to settle a case for the minor without court approval. *Id.* at 571, 652 N.E.2d at 1057 (citing *Hayes v. Massachusetts Mutual Life Insurance Co.*, 125 Ill. 626, 635, 18 N.E. 322, 326 (1888)). Court approval is also required in the case of any parent, next friend, or court-approved guardian in order to settle a minor's claim. *Id.* (citing *Leonard C. Arnold, Ltd. v. Northern Trust Co. of Chicago*, 139 Ill. App. 3d 683, 487 N.E.2d 668 (1985), *aff'd in*

part & rev'd in part, 116 Ill. 2d 157, 506 N.E.2d 1279 (1987); *Pittsburg, Cincinnati, Chicago & St. Louis Ry. Co. v. Healey*, 170 Ill. 610, 48 N.E. 920 (1897); *Mastroianni v. Curtis*, 78 Ill. App. 3d 97, 397 N.E.2d 56 (1979)). The purpose of mandatory court approval of any settlement for a minor is simple protection of the minor and his or her rights. *Id.* at 571, 652 N.E.2d at 1057.

¶ 63 The court discussed the interrelationship between a guardian of the estate of a minor child or the child's next friend with a court-appointed guardian *ad litem*. The Probate Act provides guidelines for this relationship:

"The representative of the estate of a ward shall appear for and represent the ward in all legal proceedings unless another person is appointed for that purpose as representative or next friend. This does not impair the power of any court to appoint a representative or next friend to defend the interests of the ward in that court, or to appoint or allow any person as the next friend of a ward to commence, prosecute or defend any proceeding in his behalf." 755 ILCS 5/11-13(d) (West 2008).

The court expressed its opinion that the "unless another person is appointed for that purpose" language in section 11-13(d) of the Probate Act implies that once the guardian *ad litem* is appointed by the court, that individual is vested "with exclusive authority to proceed on behalf of the minor in the pending lawsuit and operates to derogate and relieve any other person's authority to do so." *Id.* at 575, 652 N.E.2d at 1059. Finding no Illinois case supporting or rejecting this theory, the court turned to and relied upon a 1923 California appellate opinion, *In re Price*, 61 Cal. App. 592, 215 P. 710 (1923), holding that the court-appointed guardian *ad litem* had the exclusive authority to bring a lawsuit for an injured minor and acknowledging that the relevant rule of civil procedure clearly mandated that either the guardian *ad litem* or the general guardian of the minor handle court matters, which left no possibility for joint representation of the minor in that case.

¶ 64 *Ott* explains the relationship between a court-appointed guardian *ad litem* for a minor and a legal guardian for a minor. The *Ott* court did not interpret section 11-13(d) of the Probate Act to mean that when a guardian *ad litem* is appointed, any legal duty owed to the minor outside of the context of a legal proceeding is extinguished. In the context of a legal proceeding, *Ott* interprets section 11-13(d) to require that the minor's interests be represented by the guardian *ad litem*. Cody's argument that this Probate Act section should be extended to eliminate any duty owed to the minor after appointment of a guardian *ad litem* is untenable and does not represent the intentions of the drafters of the Probate Act and/or the appellate court in *Ott*. We find that *Ott* does not stand for the proposition that appointment of a guardian *ad litem* terminates all duties owed to a minor in situations outside of a legal proceeding.

¶ 65 Cody's responsibility as the attorney who drafted the trust agreement is at issue. Cody drafted the trust while representing Brenda Goodman, the minor's mother and guardian. The entire purpose of the trust was centered upon the minor's interests. Consequently, the legal malpractice allegations with respect to drafting the agreement present questions of fact irrespective of the GAL's involvement in the case. We conclude that Cody's responsibilities for document preparation and review were not obviated by the intervening act of the court's appointment of a GAL.

¶ 66 If the trial court's entry of summary judgment for Cody was based upon the preemption of his duty because of the GAL's appointment, we find that a factual question remained as to Cody's duty to the minor irrespective of the GAL appointment. Accordingly, we find that the judgment was improper and must be reversed.

¶ 67 Breach of Fiduciary Duty Count of Complaint. We next turn to the trial court's summary judgment on the fiduciary duty count of the complaint, which was based upon a duplication of the allegations in the negligence and breach of fiduciary duty counts.

¶ 68 Legal malpractice claims can be grounded in contract, tort, or breach of fiduciary duty. *Hanumadass v. Coffield, Ungaretti & Harris*, 311 Ill. App. 3d 94, 99-100, 724 N.E.2d 14, 18 (1999). These types of claims are not mutually exclusive, and therefore a plaintiff can ask for recovery for both traditional legal malpractice, as well as breach of fiduciary duty. *Collins v. Reynard*, 154 Ill. 2d 48, 50-51, 607 N.E.2d 1185, 1186-87 (1992).

¶ 69 In this case, the count for breach of fiduciary duty is essentially identical to the negligence count, with the insertion of the word "fiduciary" before the word "duty" in a couple of paragraphs and the allegation that Cody breached his fiduciary duty as opposed to "carelessly and negligently breached his duty" in the malpractice count. After careful review of the two counts, we conclude that the allegations in this complaint are duplicative.

¶ 70 Plaintiff concedes that if the court determines that a cause of action exists for legal malpractice, then the breach of fiduciary duty count should not stand. Illinois courts have held that where a claim for legal malpractice and a claim for breach of fiduciary duty are based upon the same set of facts resulting in the identical injuries to the plaintiff, the breach of fiduciary duty claim should be dismissed as duplicative. See *Neade v. Portes*, 193 Ill. 2d 433, 440, 739 N.E.2d 496, 500 (2000); *Fabricare Equipment Credit Corp. v. Bell, Boyd & Lloyd*, 328 Ill. App. 3d 784, 791, 767 N.E.2d 470, 476 (2002). Whether the trial court's dismissal of the breach of fiduciary count was proper depends, therefore, in part, upon whether the defendant was capable of stating a cause of action for legal malpractice. Dismissal on the basis of duplication, without further analysis of whether a fiduciary duty, separate from legal malpractice, existed between Cody and the minor, would have been inappropriate. Because we reverse and remand for further proceedings the trial court's entry of summary judgment against Cody, we find that summary judgment on the breach of fiduciary count is premature. Accordingly, we reverse the trial court's summary judgment on plaintiff's breach of fiduciary duty count against defendant Cody.

¶ 71

CONCLUSION

¶ 72 For the foregoing reasons, we affirm the judgment of the court dismissing the complaint against defendants Tognarelli, Levo, and Tognarelli & Levo, P.C. We reverse the trial court's entry of summary judgment in favor of defendant Cody.

¶ 73 Affirmed in part and reversed in part.