DISTRICT OF COLUMBIA COURT OF APPEALS

No. 09-PR-291

IN RE ALEXANDRA MARTEL,
KAREN BROWN STARR, APPELLANT.
INT123-01

Appeal from the Superior Court
of the District of Columbia
Probate Division

(The Hon. Eugene N. Hamilton, Trial Judge)

(Argued April 21, 2010 Decided December 2, 2010)

Before RUIZ, GLICKMAN and THOMPSON, *Associate Judges.*

MEMORANDUM OPINION AND JUDGMENT

PER CURIAM: In this appeal, appellant Karen Brown Starr, the mother of ward Alexandra Martel,[1] challenges the Superior Court Probate Division's dismissal of her petition to remove Andrea Sloan as guardian for Alexandra and/or to limit the scope of guardianship. As explained below, on the record before us, we reject most of Starr's assignments of error, but we agree that the trial court should not have dismissed Starr's petition without at least explaining why it declined her request for an evidentiary hearing.

I.

Alexandra, who was 31 years old at the time of the proceedings in issue, has been diagnosed with Asperger's syndrome,[2] mild mental retardation, pervasive developmental disorder, seizure disorder, anxiety disorder, attention deficit hyperactivity disorder, depression, psychotic disorder, and schizophrenia. She has been disabled since birth, and her disability reportedly is

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[1] Hereafter, because we sometimes refer to Alexandra Martel's father as "Martel," we refer to Alexandra Martel as "Alexandra," to prevent confusion.

[2] In a 2003 Psychological Evaluation, the District of Columbia Mental Retardation and Developmental Disabilities Administration ("MRDDA") (now known as the Department of Disability Services, "DDS") questioned the Asperger's diagnosis, opining instead that Alexandra has "cognitive delays and delays in the development of age appropriate self-help skills and adaptive functioning[.]" The mental health professionals agree, however, that Alexandra requires "24-hour supervision" or "a very high level of supervision."

permanent. At the time of the probate court hearings in 2008, Alexandra had recently completed a specialized educational program at Montgomery College, and an MRDDA evaluation confirms that she is "able to verbally make known her wants and preferences." But, according to Hope Brown, the guardian ad litem appointed by the court in this matter (the "GAL" or "GAL Brown"), Alexandra's psychiatrists report that she "operates between the 8 to 10-year-old range," and GAL Brown herself observed that Alexandra's "conversation goes from a conversation with someone who's 10 years old to a conversation with someone who is [a] teenager . . . ."

The multi-year Probate Division record that was before the probate judge is critical to our evaluation of the court's ruling. Accordingly, in what follows, we describe that background in some detail. The court first appointed a guardian for Alexandra in 2001, the result of an intervention proceeding brought while her parents, appellant Starr and appellee Erich Martel, were in the midst of an acrimonious divorce.[3] On September 6, 2001, after an evidentiary hearing that included testimony by Alexandra, her parents, a court-appointed examiner,[4] and others, the Honorable Jose Lopez found that Alexandra was incapacitated[5] and that she "need[ed] . . . a guardian to assist her in making health care and life skill choices." Judge Lopez appointed Myrna Fawcett as guardian and Ellen MacDonald as guardian ad litem,[6] and directed that they work together to find an "appropriate supervised independent living facility" for Alexandra.

Following her parents' separation and divorce, Alexandra initially resided with Starr. However, after Alexandra experienced delusions and hallucinations in October 2002[7] and

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[3] The intervention proceeding was brought pursuant to the District of Columbia Guardianship, Protective Proceedings, and Durable Power of Attorney Act of 1986 (the "Guardianship Act" or the "Act"), D.C. Code §§ 21-2001–2085 (2001 & 2010 Supp.).

[4] *See* D.C. Code § 21-2011 (7) (2010 Supp.).

[5] *See* D.C. Code § 21-2011 (11) (defining "incapacitated individual" as "an adult whose ability to receive and evaluate information effectively or to communicate decisions is impaired to such an extent that he or she lacks the capacity to manage all or some of his or her financial resources or to meet all or some essential requirements for his or her physical health, safety, habilitation, or therapeutic needs without court-ordered assistance or the appointment of a guardian or conservator").

[6] Each of Alexandra's parents had asked to be appointed guardian, and Alexandra requested that her mother be appointed guardian, but Judge Lopez found that it was "not in the best interest of" Alexandra for either of her parents to be appointed as her guardian because the parents were "so locked in and competing in battle in their own divorce proceeding that it would be best for someone to serve independently as Alexandra's guardian . . . ."

[7] According to the 2003 Psychological Evaluation prepared by MRDDA, Alexandra

(continued...)

subsequently was diagnosed with psychosis and depression, she moved to her father's residence. In December 2002, upon petition of the guardian and guardian ad litem and after two hearings, Judge Lopez issued a protective order directing Starr not to "threaten[,] harass or interfere in any way with the fulfillment of duties of the Guardian or Guardian *ad litem*." The order also restricted Starr to supervised visitation with Alexandra one time a week for no more than two hours, and limited Starr's attendance at Alexandra's therapist appointments, her communications with Alexandra's physicians, and her telephone contact with Martel regarding Alexandra's mental and physical health. In August 2003, Judge Lopez issued an order declining to schedule a hearing on the issue of increased visitation between Starr and Alexandra. Judge Lopez wrote that Starr "has a long way to go before releasing the tether by which she holds Alexandra. It benefits no one but [Starr] to increase her opportunity to harden the hold."

On June 15, 2005, Judge Lopez signed a consent order concerning visitation by Starr with Alexandra.[8] In a separate order issued the same day, Judge Lopez observed that Starr had "a history of not complying with court orders and interfering with [Alexandra's] therapy to the point of hampering Alexandra's opportunity to become autonomous." Judge Lopez acknowledged that Starr "is very valuable for the needs and mental health of Alexandra," but found that Starr's "unbridled overbearing style could force Alexandra to look at the world through her mother's eyes[,]" that "[t]he history of this case tells us that there has been a problem in the way [Starr] has tried to shape Alexandra's thinking[,]" and that "[i]t would be of great benefit to all" for Starr to "let go of the notion of telling Alexandra, the Court and the other players what is good for Alexandra." Judge Lopez stated that it was "time for [Starr] to simply attempt an everyday relationship with her daughter, and leave the rest for the therapist." Notwithstanding the court's admonitions, by October 4, 2005, according to a report by the guardian and guardian ad litem, Starr interfered with Alexandra's day program and with the work of Alexandra's therapists (by asking them to advocate Starr's objectives). The report advised the court that, as a result, the guardian and guardian ad litem had notified Starr that the restrictions of Step One visitation were again in effect.

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[7](...continued)
suffered a psychotic break in October 2002 and was hospitalized between October 18 and November 5, 2002, following an episode of hallucinations. The evaluation states that "many areas of her adaptive functioning . . . experienced a decline" since that psychotic break. The guardian and guardian ad litem reported in July 2003 that Alexandra also was hospitalized in early March 2003 after "suffering from a serious case of paranoia."

[8] The consent order provided for, *inter alia*, a schedule of supervised visitation ("Step One visitation"); thereafter, but only if Alexandra continued to do well in her day program and Starr complied with the terms of the previous step, unsupervised visitation on alternate weekends; thereafter, subject to the same conditions, unsupervised visitation on alternate weekends, to include one overnight visit; and a reversion to Step One in the event of violations of the consent order. The consent order also provided for "[a]dditional visitation . . . for special situations" with the written consent of Martel and the guardian and guardian ad litem.

On October 14, 2005, Fawcett and MacDonald filed a petition to withdraw as guardian and guardian ad litem, respectively. The court accepted their resignations, and, after noting that "Alexandra's parents as well as her Guardian and Guardian ad litem agree that Alexandra is unable to care for herself or make medical decisions without significant assistance" and that Alexandra's parents "still have substantial areas of disagreement about Alexandra's medical treatments and custodial arrangements[,]" the court concluded that the appointment of a "neutral third party successor guardian is necessary and all parties are in agreement to such an appointment." The court reasoned that the "successor guardian should be an individual with experience in medical matters, experience with clients who are customers of MRDDA and who can be firm in working with the family." The court observed that "[a]ll parties were in agreement" that appellee Sloan, who had served as Alexandra's court-appointed counsel, had the "requisite background and experience," and the court appointed her to be the successor guardian. The court declined to rule on whether the parties should move "back to 'Step 1 visitation'" because of Starr's alleged violations of visitation agreements, but directed Sloan and Alexandra's parents "to take immediate actions to communicate to set up an appropriate visitation schedule" and ordered both parents to "communicate with Ms. Sloan and to fully cooperate with her in carrying out her duties as Guardian."

In her "First Report of Successor Guardian" filed in August 2006, Sloan reported that Alexandra had had "virtually unrestricted access to visits" with Starr, but that Starr had become "increasingly uncooperative," failing to take Alexandra to her day program and interfering in various ways with Alexandra's sessions with her therapists and doctors. As a result, Sloan severely limited Starr's contact with Alexandra's doctors. In her 'Fourth Report of Successor Guardian" filed in November 2007, Sloan advised the court that, in August 2007, she authorized Starr to take Alexandra to Minnesota for approximately two weeks to visit Alexandra's grandparents. Because Sloan knew that Starr opposed Alexandra's regime of psychotropic medication (clozaril, prescribed after Alexandra's psychotic episodes), Sloan required, and Starr gave, an assurance that another person in Minnesota would be responsible for giving Alexandra her medication. When Alexandra returned from the vacation, she "demonstrated symptoms similar to those during her psychotic break[,]" and Alexandra's psychiatrist opined that the symptoms were likely "the result of having her clozaril withheld." Because Sloan suspected that Starr failed to ensure that Alexandra had her medications while in Minnesota, because Starr did not report Alexandra's symptoms upon returning from the trip, and because of Alexandra's allegation that Starr had physically abused her,[9] Sloan severely restricted Starr's visitation with Alexandra.

The restrictions on visitation that Sloan imposed precipitated the filing of Starr's April 2, 2008 petition to "dismiss guardianship or in the alternative to limit the scope of the guardianship and/or remove Andrea Sloan as guardian; to appoint counsel to Alexandra Martel; and to allow [Starr] unrestricted access to her daughter or to immediately increase visitation and contact" (a

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[9] DDS, which conducted an investigation, determined that it was "less likely than not" that Starr had slapped Alexandra and that evidence that Starr had pushed Alexandra to the floor was "inconclusive."

petition that Starr subsequently amended, "narrow[ing]" the relief sought to removal of Ms. Sloan as guardian and/or to limit the scope of the guardianship). Sloan and Martel opposed Starr's requests to replace Sloan as guardian and to limit the scope of the guardianship.[10] The court (the Honorable Eugene Hamilton) scheduled a hearing, granted Starr's motion for discovery and appointed attorney Leslie Fein to serve as counsel for Alexandra.

Prior to the scheduled hearing, Fein filed an answer to the petition on Alexandra's behalf, in which he (1) expressed "his belief that Alexandra cannot determine her own legitimate interests" and that "the appointment of a guardian ad litem is necessary" and asked the court to appoint the same; (2) advised the court of Alexandra's consistent statements to Fein that "she wants to be able to spend time with her mother" and explained that guardian Sloan "only allows infrequent contact under strict supervision"; and (3) asked the court to "immediately require continuing and substantial contact" between Alexandra and Starr.

The first hearing took place on May 22, 2008, and several things transpired. First, Fein told the court that there was "no question" that Alexandra continued to be "an incapacitated person" and reiterated his belief that Alexandra was not capable of understanding her legitimate interests and that he did not think the case could go forward without the appointment of a guardian ad litem. None of the parties objected to the appointment of a guardian ad litem, and the court agreed to appoint one. Second, Fein reiterated that Alexandra wanted to spend more time with her mother, to include overnight visits. The court stated that "there should [not] be any great problem about visitations by the subject with her mother" although there had to be "appropriate arrangements made for such visitations[.]" The court asked Fein whether he would be able to "broker with the guardian" and Fein stated that he had done so, getting "the ball rolling" for the last three visits. Without objection, the court instructed Fein to ascertain Alexandra's wishes with respect to visitation and to convey those requests to Sloan ("filtering . . . [as] necessary for [Alexandra's] health, welfare and safety"), "which request should be granted."[11] Third, the court suspended further discovery (and thereafter, on June 6, 2008, rescinded the order permitting discovery), explaining that the earlier order had been "ill advised."

Subsequent to the first hearing, the court appointed Brown to serve as GAL. During the second hearing, which took place on June 24, 2008, GAL Brown informed the court that she had

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[10] Martel requested that the scope of Alexandra's guardianship continue unchanged and cited Starr's "(i) inability to involve herself in Alexandra's life in an appropriate manner, (ii) failure to behave appropriately at appointments and meetings and (iii) . . . disregard of Alexandra's prescribed medical regimen and the Court's Order that she work with the Guardian . . . ."

[11] Fein told the court that he saw no problem with Alexandra's overnight visits with Starr notwithstanding that Starr had unrelated male occupants(s) in her home, but sought the court's guidance on the matter. The court directed that there be no overnights "in a place where there is any presence overnight or for a prolonged period of time of any male person who is unrelated to the subject."

spoken with Alexandra and others but still needed to speak with Alexandra's physicians about whether Alexandra is "in a position to make determinations about who . . . her guardian should be or whether she can sufficiently weigh in on that question without more." She explained that "[g]iven the nature of the diagnosis of Asperger's, which one of the elements of that condition is that the patient is highly suggestible[,]" she questioned whether Alexandra could "state who, with any effectiveness, should be her guardian" and wanted "to ascertain whether or not Alexandra can articulate with any real understanding what her desires are as it relates to her guardian, whether or not she knows and can identify someone that she would like to serve in that capacity and I think I need additional information from physicians to see whether or not she can formulate those kinds of opinions with any legitimacy." The court continued the hearing until October 7, 2008, to permit the GAL to conduct the investigation she had described and to gather the information she needed.[12]

Before the third hearing in open court, Starr filed her amended petition, seeking only removal of Sloan as guardian and/or limitation of the scope of the guardianship. At the final hearing on October 7, 2008, Fein addressed the court and said:

> Your Honor, my client has consistently told me as late as yesterday that she doesn't believe she has the need for a guardian at all, and certainly does not want Ms. Sloan[] to continue to serve in that, if the Court feels that there should be a guardian. It was my belief that we needed a guardian ad litem to help assist my client in determining what was in her best interest. That's why I sought the appointment of someone to serve in that capacity. I believe Ms. Brown has done a thorough job and I can't do anything other than put forward her argument and her position as the position of my client, knowing that Alexandra, as I started by saying, has consistently said she doesn't think she needs a guardian and if she does need a guardian, it shouldn't be Ms. Sloan[.]

GAL Brown then told the court that she had had the opportunity to speak with the psychiatrist and therapist that Alexandra said she trusts, including the therapist that Alexandra saw bi-weekly. The GAL reported that the therapists believed that Alexandra required a guardian and that Sloan "should remain the guardian" for several reasons: because she was "not easily manipulated by either side," has "put in place restrictions when appropriate to ensure that Alexandra's best interests and her medical needs are attended to" and "has the ability to . . . be creative in trying to meet the needs of the entire family and Alexandra . . . ." GAL Brown reported that the therapists cited a "pattern" of "anytime a guardian goes against the wishes of one or more people who are connected to Alexandra, there is an attempt to remove that person as guardian[,]" a result that "set[s] up Alexandra for inconsistent care" even though she needs "continuity of care[.]" The GAL

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[12] Quality Trust for Individuals with Disabilities, Inc. ("Quality Trust"), one of the *amici* in this appeal, filed a petition to participate in the proceedings, but the court denied the petition in open court before adjournment of the second hearing.

reported that the therapists felt that Alexandra, who they said "operates between the 8 to 10-year-old range," was "not in a position to exercise the appropriate judgment in deciding what would be in her best interest" and "cannot properly assess what's going on in her life at this time." Alexandra's psychiatrist told the GAL that there was "no concrete reason for [Sloan's] removal as the guardian" and "believe[d] she would be the best person to stay" since "there needs to be a point where everyone understands that this is the guardian and there will be no change so that Alexandra can move on with her life . . . ."

The GAL further told the court that Alexandra's therapists said that Alexandra is "unduly influenced, highly suggestible, and that what was going on was "just a repeat of what has gone on in the past. . . . They believe that if . . . Sloan[] remains and the Court does mandate that, a lot of this will go away." GAL Brown recommended that Sloan remain as guardian even though Alexandra "said she didn't go along with that," because "this is what the people she trusts" and who "have a sense of who [Alexandra] is" "have indicated . . . is in her best interest." The GAL explained that she had spoken with Alexandra both in and outside Fein's presence, and that while Alexandra said that she did not want Sloan to be her guardian, she offered "nothing really concrete" as a reason other than the complaint that "no one listens to her." The GAL observed that Alexandra's expressed wish is "more of what the doctors believe is the influence of the mother," who is "very controlling and manipulative and seeks to control all of Alexandra's activity. . . . That is what they have stated to me."[13]

Starr's counsel urged the court to schedule an evidentiary hearing. Judge Hamilton expressed "serious misgivings about protracted and extended . . . evidentiary hearings in this case . . . ." Before deciding whether to hold an evidentiary hearing, however, he asked each side to submit a brief pretrial statement about the evidence and the witnesses they would like to present. He said that he would "take a look at it and determine whether to grant" an evidentiary hearing and the extent of the hearing. After Starr filed her statement and the guardian filed her objection and opposition, the court, on February 9, 2009, entered an order dismissing Starr's petition and declaring that Sloan "shall continue to serve as guardian for Alexandra Martel without a change in the scope of her fiduciary duties." This appeal followed.

II.

Starr urges reversal of the court's February 9, 2009 order on several grounds, which we address in turn.

A. Appointment of the GAL and the Conduct of the GAL and Alexandra's Counsel

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[13] The GAL also reported that Alexandra's therapists believe that Starr "has alienated many of Alexandra's doctors" and that this has been "problematic" for Alexandra.

We begin with the issues that Starr identifies as "[w]hether the Superior Court abused its discretion in appointing a *guardian ad litem* for the Ward when the Ward clearly articulated her legitimate interests and the Ward's then-current ISP [Individual Support Plan] unequivocally confirmed her capacity to have input in selecting her own decision maker," and "[w]hether, in violation of the District of Columbia Guardianship, Protective Proceedings, and Durable Power of Attorney act of 1986[,] the Ward's counsel was limited to advocating the position of the *guardian ad litem* rather than zealously advocating the wishes of his own client as she clearly expressed." Starr summarizes her arguments as "[t]he Superior Court Abused its Discretion in Appointing A *Guardian Ad Litem* for the Ward in Light of the information Contained in Alexandra's 2007 ISP" and "Ward's Counsel Should Have Advocated the Position of His Ward and Was Not Restricted to Deferring to the Position of the *Guardian Ad Litem.*"

In the Probate Division, Starr did not state objections or make arguments that apprised Judge Hamilton of the issues she now raises. Not only did her counsel raise no objection to the appointment of a guardian ad litem, but, quite the contrary, her counsel suggested at the first hearing that the court consider appointing as guardian ad litem a lawyer associated with Quality Trust. Starr's position did not change even after she reviewed a copy of Alexandra's 2007 ISP.[14] At the second hearing on June 24, 2008 (having received a copy of the ISP on the morning of the May 22 hearing), Starr's counsel told the court that GAL Brown's "further investigation of what Alexandra wants and what her capacity is" was "critical" to the task before the court, and that the GAL's inquiry should include a "look at both parents' responsibilities." In addition, Starr's counsel said that "[w]e certainly think that [GAL] Brown needs to talk to everybody and make decisions[,]"; that "we hope that Ms. Brown can look at the situation and make a recommendation"; that "we welcome Ms. Brown's investigation'; and that Starr would "defer to Ms. Brown" regarding the need for a new guardian and "let her [Brown] make the decision." Starr's counsel made the statements in the previous sentence *after* GAL Brown had told the court that her assigned task "required a little bit more than just reading . . . the ISP," and that it required talking to Alexandra's doctors about "whether or not she can really, in fact make a decision about [who her decision maker should be]." In short, Starr did not preserve for appellate review her claim that appointment of the GAL was unnecessary in light of the October 2007 ISP.[15]

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[14] In the October 2007 ISP, a box is checked to indicate that Alexandra "[c]an . . . decide who should make decisions for . . . her in those areas in which he/she lacks capacity to make decisions."

[15] To be sure, Starr's counsel did voice a number of complaints after she heard the GAL's report on October 7, 2008. Immediately after the GAL summarized her recommendations, Starr's counsel stated that the GAL's report "didn't say anything about what Alexandra wanted." Appx. 111 [10/7 Tr. 14]. Starr's counsel then referenced *In re Orshansky*, 804 A.2d 1077 (D.C. 2002), explaining that the trial court in that case had erred by allowing counsel to the disabled adult and the GAL to neglect to properly ascertain the wishes of the subject of the proceeding, and telling Judge Hamilton, "that is precisely what happened in this case." [Appx. 112; 10/7 Tr. 15]. Starr's

(continued...)

Nor did Starr preserve for appellate review the issue she now raises as to the role of Alexandra's counsel. To restate, Starr now complains that the court's ruling was the result of Alexandra's court-appointed counsel having failed to advocate zealously "for Alexandra's clearly expressed wishes," counsel Fein having determined instead "simply . . . to seek the appointment of a *guardian ad litem*" and "to follow the *guardian ad litem*'s recommendation." Before Judge Hamilton, Starr's counsel did assert that "what's happened in this case" is that "counsel to the disabled adult and the GAL all failed . . . to properly ascertain what [the subject's] wishes are." [Appx. 112;10/7 Tr. 15] But there can be little doubt that the court would have regarded Starr's counsel's statement about Fein's failing to "ascertain" Alexandra's wishes as rhetorical flourish (rather than as an objection calling the court's attention to Fein's violation of a statutory duty), since, moments earlier, Fein had demonstrated the contrary, telling the court that Alexandra "certainly does not want Ms. Sloan[] to continue to serve" and "has consistently said she doesn't think she needs a guardian and if she does need a guardian, it shouldn't be Ms. Sloan[.]" (Moreover, immediately after making her rhetorical statement, Starr's counsel told the court that neither neither GAL Brown nor Alexandra's counsel "would dispute that Alexandra does not want Andrea Sloane to be her guardian.")

Throughout the proceedings, Starr's counsel raised no other objection to the performance of Alexandra's counsel or to the court's expressed understanding of counsel's role. For example, Starr's counsel did not object when the court instructed Alexandra's counsel Fein to convey to Sloan Alexandra's wishes (about visitation) "filter[ed]" as "necessary for Alexandra's health, welfare, and safety . . . ." And, far from complaining about either the GAL or the conduct of

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[15](...continued)
counsel then noted that GAL Brown had failed to make reference to the statement in the 2007 ISP that Alexandra had the capacity to choose her own guardian, and asserted that the GAL had not "seen Alexandra since the June hearing," implying that the GAL had failed to speak with Alexandra at sufficient length to discern her position.

But the foregoing are not issues that Starr raises on appeal. This is not surprising, as Starr's counsel went on to acknowledge to the court that the GAL *had* ascertained Alexandra's wishes, stating ,"I believe the GAL has just told you herself, that she knows that Alexandra has a strong desire not to have Andrea Sloane as the guardian" and that "Alexandra has said to Ms. Brown . . . that she does not want Andrea to be her guardian" (and the GAL subsequently confirmed that Alexandra had stated consistently that "she doesn't want Andrea to be her guardian"). Starr's counsel also raised no objection to the GAL's statement that, as guardian ad litem, she was "tasked with the responsibility" of "determin[ing] what's in Alexandra's best interest" on the basis of her understanding of "the dynamics of the situation . . . as seen through the lens of the doctors and trained physicians who treat her" (i.e., not on the basis of the ISP). And, Starr's counsel told the court that she would "defer to [GAL] Brown" regarding on how many occasions the GAL had spoken with Alexandra, and the GAL responded that she had had an "extensive conversation" with Alexandra "for close to three hours" on October 6, spoke to her on another occasion "in depth," and also spoke with her briefly on the day of the June 24 hearing.

Alexandra's counsel, Starr's counsel told the court that "with Mr. Fein's appointment . . . , Alexandra's voice is now finally being heard." Notably, Starr's counsel made this statement *after* Fein reminded the court that "I expressed to Your Honor at the last hearing that [Alexandra] was adamant that she wanted the guardianship dismissed and that she wanted Andrea Sloan removed[,] but I did not feel that she could recognize her own interests, legitimate interests, and asked for the appointment of a guardian ad litem" – a statement by which Alexandra's counsel unambiguously conveyed that his approach was not to be bound by Alexandra's expressed wishes as to her guardian.[16]

Starr's failure to raise her objections in the trial court leaves us without such record as may have been developed in response to the objections (such as a fuller exposition by the GAL about her consideration of the ISP, or a fuller account by Fein about his client's wishes and instructions (to the extent he was able to give such an account consistent with his duty of confidentiality of lawyer-client communications)).[17] Accordingly, we review Starr's claims only for plain error, meaning that "we will disturb the [probate] court's disposition only where the error was 'plain' (in the sense of 'clear' or 'obvious') and where reversal is required to avoid a clear miscarriage of justice." *In re S.C.M.*, 653 A.2d 398, 404 (D.C. 1995); *In re Rips*, 947 A.2d 1161, 1163 (D.C. 2008) ("It is a basic rule in our jurisprudential system that issues, points, and theories not advanced in the trial court will not be considered on appeal except in exceptional situations where a clear miscarriage of justice would result otherwise.") (citation omitted).

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[16] At one point during the October 7 hearing, Starr's counsel did observe that "Mr. Fein has said that Alexandra has told [her counsel] that she doesn't want Andrea, but that his job is to defer to [the GAL] today." Appx. 138 [10/7 Tr. 41]. However, Starr's counsel made this statement in the context of answering the court's question about what she would "propose to present during the course of an evidentiary hearing." Starr's counsel began her response by telling the court that "Alexandra needs to be heard by the Court" and "would like to speak to Your Honor," and that "we need an evidentiary hearing" because Alexandra has "never had a chance to talk to you, Your Honor." Starr's counsel's reference to Fein's statement that he must defer to the GAL was not an objection to the performance of Alexandra's counsel; rather, the context makes clear, the reference was made to explain why Fein would not have not proposed that Judge Hamilton hear from his client. Of particular note, Starr's counsel "totally agree[d]" with Judge Hamilton that if Alexandra's counsel "wants his client to be heard or to speak to the Court, . . . it's up to him to say that," and she told the court, "All I'm saying, Your Honor, is that Alexandra has not spoken to the Court. It's an observation." Starr's counsel urged the court to "look[] over" the head of the guardian and court-appointed counsel by taking evidence directly from Alexandra on the "pivotal issue" of whether Alexandra had "the capacity to be involved in a decision as to who her guardian is." She finished by telling the court, "If we had an evidentiary hearing, Your Honor, we would in some fashion, elicit testimony from Alexandra Martel."

[17] The record suggests that Mr. Fein was guarded in what he revealed about his discussions with his client. When describing Alexandra's position, he finished by telling the court, "That's about all I think I should say."

1. The GAL

Starr contends that the court abused its discretion in appointing a GAL to assist Alexandra to determine her interests when the court had before it in the record the October 2007 ISP, which states that while Alexandra does not show the capacity to make decisions about matters such as medical and other treatment, habilitation or day treatment, residential placement, financial matters, or life planning, she had "demonstrated the capacity to choose someone to make these decisions on her behalf" and "can communicate her wants, needs, and preferences."

We cannot agree that the court plainly erred in appointing a guardian ad litem. To begin with, with Alexandra's counsel having expressed concern about Alexandra's ability to determine her legitimate interests, the court followed the "proper course" in appointing a guardian ad litem. *Orshansky*, 804 A.2d at 1097 n.18; *see also In re Langon*, 663 A.2d 1248, 1250 (D.C. 1995) (noting that the court has "considerable discretion" in its decision regarding a guardian); Super. Ct. Prob. R. 306 (b)(2) (providing that a petitioner seeking appointment of a guardian ad litem must show that "because of impaired ability to receive and evaluate information regarding the proceeding, . . . the subject of the proceeding cannot determine the subject's own interests without assistance"). Moreover, D.C. Code § 21-2033 (a) (2001) provides more broadly that "[a]t any point in a proceeding, a court may appoint a guardian ad litem to prosecute or defend the interest of individuals in any legal proceeding *if the court determines that representation of the interest otherwise would be inadequate*" (italics added). Further, the court was not bound to accept the statements in the ISP, which, in any event, was internally contradictory. The ISP indicated that Alexandra both did and did not have a demonstrated capacity to execute a durable power of attorney. The ISP also contained erroneous information: although Alexandra has had a guardian continuously since 2001, the 2007 ISP states that Alexandra does not have a guardian. Moreover, there is no indication that those who prepared the ISP considered whether, in circumstances like those that precipitated Starr's petition, Alexandra had the capacity to decide whether her current guardian should be removed or whether the scope of the guardianship should be limited.

Nor is it plain that the GAL failed to "assist [Alexandra] . . . to determine . . . her interests," *id.*,[18] or that the GAL's appointed role was inconsistent with the court's obligation to "encourage the development of maximum self-reliance and independence of the incapacitated individual." D.C. Code § 21-2044 (a) (2010 Supp.). The GAL spoke with Alexandra before appearing at the June 24, 2008 hearing and set as her goal at the outset determining whether Alexandra could "make determinations about who . . . her guardian should be[,]" whether she could "articulate with any real understanding what her desires are as . . . to her guardian," and whether she could "identify someone that she would like to serve" as guardian. The GAL told the court that she needed information regarding whether Alexandra could "*sufficiently* weigh in" on who should be her guardian, a statement that made apparent that the GAL understood that Alexandra was entitled

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[18] *See also* Super. Ct. Prob. R. 306 (d). Starr complains in her brief to this court that the GAL failed "to encourage Alexandra's ability to participate in the decision of whether Ms. Sloan should continue to act as her guardian as well as the scope of the guardianship."

to "weigh in."[19] The GAL arranged to speak with therapists that Alexandra said she trusted, and, having spoken with them, spoke again at length with Alexandra about their recommendations. Although the GAL acknowledged Alexandra's statement that she "didn't go along with" the trusted therapists' recommendations that Sloan remain as guardian, the GAL explained her understanding that Alexandra's view likely had been shaped by Starr's attitude toward Sloan, and did not necessarily reflect Alexandra's own preference. The GAL reported that when she inquired of Alexandra why she did not want Sloan to continue as guardian, Alexandra gave no concrete reason. Whether or not the GAL's assessment was correct, the record surely does not make plain either that the GAL failed to assist Alexandra in determining her interests or that the GAL failed to encourage Alexandra "to participate, to the maximum extent of [her] ability" in the proceedings, Super. Ct. Prob. R. 306 (d)(2), or failed to encourage her to express a self-reliant and independent view about her care.

2. Alexandra's Counsel

Starr contends that Judge Hamilton erred in dismissing her petition without a hearing in the face of Alexandra's court-appointed counsel having failed to advocate zealously for Alexandra's expressed wishes and having instead followed the recommendation of the GAL. Starr argues that this court's decision in *Orshansky* establishes that, as counsel for Alexandra, Fein was required to advocate Alexandra's wishes, not what the GAL, or counsel, or anyone else believed was in Alexandra's best interest.

Orshansky involved the appointment of a guardian and conservator in the case of 87-year-old Orshansky, who was suffering from dementia. Prior to the diagnosis of dementia, Orshansky had executed a health care proxy authorizing her niece to make decisions on her behalf in case of her own incapacity. We held that when the court appointed a third party as guardian and conservator, it failed to take "proper account of Ms. Orshansky's own plans and wishes," including the health care proxy. 804 A.2d at 1080. We emphasized that "[a] principal theme of the Guardianship Act is that the wishes of the subject of an intervention proceeding regarding the decisions to be made are entitled to consideration and respect[,] notwithstanding that the subject of the proceeding is incapacitated . . . ." *Id.* at 1093. We also underscored that "[o]n the specific issue of whom to appoint as guardian of an incapacitated individual, the Act assigns the highest priority to the incapacitated individual's own stated preference . . . ." *Id.* at 1094. We cited D.C. Code § 21-2043 (b), which provides that "[u]nless lack of qualification or other good cause dictates the contrary, the court shall appoint a guardian in accordance with the incapacitated

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[19] We note that, in asking for the appointment of a guardian ad litem, Alexandra's counsel, too, understood that the guardian ad litem's role would be to "sit down with Alexandra and listen carefully to what she's saying and then determine whether Alexandra needs help determining her own interest or whether the GAL, that person themselves has to determine the best interests." Thus, to the extent that the GAL took direction from Alexandra's counsel as to her task, the record does not make it plain that the GAL failed, as Starr now asserts, to encourage Alexandra to participate in the decision about whether Sloan should continue as her guardian.

individual's current stated wishes or his or her most recent nomination in a durable power of attorney." *Id.*

We held in *Orshansky* that the probate court had abused its discretion and violated statutory requirements "by not giving the wishes of Mollie Orshansky the consideration to which they were entitled by law before appointing Mr. Jordan as her guardian and conservator." *Id.* at 1095. We noted with criticism that Orshansky's court-appointed counsel had never spoken with her, even though Orshansky had expressed to others her strong desires about where she should live and her desire not to have the court supersede her planned arrangements. *Id.* at 1087, 1087 n.10, 1088. We stressed that "[l]ittle if any effort was made even to ascertain Ms. Orshansky's wishes," that "[n]either her own counsel nor [the appointed guardian] undertook to convey Ms. Orshansky's desires to the court," and that when Orshansky's niece "purported to report Ms. Orshansky's views as she had expressed them, those views were disregarded without any finding as to whether [her niece's] reporting was accurate." *Id.* at 1095. We expressed "grave concern" that Orshansky did not receive the zealous representation to which she was entitled under D.C. Code § 21-2033 (b), since her appointed counsel allowed the hearing to go forward without Orshansky being present, neither met nor spoke with her, "presented no evidence of her client's wishes," "vigorously advocated in favor of appointments that her client may have opposed," and relied on the guardian's "reports of Ms. Orshansky's condition." *Id.* We further observed that the court had failed to discuss and had "disregarded . . . entirely" the testimony about what Orshansky purportedly wanted, even though this was "critical evidence that the court was required to consider in making the discretionary determination of whom to appoint as guardian . . . ." *Id.* at 1097. We admonished that, to comply with section 21-2043 (b), the court was required to recognize explicitly its obligation to appoint a guardian in accordance with the individuals's stated wishes and "only then determine whether good cause dictates the rejection of the incapacitated individual's own choice." *Id.* at 1098.

Starr contends that, like Orshansky, Alexandra did not receive the zealous representation to which she was entitled under D.C. Code § 21-2033 (b), since her appointed counsel advocated in favor of an outcome — retaining Sloan as guardian — that his client Alexandra opposed, and that, like the derelict counsel in *Orshanky*, Alexandra's counsel improperly relied on a third party's (GAL Brown's) reports for the position that he advocated. Thus, Starr argues, counsel and the court failed to take proper account of and to accord consideration and respect to Alexandra's wishes, to give her stated preference the highest priority, and to act in accordance with her current stated wishes.

We cannot agree that *Orshansky* establishes plainly that Fein's representation of Alexandra and the court's ruling in the face of that representation were contrary to the requirements of the Guardianship Act. This case is distinguishable from *Orshansky* in several critical ways. First, Fein did not fail to speak with Alexandra, or to identify Alexandra's wishes, or to convey those wishes

— including Alexandra's stated desire that Sloan be replaced — to the court.[20] Unlike in *Orshansky*, where we found that little effort had been made to ascertain the subject's wishes, here the court and all parties recognized and acknowledged that Alexandra had expressed the wish that Sloan be removed as guardian. In addition to stating that position repeatedly, Fein advocated effectively for Alexandra's wish to spend more time with her mother (with the result that Starr withdrew the portion of her petition that sought increased visitation. Starr's counsel acknowledged at the second hearing that Starr had been "able to have access to her daughter[,]" and Fein agreed that "visitation [was] ongoing, every day . . . , between subject ward and her mom . . . .").[21]

Second, in *Orshansky*, the court "voided [Orshansky's] health care proxy," 804 A.2d at 1083, thus entirely disregarding Orshansky's plans for her care that she articulated while (presumably) she had no mental disability, even though the record suggested no good cause for failing to give that plan priority. Here, Alexandra's disability had been life-long, and her thinking or judgment about who should oversee her treatment, living arrangements and life-skill planning presumably was hampered by the developmental delays that caused her to need a guardian in the first place (even though, as the Act and *Orshansky* clearly dictate, her thinking was "critical evidence" that could not be ignored as superfluous or irrelevant).[22] More important, neither counsel nor the GAL on whose recommendation counsel relied, disregarded Alexandra's expressed wish, but each expressed reasons — "good cause," D.C. Code § 21-2043 (b) — that dictated not taking complete direction from Alexandra's expressed views. Fein cited Alexandra's complaint that neither Sloan nor her previous guardians had listened to her. GAL Brown likewise referenced Alexandra's expressed rationale for wanting Sloan removed, i.e., that "no one listens to her." Brown further cited the opinion of Alexandra's therapists that Alexandra is "unduly influenced, highly suggestible," taking the impression that Alexandra's expressed wishes were not really her

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[20] Fein told the court repeatedly that Alexandra "wants more time with her mother, including overnights[,]" "wants Andrea Sloan replaced," and "wants to be on her own and in an independent living situation." He advised the court that he was "still thinking that a GAL should be appointed for her but her position is that she wishes both parents and the guardian to treat her like an adult." He repeated that Alexandra's "consistent position" is that "her guardian does not listen to her." At the final hearing, he emphasized to the court that Alexandra "doesn't believe she has the need for a guardian at all, and certainly does not want Ms. Sloan[] to continue to serve . . . ."

[21] Fein also advocated Alexandra's wishes by seeking a closed hearing because of Alexandra's request for privacy (a request that Starr's counsel opposed) and he expressed to the court Alexandra's preference about where to sit in the courtroom.

[22] *Cf. Doe v. District of Columbia Mental Retardation and Developmental Disabilities Admin.*, 489 F.3d 376, 381 (D.C. Cir. 2007) (agreeing that under the District of Columbia Health Care Decisions Act, the "'best interests' standard — not the 'known wishes' standard [described in D.C. Code § 21-2210 (b) (2001)] — applies to medical decisions for intellectually disabled individuals who have always lacked the mental capacity to make those decisions for themselves").

own, but Starr's (an impression reminiscent of Judge Lopez's finding in 2005 of "a problem in the way [Starr] has tried to shape Alexandra's thinking" and his finding that Starr had an "overbearing style [that] could force Alexandra to look at the world through her mother's eyes"). And Judge Hamilton, observing that "the guardian is asked . . . to make decisions and to do things that don't place them on the highest pedestal so far as popularity . . . is concerned," understood that Alexandra's wishes with respect to her current guardian were likely to be, at least in part, a reaction to the firm approach of the guardian who had been selected precisely because of her capacity to be "firm in working with the family."

Third, our discussion in *Orshansky* focused on the priorities that a court should observe when appointing a guardian (and, in particular, appointment of an initial rather than a successor guardian). *See* 804 A.2d at 1096 (admonishing that what Orshansky wanted was critical evidence for the court to consider in making the "determination of whom to appoint"). We did not suggest that the standard we discussed there necessarily governs a court's determination as to whether to remove a guardian (in this case, one whose appointment had been supported by all parties). Notably, the Act itself establishes differing procedural requirements for the appointment and the removal of a guardian.[23] Moreover, the record that was before the court was of a guardianship that had been in place for seven years, Alexandra's dislike of each of the guardians who had been appointed,[24] repeated court orders designed to prevent Starr from interfering with the guardians' performance of their duties and the work of Alexandra's therapists, what Judge Lopez found were Starr's persistent efforts to tell Alexandra "what is good for [her,]" Starr's conduct that Judge Lopez found was "hampering Alexandra's opportunity to become autonomous," the court's selection of Sloan as successor guardian for her ability to be "firm in working with the family," and

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[23] The court may remove a guardian "after a hearing" if removal is in the best interest of the ward. *See* D.C. Code § 21-2049 (a) (2010 Supp.). The hearing need not be an oral one. *See In re Estate of Greene*, 829 A.2d 506, 508 (D.C. 2003) ("[W]hile a hearing [to remove a conservator] is required, the hearing need not inevitably be an oral one. Rather a hearing in certain circumstances may be held through written submission.") (citation and emphasis omitted); *Langon*, 663 A.2d at 1251 n.5 (reasoning that because the court never reached the issue of whether to appoint a successor guardian and addressed only the issue of whether the current guardian should be removed — which the ward had expressly opposed through a court-appointed visitor — fewer procedural protections applied). By contrast, the Act specifies that before appointing a guardian or successor guardian, to safeguard the rights of the subject, the court must *inter alia* allow the subject to cross-examine witnesses at an evidentiary hearing. D.C. Code §§ 21-2041 (h), 21-2049 (c) (providing that "[b]efore appointing a successor guardian, . . . the court shall follow the same procedures . . . that apply to a petition for appointment of a guardian").

[24] There was no dispute about this. Starr wrote to Sloan in 2005 that "Alexandra strongly dislikes both of her [then] guardians [Fawcett and MacDonald]."

Sloan's appointment with the approval of all the parties.[25] On this record, Judge Hamilton reasonably perceived a need to take into consideration a number of factors beyond Alexandra's wishes.[26] This is especially so since there was no proffer by any party at the time of the 2008 intervention proceeding that Alexandra had expressed a wish as to who should replace Sloan as her guardian (a fact that made this case quite different from that of Orshansky, who had specified in her health care proxy that her niece was to be her agent).[27]

For all the foregoing reasons, we cannot conclude that, from this court's guidance in *Orshansky*, it should have been obvious to the court that Alexandra's counsel had failed to fulfill his duties as counsel or that the proceeding should not have been dismissed without more zealous advocacy of Alexandra's wishes. Nor does the Guardianship Act make plain that Alexandra's counsel should have zealously advocated her stated wishes as to her guardian rather than the GAL's recommendations as to Alexandra's best interests. The Guardianship Act requires that "counsel for the subject of a guardianship or protective proceeding . . . represent zealously that individual's legitimate interests." D.C. Code § 21-2033 (b).[28] The Act does not define the term "legitimate interest," but it appears to use the term interchangeably with the term "interests." *See* D.C. Code § 21-2033 (b) (providing that "[t]he duty of counsel for the subject of a guardianship or protective proceeding is to represent zealously that individual's legitimate interests," which "[a]t a

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[25] Although Starr had wanted to be Alexandra's guardian, she wrote to Sloan (who was then Alexandra's counsel), saying, "If a [court-appointed] guardian is inevitable, could you be named as guardian?"

[26] *Cf. In re Guardianship of Botz*, 2007 Vt. Super. LEXIS 36, *15–*18 (Vt. Super. Ct. Mar. 15, 2007) (holding, despite statutory requirement that court take into consideration "the preference of the ward", that fact that ward "no longer wishe[d] to have [his current guardian] in the role" did not support a finding that the guardian was no longer suitable and should be removed, where the court observed, as to the guardian that the ward wanted as a successor, that it was "highly likely that after a short period of time," if the proposed successor guardian resisted the same types of demands that caused the ward to dislike the current guardian, the relationship between the ward and the successor guardian would likewise deteriorate).

[27] Judge Hamilton observed, no doubt correctly, that "the Court doesn't have an endless supply of persons to appoint as guardians, in this case or in any other case, unless there's a good reason to do so that can be articulated."

[28] This language in the Act is in stark contrast to the statutory law in some other jurisdictions, which expressly require that counsel for an incapacitated individual advocate the expressed wishes of the client. *See, e.g.*, Wis. Stat. § 54.42 (b) ("Any attorney . . . shall be an advocate for the expressed wishes of the proposed ward or ward."); Fla. Stat. § 744.102 (1) (providing that the "[a]ttorney for the alleged incapacitated person . . . . shall represent the expressed wishes of the alleged incapacitated person to the extent it is consistent with the rules regulating The Florida Bar").

minimum, this shall include: . . . (3) Securing and presenting evidence and testimony and offering arguments to protect the rights of the subject of the guardianship or protective proceeding and further that individual's *interests*") (emphasis added). Notably, the Act uses the term "interests" to describe as well the role of a guardian ad litem. D.C. Code § 21-2011 (a) (2010 Supp.) provides that a "guardian ad litem" is "an individual appointed by the court to assist the subject of an intervention proceeding to determine his or her *interests* in regard to the guardianship or protective proceeding or to make that determination if the subject of the intervention proceeding is unconscious or otherwise wholly incapable of determining his or her interest in the proceeding even with assistance") (emphasis added); *see also* D.C. Code 21-2033 (a) (providing that "a guardian ad litem may be appointed by the court to assist the subject of an intervention proceeding to determine his or her *interests* in regard to the guardianship or protective proceeding or to make that determination if the subject of the proceeding is unconscious or otherwise wholly incapable of determining his or her *interests* in that proceeding even with assistance") (emphasis added). We have recognized, however, that a guardian ad litem's role is to determine or assist in determining a subject's "best interest." *Orshansky*, 804 A.2d at 1097 n.18. In sum, the language used in the Act as a whole and our case law support an interpretation that (at least when counsel believes that the client ward is unable herself to determine her legitimate interests, and there is no indication that she was able to determine, and that she articulated, those interests in the past) the requirement of section 21-2033 (b) that counsel zealously advocate the subject's "legitimate interests" may be satisfied by counsel's advocacy of what the GAL has determined to be in the ward's best interest (which may or may not overlap with the ward's expressed wishes).

The legislative history of the Act supports the same interpretation. The Committee on the Judiciary explained:

> According to the District of Columbia Code of Professional Responsibility . . . , the role of counsel is to allow the client to make decisions and these decisions are binding on the attorney if they are made within the framework of the law. *In contrast* under Bill 6-7, Section 21-2033, the precise role of counsel is to adopt a *best interests approach* once his or her client's mental abilities are suspect, and will not be influenced by the opinions of those who promote the appointment or protective order.

D.C. Council, Report on Bill 6-7 at 15 (June 18, 1986) (italics added) ("Committee Report").[29] This interpretation is reflected as well in the Probate Division Rules (which have special force because the Act provides that "[u]nless specifically provided to the contrary in this chapter [Chapter 20, "Guardianship, Protective Proceedings, and Durable Power of Attorney"] or inconsistent with its provisions, *the rules of the court . . . govern proceedings under this chapter*." D.C. Code § 21-2022 (2001) (emphasis added)). Super. Ct. Prob. R. 305 (a)(4) provides that "[i]f counsel determines that the subject of the proceeding cannot determine his or her own legitimate interests and has no guardian,[30] counsel may apply for appointment of a guardian ad litem[,]" and

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[29] Although the Committee expressed the view that a "best interests approach" is different from the approach generally required of counsel in a typical attorney-client relationship by the Rules of Professional Conduct, we do not perceive a true conflict. D.C. R. Prof. C. 1.2 provides generally that "[a] lawyer shall abide by a client's decisions concerning the objectives of representation . . . ." However, comment 2 to the Rule states that "[i]n a case in which the client appears to be suffering mental disability, the lawyer's duty to abide by the client's decisions is to be guided by reference to rule 1.14." In turn, Rule 1.14 provides in pertinent part:

> (a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a typical client-lawyer relationship with the client.
>
> (b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a surrogate decision-maker.

D.C. R. Prof. C. 1.14 (a)–(b). Thus, although directing that a lawyer for an individual with diminished mental capacity must maintain a typical client-lawyer relationship to the extent reasonably possible, Rule 1.14 recognizes that the lawyer may seek the appointment of a surrogate decision maker — such as a guardian ad litem — when the client cannot adequately act in her own interest.

[30] In this proceeding, although Alexandra had a guardian, the guardian was the subject of the removal petition, and it was reasonable to interpret Rule 305 (a)(4) to authorize counsel to seek

(continued...)

Super. Ct. Prob. R. 306 provides the following with respect to the relationship between the subject of an intervention proceeding and her counsel:

> To the maximum extent possible the subject of the proceeding shall remain responsible for determining his or her legitimate interest. In cases where a guardian ad litem has been appointed because the subject is unconscious or otherwise wholly incapable of determining his or her interests, even with assistance, *counsel shall follow the guardian ad litem's determination of the subject's interests*. In all other cases, counsel shall to the maximum extent possible ascertain directly the subject's determination of his or her legitimate interest.

Super. Ct. Prob. R. 305 (a)(6) (emphasis added).[31]

The authorities discussed above make untenable an argument that the court plainly erred in proceeding while Alexandra's counsel advocated her best interests (as determined by the GAL) rather than her expressed wish as to the fate of her guardian.[32] Starr and *amici* argue, however, that because Alexandra was neither unconscious nor "wholly" incapable of determining her interests, counsel plainly acted improperly in following the GAL's determination as to Alexandra's interests.

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[30](...continued)
the appointment of an independent guardian ad litem to assist in determining and to advise counsel regarding Alexandra's best interests.

[31] *See also* Probate Rule 306 (d): "A guardian *ad litem* shall assist the individual for whom the guardian *ad litem* has been appointed to determine the individual's interests in regard to the legal proceedings in which the individual is involved. If the individual is wholly incapable of determining his or her own interests, the guardian *ad litem* shall make that determination and advise the individual's counsel accordingly."

[32] Also precluding a finding of plain error is the fact that Fein's approach appears to have been consistent with the guidance set forth in the Probate Division Attorney Practice Standards adopted by the Superior Court through its Administrative Order 06-19 (December 5, 2006). The Practice Standards provide *inter alia* that "[w]hen a Guardian ad litem is appointed, Counsel for the Subject regards the Guardian ad litem as the 'substitute' client" [Comment to Practice Standard 3]; that "if counsel has reason to believe that the subject's legitimate interests require investigation, counsel shall request appropriate substitute decision-making alternatives, such as the appointment of a Guardian *ad litem*" [Practice Standard 3.4]; that "[i]n the event that a Guardian *ad litem* for the subject is appointed, Counsel for the Subject follows the directives of the Guardian *ad litem* regarding the subject's best interests" [Practice Suggestions to Practice Standard 3.4]; and that the guardian ad litem should "[c]ommunicate with Counsel for the Subject so counsel can advocate more effectively on behalf of the subject once the Guardian *ad litem* has determined the best interests of the subject." [Practice Suggestions to Practice Standard 4.1]

But the Act does not plainly require that the subject of an intervention proceeding be "wholly incapable of determining his or her interests" in all respects before the guardian ad litem may be charged with determining the subject's interests. Rather, the language of section 21-2033 (a) is open to the interpretation that where the ward is wholly unable to make a considered judgment with respect to a particular matter affecting her care — such as whether her current guardian should remain as guardian — the task of making that determination falls to the guardian ad litem (and the duty of counsel is to advocate that identified interest in accordance with the determination of the GAL as substitute decision maker).[33] Moreover, especially in light of the GAL's reports about the opinions of the therapists that Alexandra saw regularly and trusted, we cannot say that the court plainly erred in not relying on the statement in Alexandra's 2007 ISP that Alexandra had the capacity to choose someone "to make . . . decisions on her behalf." Again, there is no indication that those who prepared the ISP (and who indicated in it that Alexandra had no guardian) considered the history of the guardianship and the need for a guardian who could be firm in working with Alexandra's family. Nor did they consider whether, under all the circumstances leading up to Starr's petition, Alexandra had the capacity to decide whether her current guardian should be removed or whether the scope of the guardianship should be limited.

Comment 6 to Rule 1.14 of the Rules of Professional Conduct provides that:

> [i]n determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as: the client's ability to articulate reasoning leading to a decision, variability of state of mind, ability to appreciate the consequences of a decision,

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[33] *Cf.* Martin Guggenheim, *The Right to Be Represented but Not Heard: Reflections on Legal Representation for Children*, 59 N.Y.U. L. Rev. 76, 92 (1984) (noting that under the Model Code of Professional Responsibility, "[a]s long as a client is capable of making a 'considered judgment on his behalf,' the client's wishes must guide counsel's actions"). Under this interpretation, the proper role of counsel to a developmentally immature client is similar to the role that counsel to a minor child may be expected to take in a child welfare proceeding. *See S.S. v. D.M.*, 597 A.2d 870, 875 (D.C. 1991) ("As advocate, the attorney forms an opinion, either in consultation with the child or based on his or her own analysis, about the disposition which would promote the child's best interests and advocates that position before the court") (citing, at 875 n.18, *inter alia*, Robyn-Marie Lyon, *Speaking for a Child: The Role of Independent Counsel for Minors*, 75 Cal. L. Rev. 681 (1987) (observing, at 689–90, that "scholars and practitioners increasingly debate . . . the acceptability of various roles for the child's attorney[,]" and concluding, at 693, that "an attorney should advocate the position desired by her client if the court determines that the child possesses sufficient maturity to comprehend the circumstances of the case, the crucial issues, and the probable consequences of the available positions on those issues. If the court determines that the child does not possess the requisite degree of maturity, the child's attorney should act under the doctrine of substituted judgment to approximate the decision that the child would want if he were mature.").

> the consistency of a decision with the known long-term commitments and values of the client.

Here, such factors as reported to the court gave Judge Hamilton a basis for accepting Fein's representation that Alexandra was incapable of determining her interests with respect to her guardian. The court heard that she gave no concrete reason for wanting Sloan removed, was subject to her mother's influence, and believed she needed no guardian at all (despite all indications to the contrary).

Finally, in assessing whether it should have been "plain" to the trial judge that Alexandra could determine her own legitimate interests and was entitled to have her counsel zealously advocate her stated desire as to the guardian rather than the GAL's recommendation, we take into account that in the probate court none of the parties objected to her counsel's approach.[34] "[I]n the absence of objection at trial, we find no miscarriage of justice" in the court's appointment of a GAL or in the reliance by Alexandra's counsel on the GAL's recommendations. *S.S.*, 597 A.2d at 883. And in light of all the foregoing, the court did not plainly err in proceeding on the basis of Fein's representation of Alexandra.

B. Denial of Quality Trust's Petition to Participate in the Proceeding

We turn next to Starr's argument that the court abused its discretion in denying Quality Trust's petition to participate in the proceedings pursuant to D.C. Code § 21-2041 (i) and Probate Rule 303 (b). Quality Trust had sought to participate by filing a brief "addressing certain legal issues and standards applicable to any appointment of a guardian" and "to be present at and to participate in any hearings in this matter concerning a guardian" for Alexandra. In denying the petition, the court expressed concern that there not "be too many people speaking for the ward in the case[,]" pointing out that Alexandra was "represented by independent counsel."

We address the issue of Quality Trust's petition to participate only briefly, because Starr lacks standing to raise this argument on appeal. The injury, if any, from non-participation was Quality Trust's injury, and Quality Trust itself had the opportunity to appeal the court's ruling, since the Probate Division Rules permit "[a]ny person who is aggrieved by a final order or judgment of the Probate Division . . . and who participated in the determination of that order or judgment [to] file an appeal therefrom" to this court. Super. Ct. Prob. R. 8 (a). Quality Trust did not appeal the probate court's ruling, and Starr "has suffered no injury to [her] legal rights or to

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[34] We appreciate that the parties may have been unsure about the proper role of counsel. Legal scholarship reflects that "[i]n representation for those with diminished capacity, there is widespread deliberation and 'robust debate' in the legal profession over how the role of the attorney [to an adult child with disabilities] will be defined." A. Frank Johns, *Guardianship Adjudications Examined Within the Context of the ABA Model Rules of Professional Conduct*, 37 Stetson L. Rev. 243, 268 (2007).

some legally protected relationship" by the denial of Quality Trust's petition. *In re Delaney*, 819 A.2d 968, 1003 (D.C. 2003) (citing *In re Jacobson*, 387 A.2d 590, 591 (D.C. 1978)).

We do note, however, that a Quality Trust representative was present at the first two hearings and the court agreed to "accept . . . into the record" the written submission that Quality Trust had filed. Thus, Quality Trust obtained much of what it sought through its request to participate, particularly inasmuch as its representative told Judge Hamilton that Quality Trust did not "have an outcome that we recommend." Further, to the extent that Quality Trust sought to present evidence at any evidentiary hearing that the court might order on Starr's petition, Starr could have obtained the organization's participation by calling one or more of the organization's representatives as witnesses (and, indeed, Starr listed such representatives as witnesses on her pre-trial statement). Finally, by participating in this appeal as an *amicus*, Quality Trust presumably has had the opportunity to set out in its brief to this court the perspective it wished to present.

C. The Court's Decision Not to Permit Discovery

We next consider Starr's claim that the court abused its discretion in denying her request to conduct discovery.[35] We begin by noting that Starr's April 2, 2008 petition sought broad relief: Starr sought to "dismiss [the] guardianship or in the alternative to limit the scope of the guardianship and/or remove Andrea Sloan as guardian; to appoint counsel to Alexandra Martel; and to allow [Ms. Starr] unrestricted access to her daughter or to immediately increase visitation and contact" between Alexandra and Starr. As the basis for the petition, Starr not only averred that Sloan had restricted contact between Alexandra and Starr, but also alleged, *inter alia*, that Sloan was "not principally interested in . . . acting pro-actively in the Ward's best interests[,]" that no progress had been made to develop a life plan for Alexandra, and that Sloan "refuses to let Alexandra be seen by a doctor to evaluate her continued regimen" of psychotropic medication, which has caused "side effects [such as] fungal infections, dizziness, lethargy and constipation." Starr also asserted that a guardianship was no longer necessary and that the guardianship had increased family acrimony and caused stress to Alexandra. It was in the face of those allegations that, by order dated April 11, 2008, the court granted Starr's petition to conduct discovery without waiting for an opposition to be filed.

Starr's discovery requests likewise were broad. For example, her first request for production of documents sought "[a]ll documents which relate to Alexandra Martel." Starr also sought, among other things, medical records ("All documents relating to doctors and other healthcare providers that Alexandra Martel has been taken to . . . since the beginning of [Sloan's] appointment as guardian" and "All documents relating to . . . all medications that Alexandra Martel has been prescribed") and documents relating to any effort Sloan had made to "investigate . . . any funds left to Alexandra . . . by her paternal grandparents . . . ." Starr's interrogatories asked Sloan

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[35] Super. Ct. Prob. R. 312 provides that "discovery, conducted in accordance with Superior Court Civil Rules 26 through 37, may be had only upon order of the Court . . . with such limitations on the manner and scope of discovery as in its discretion the Court deems appropriate."

to describe in detail, *inter alia*, "all facts and evidence supporting your contention that [Starr] ever withheld medication from Alexandra" and "all side effects of Clozaril." Reviewing the discovery requests during the first hearing on May 22, 2008, and expressing surprise at their volume, Judge Hamilton announced that discovery would be suspended. Quoting some of the interrogatories that Starr had propounded, Judge Hamilton criticized the breadth of the discovery requests as "unreasonable, absolutely unreasonable" and not "reasonably necessary to address and dispose of any appropriate issue that may exist in this case."[36] The court issued an order on June 8, 2008, rescinding the earlier order permitting discovery order. That order followed the discussions at the May 22 hearing in which both Starr's counsel and Alexandra's counsel told the court that progress had been made to increase visitation between Starr and Alexandra. It also followed receipt by Starr's counsel of Alexandra's 2007 ISP and a colloquy in which the court corrected its records to make sure that Starr was listed on the docket as an interested person, so that she would receive all filings in Alexandra's case.

During the June 24, 2008 hearing, Judge Hamilton again discussed the subject of discovery, explaining that he wanted to be "as non-intrusive as possible" into the ward's life and did not want unnecessarily to "open that door to this lady's medical history" and to the risk of further dissemination or distribution of her medical information. Judge Hamilton also observed that "some of the initial pressure that gave rise to this litigation has, to some extent, if not substantially, been dissipated." Earlier in the June 24 hearing, Judge Hamilton had heard from Starr's counsel that Starr had been "able to have access to her daughter . . . ." Fein likewise reported during the hearing that "visitation [was] ongoing, every day . . ., between subject ward and her mom" and told the court that Alexandra's classes were "going smoothly." Starr's counsel told the court, however, that she would be asking the court to reconsider its discovery ruling to permit discovery of records related to Alexandra's schooling and to her medication.

Starr filed her scaled-back petition on September 19, 2006, "narrow[ing]" the relief sought to removal of Ms. Sloan as guardian and/or to limit the scope of the guardianship). However, Starr did not proffer a scaled-back discovery request. Subsequently, in her pre-trial statement filed on November 19, 2006, regarding discovery she stated that she "may seek to have the Court reconsider its prior discovery orders to ensure that appropriate information is available at trial

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[36] The court pointed to Starr's second interrogatory, which in part asked Sloan to "[i]dentify all experts, witnesses, and any other persons with whom you have communicated regarding Alexandra Martel, Karen Martel, your conduct as guardian for Alexandra Martel and/or any other fact relating to the above-captioned matter, and describe in detail the communication(s), including (a) who initiated the communication; (b) the information that was communicated; (c) the date of the communication; and (d) the names of all people who were present." The court also found "unreasonable" Starr's third interrogatory, which asked the guardian to "[i]dentify all communications that you have had with Alexandra Martel about her wishes since January 1, 2007, and describe in detail the communication(s), including (a) who initiated the communication; (b) the information that was communicated; (c) the date of the communication; and (d) the names of all people who were present."

. . . ." It is on this record that we consider whether the court abused its discretion in not permitting discovery.

We discern no abuse of discretion with respect to discovery. The court's concern about the overbreadth of Starr's discovery requests was well-founded even before Judge Hamilton directed that "visitation . . . should be granted" (and the parties acknowledged that the visitation issues raised in Starr's petition had largely been resolved) and before Starr amended her petition. In the wake of those and other developments, the court's continuing concern was warranted *a fortiori*. In filing her amended petition, Starr asserted that the court "should limit the guardian's authority to making medical decisions . . . ." That assertion rendered unnecessary Starr's requests for medical records and medication information and made reasonable Judge Hamilton's conclusion that the requested discovery was not "designed to obtain information which is reasonably necessary to address and dispose of any appropriate issue that may exist in this case." Further, Starr's counsel told the court that Starr's conduct was not an issue in the case,[37] a representation that made unnecessary as well the discovery requests for information purportedly supporting Sloan's charges with respect to Starr's withholding of Alexandra's medication or misconduct toward Alexandra.[38] Thus, the discovery requests that Starr had originally propounded were out of proportion to the issues left in the case. And, although Starr's counsel advised the court that she might ask the court to reconsider its discovery ruling, she never provided the court with a more limited discovery request to consider. Judge Hamilton had expressed concerns about the intrusiveness of the discovery and about the impact on Alexandra of ratcheting up the volume of the litigation, having been advised of Alexandra's expressed desire not to be in the midst of tug of war between the people involved in her life.[39] In light of that reasonable concern, and since Starr did not proffer a limited discovery request, we cannot conclude that the court abused its discretion in not reconsidering its discovery order.

D. Dismissal Without An Evidentiary Hearing

Finally, we consider Starr's claim that the court abused its discretion in dismissing her amended petition without having held an evidentiary hearing. As discussed in note 23 *supra*, the probate court is not necessarily required to have an evidentiary ruling before deciding whether to remove a guardian or to limit the scope of a guardianship. Rather, as provided in Super. Ct. Prob. R. 322 (e)(1)–(2), the court "in its discretion may schedule an oral hearing" or may rule on a petition "through written submission." Thus, whether to grant an evidentiary hearing was

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[37] Starr's counsel said that the case was "not . . . about Karen Martel."

[38] Additionally, Starr had been able to obtain a copy of Alexandra's ISP and was reinstated as an interested person entitled to receive court filings in the case on a regular basis.

[39] At the first hearing, Fein explained to the court that Alexandra "still sees this as a family court fight between Mom and Dad. . . . [a]nd . . . it always comes down to the two of them fighting. . . . [a]nd how uncomfortable that makes her feel. . . . I don't want that kind of attention."

discretionary. Part of our task is to determine whether the record that was before the court provided a sufficient basis for the court to dismiss the petition without an evidentiary hearing.[40] We recognize the principle that a court need not conduct a "formal[] evidentiary hearing" where "the probable value of the proposed additional procedures [is] limited." *Neilson v. Colgate-Palmolive Co.*, 199 F.3d 642, 653, 654 (2d Cir. 1999).

It is difficult to fault the trial judge for his tentative conclusion, expressed on the record during the October 7, 2008 hearing, that no evidentiary hearing was warranted as to the issues that Starr's counsel had identified during the hearing as "pivotal." Starr's counsel told the court that the "pivotal issue" and "really, *the only issue in the case*, is does Alexandra have the capacity to be involved in a decision as to who her guardian is" or "the capacity to choose someone to make the decisions on her behalf" (emphasis added). She argued that Alexandra's ISP was "clear on its face" that Alexandra did have that capacity, and that "[i]f there's going to be a dispute about that for some reason, about who should be the guardian, you have to have an evidentiary hearing." She added that the proceeding was about "who is the best guardian for Alexandra," "not . . . about Karen Martel," but that an evidentiary hearing would be necessary if the dispute about what happened during Alexandra's trip to Minnesota was going to be an issue. Starr's counsel also told the court that a hearing was necessary so that the court could "hear from Alexandra directly" and to "test the[] findings of the GAL."

Further, when Judge Hamilton asked Starr's counsel, "What would you propose to present during the course of an evidentiary hearing?" counsel stated *inter alia* that she would present (1) testimony from the GAL as to the basis for her opinion (presumably, her opinion that Alexandra was "not in a position to exercise the appropriate judgment in deciding what would be in her best interest" with respect to a guardian); (2) testimony of relatives and friends who observe and interact with Alexandra, who would say that she has "a voice that should be heard"; (3) testimony by people involved in the preparation of Alexandra's ISP, whom counsel would examine about why they say Alexandra had the capacity to make a decision about the selection of her guardian; (4) medical testimony that Alexandra is a "very competent young woman" and "should be heard by the court"; and (5) testimony from Alexandra, so that she could speak to the judge directly.

Thus, much of what Starr told the court she would present at an evidentiary hearing focused on whether Alexandra was capable of deciding who should be her guardian. However, this was testimony that would become relevant only if and when the court determined to remove Sloan. In that regard, the court had to determine whether the guardian was carrying out her duties in

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[40] We must "examine[] the record and the [probate] court's determination for those indicia of rationality and fairness that will assure [us] that the [probate] court's action was proper." *Orshansky*, 804 A.2d at 1092 (citation omitted). We note that the court was entitled to "take judicial notice of the contents of court records" from earlier in the case. *S.S.*, 597 A.2d at 880.

compliance with the requirements of the guardianship statute.[41] As to Starr's statement that a hearing was necessary so that the court could hear from Alexandra directly, Judge Hamilton observed that he would "feel uncomfortable" convening an evidentiary hearing to enable Starr's counsel to elicit testimony from Alexandra when Alexandra's counsel had not requested that she testify, when the court was unaware of what privileged conversations might have occurred between Alexandra and her counsel about her role in the proceeding, and when Alexandra's counsel had expressed that Alexandra "understands that she's [being] used as some type of object or pawn . . . in a struggle that she doesn't want to be involved in." It was reasonable for the court to consider those factors in determining whether a hearing was warranted.[42]

But Starr's counsel also told the court that, at an evidentiary hearing, she would show that Sloan has not balanced her duties to protect the ward and to respect and encourage her independence. Judge Hamilton discounted this as a basis for holding an evidentiary hearing, reasoning that "[a]t the end of the day, even with an evidentiary hearing," the problem would still be balancing between "establish[ing] enough authority in the guardian but at the same time, accord[ing] to the subject independence and avenues by others to be involved in the care and welfare of the subject." We can understand that the court might have thought that no evidentiary hearing was required to obtain the information necessary to achieve the necessary "balancing,"[43] particularly in light of the court's perception – amply supported by the record – that some of the issues had been "blown out of proportion" and "distorted to some extent because of the level of aggressive advocacy," and that the problem was "basically a conflict" between Sloan and Starr.[44]

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[41] The court is required to exercise its authority "so as to encourage the development of maximum self-reliance and independence of the incapacitated individual." D.C. Code § 21-2044 (a). The guardian is charged with acting in the ward's best interests by pursuing the "least intrusive, least restrictive, and most normalizing course of action possible to provide for [her] needs," D.C. Code § 21-2011 (1)(B) (2010 Supp.), and by "[i]nclud[ing] the ward in the decision-making process to the maximum extent of [her] ability" and "[e]ncourag[ing] the ward to act on . . . her own behalf whenever . . . she is able to do so, and to develop . . . capacity to make decisions in those areas in which . . . she is in need of decision-making assistance, to the maximum extent possible." D.C. Code § 21-2047 (a)(7), (8) (2010 Supp.).

[42] *Cf. In re McMillan*, 940 A.2d 1027, 1038 (D.C. 2008) (discussing Probate Division forms stating that the subject of an intervention proceeding has the right to remain silent).

[43] Indeed, the court's expressed reservations echoed our own recognition, in *Orshansky*, that "a suitable guardian has considerable discretion in gauging how best to care for his or her ward, and the Guardianship Act does not call for judicial micromanagement and second-guessing." 804 A.2d at 1102.

[44] For example, in her amended petition, Starr asserted that the "crux of this litigation" is "Sloan's need to strictly monitor all contact between Alexandra and her mother" and what she

(continued...)

Nevertheless, when the claims amounting to second-guessing, efforts at micro-management, and expressions of personal animus are peeled away, there remain among Starr's claims some issues as to which the court did not explain its decision that an evidentiary hearing was not warranted to determine whether Alexandra's needs and the goal of her developing maximum self-reliance are being met under the current guardianship arrangement. The court's statements at the October 7 hearing did not address Starr's point that an evidentiary hearing would give her an opportunity to present expert testimony about matters such as the "proper conduct of a guardian" and "skills regarding finding independence," against which to test the adequacy of Sloan's overall performance. This anticipated focus of an evidentiary hearing was perhaps lost in the array of issues discussed at the October 7 hearing, but it is the clear theme of Starr's pre-trial statement. In her pre-trial statement, she advised the court that she would present evidence to demonstrate that, in the "upcoming and critical years of her life," Alexandra needs a guardian able to work collaboratively with Alexandra, her family and others to "create a concrete plan of education, job skills training, life skills and mobility training, social/family planning, and employment"; and that she intended to call as a witness, among others, an expert in "life skills planning, education and residential living for developmentally disabled adults."

Because the decision whether to hold an evidentiary hearing is within the discretion of the probate court, the court's decision "is not to be disturbed absent a showing of clear abuse."[45] But the court's "reasons for exercising discretion should not only be spelled out so a reviewing court

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[44](...continued)
asserted was Sloan's "personal animus" toward Starr (rather than, as her initial petition alleged, that Sloan was "not principally interested in . . . acting pro-actively in the Ward's best interests").

In addition, the court doubtless recognized that many of Starr's complaints about Sloan's restrictions were of a piece with her complaints about the previous guardian team. Sloan as well as counsel for Alexandra and Martel had urged the court to consider the recent history of the case, with Martel's counsel emphasizing Judge Lopez's finding that Starr "has a long way to go before releasing the tether by which she holds Alexandra." In assessing Starr's complaint about Sloan's "puzzling restriction of Alexandra's access to a cell phone," the court had access to a record showing that, in 2005, then-guardian Fawcett reported to the court that Starr was calling Alexandra's cell phone as a way of achieving unsupervised contact with Alexandra in contravention of the protective order that Judge Lopez had entered, and thereby was undermining Alexandra's progress in the program that had been arranged by the guardian. Moreover, Judge Hamilton recognized from experience that "the guardian is asked in many instances to make decisions and to do things that don't place them on the highest pedestal so far as popularity . . . is concerned[,]" and he reasonably admonished that the court could not "change the guardian every time somebody says I don't like this guardian, although that might be the subject herself."

[45] *Rosendorf v. Toomey*, 349 A.2d 694, 699 (D.C. 1975) (citation and internal quotation marks omitted).

can tell the basis of the [c]ourt's decision, but also so that counsel can know the basis of such decision." *Johnson v. United States*, 398 A.2d 354, 364 (D.C. 1979) (citation and internal quotation marks omitted). Here, in its abbreviated order dismissing Starr's petition, the court did not explain why, in light of the issues raised in Starr's pre-trial statement, an evidentiary hearing focusing on those limited issues was not warranted.[46] As a result, we cannot tell why the court concluded that it was not "required to undertake a special factual inquiry and seek the answers to particular questions or raise questions about particular concerns prior to rendering a discretionary decision," *id.* at 365, on Starr's petition for a change in guardian. Accordingly, we conclude that we should remand this matter for the court either to explain its decision not to hold a hearing, or to afford Starr a hearing on her petition.

So ordered.

ENTERED BY DIRECTION OF THE COURT:

JULIO CASTILLO
Clerk of the Court

[46] As noted earlier, the court had expressed "serious misgivings about protracted and extended . . . evidentiary hearings," but did not explain why a narrower, focused hearing was unwarranted.

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