

Department of Fair Employment and Housing

Appeal to the Director

To: Director Kevin Kish

From: Spectrum Institute by Thomas F. Coleman

Re: Appeal from Administrative Decision
DFEH Number: 201808-03296020

Date: November 26, 2018

Appeal

On November 20, 2018, the Department of Fair Employment and Housing sent a notice to Thomas F. Coleman indicating that it “has declined your request for DFEH to open a director’s investigation into alleged discrimination by a State-operated, funded, or financially-assisted entity and has closed your case” The notice specified that the case was closed for the following reason(s): “DFEH will not exercise its discretion under Cal. Code Regs., tit. 2, § 10012 to open a director’s investigation.”

On November 21, 2018, Thomas F. Coleman, on behalf of Spectrum Institute, sent a notice of appeal via email to the email address specified in the case closure letter. That notice explained that information regarding the basis for the appeal would be sent to the department in the coming days.

Cal. Code Regs., tit. 2, § 10033 states that “any person who wishes to appeal the department’s decision to reject a complaint or close a case may appeal to the director. . . .” This is an appeal to the director. The section further states that the appeal shall specify “the grounds upon which the appealing party considers the department’s determination to be unjust” Spectrum Institute, through its representative Thomas F. Coleman, considers the closure of the case without an investigation to be unjust. The reasons are explained below.

Procedural History

On August 16, 2018, Thomas F. Coleman filed a complaint with the Superior Court of the State of California for the County of Sacramento on behalf of Spectrum Institute and The Arc of California. The complaint alleged that the superior court was violating the Americans with Disabilities Act, Section 504 of the Rehabilitation Act of 1973, and Government Code Section 11135 by failing to appoint attorneys for a significant number of adults with intellectual or developmental disabilities who are required to participate as litigants in probate conservatorship proceedings. A second complaint was filed on behalf of Spectrum Institute and California Advocates for Nursing Home Reform for the failure to appoint attorneys for a significant number of adults with cognitive disabilities that are age related or due to medical illnesses or accidents.

Both complaints alleged that without the appointment of an attorney, these litigants had to represent

themselves pro per and, as a result of the severity of their disabilities they were not afforded effective communication and meaningful participation in the conservatorship proceedings. It was further alleged that the superior court knew of the severity of their disabilities, knew or should have known that they would prevent effective communication and meaningful participation, had a duty as a public entity receiving state and federal funds to remedy this problem, but systematically and willfully failed to take remedial action to cure this problem.

On August 16, 2018, Thomas F. Coleman on behalf of Spectrum Institute, sent a letter to Mr. Kevin Kish, director of DFEH, alerting him to the complaints filed with the superior court. Accompanying the letter were two pre-complaint inquiries for alleged violations of Section 11135 by the superior court. One inquiry focused on alleged violations of the rights of proposed conservatees with intellectual and developmental disabilities. The other focused on proposed conservatees with other types of cognitive disabilities. Both inquiries stated: “This precomplaint inquiry should be construed as a referral to the director for the purpose of him initiating a director’s investigation” All materials that had been sent to the superior court were also included with the letter to Mr. Kish.

On September 4, 2018, Thomas F. Coleman was contacted by Mr. Narbeh Vartanian, an intake consultant with DFEH. Two days later, an extensive phone interview of Mr. Coleman was conducted by Mr. Vartanian. DFEH was advised that all materials supporting the request for an investigation were available online at: <http://spectruminstitute.org/Sacramento/>

Additional written materials were submitted by email to Mr. Vartanian on: September 6, September 7, October 17, October 19, November 15, November 16, November 18, November 19, and November 20. Mr. Vartanian later indicated that all of those communications and materials were uploaded to the case file.

On October 16, 2018, the Court Executive Officer of the Sacramento Superior Court sent a letter to Mr. Coleman in response to the complaint that had been filed with the court. The letter stated that the court is in compliance with relevant sections of the probate code relating to appointment of counsel and “has detected no systemic deficiencies” in that regard. The court does not believe that state or federal disability discrimination laws require appointment of counsel in all conservatorship proceedings.

Finally, the letter states that “determining whether an individual has meaningful access to the court system requires an individualized analysis.” However, what is missing from the letter is any explanation of whether the court is engaging in such an analysis in each of those cases in which an attorney is not appointed. That omission from the letter is very telling. There is nothing to indicate that the court does engage in such an individualized analysis in any probate conservatorship proceeding. An investigation by DFEH would likely confirm that in the significant number of cases in which no attorney is appointed, the court has not engaged in any analysis or evaluation of the litigant’s ability to have effective communication or meaningful participation in the proceeding without an attorney.

On November 20, 2018, Mr. Vartanian sent a “Notice of Intake Form Closure” to Thomas F. Coleman via email and postal mail. The following day, a notice of appeal was sent to the Appeals Unit via email with a copy also being sent to Mr. Vartanian.

Factual Background

The problem addressed in the precomplaint inquiries was first brought to the attention of Thomas F. Coleman, legal director of Spectrum Institute, in what might be called a “whistle blower” report. A letter from a representative of Alta California Regional Center was sent to Mr. Coleman on March 17, 2017. It disclosed that many regional center clients were not receiving court-appointed attorneys in probate conservatorship proceedings and were therefore being required to represent themselves in these proceedings. It was alleged that the Sacramento County Superior Court was among the courts that were failing to appoint attorneys for these involuntary litigants. (See: <http://spectruminstitute.org/Sacramento/04-exhibit-a.pdf>)

Subsequently, the whistle blower explained the nature and magnitude of the problem in a documentary film titled *Pursuit of Justice*. Her statements occur at 6:30 minutes into the 35-minute film. (See: <http://pursuitofjusticefilm.com/>)

This information eventually caused Mr. Coleman to review online court records in a sample of probate conservatorship cases processed through the Sacramento County Superior Court. This audit revealed that in a significant number of general conservatorship cases, the court did not appoint an attorney to represent the proposed conservatees. As a result, many litigants had to represent themselves. (See: <http://spectruminstitute.org/Sacramento/05-exhibit-b.pdf>)

Mr. Coleman then consulted a variety of professionals asking them to render an opinion on the ability of adults with serious cognitive and communication disabilities to effectively represent themselves in probate conservatorship proceedings. These professionals included a clinical psychologist, an elder law attorney, an ADA compliance specialist, and a former regional center employee. These professionals concluded that most proposed conservatees would not be able to have effective communication or meaningful participation in these proceedings without a court-appointed attorney. (<http://spectruminstitute.org/Sacramento/02-declarations.pdf>)

Based on the whistle blower report, the audit of a sample of cases, and the opinions of the professionals, complaints were filed with the superior court and the precomplaint inquiries and referral were sent to Director Kish.

The Problem

The Sacramento County Superior Court receives petitions asking the court to grant an order placing an adult into a conservatorship due to serious cognitive and other disabilities that prevent the adult from making major life decisions and therefore place the health and welfare of the adult at risk. The court then issues a citation that requires the adult in question to participate in the conservatorship proceeding as a respondent. A verified petition, supporting documents, and medical capacity declaration put the court on notice of the nature and severity of the cognitive and other disabilities of the proposed conservatee. As a result, from the very beginning of the case, the court has knowledge of the nature, severity, and effects of these disabilities.

For adults with developmental disabilities, petitioners have the option of filing a petition for general conservatorship or a petition for limited conservatorship. Limited conservatorship proceedings are only allowed for adults with developmental disabilities. In limited conservatorship proceedings, the

court must appoint an attorney to represent the proposed limited conservatee. Some petitioners choose to file for a general conservatorship, perhaps due to counseling or coaching by others, and as a result they bypass the requirement that counsel be appointed. This has the effect of expediting the proceeding and removing potential obstacles to the granting of an order of conservatorship – obstacles that an appointed attorney may raise. A significant number of proposed conservatees who have developmental disabilities do not receive an appointed attorney as a result of the filing choice of the petitioners and as a result of the court failing to appoint an attorney on its own motion.

For adults with other cognitive and communication disabilities, petitioners can only file for a general conservatorship. A restrictive reading of relevant sections of the probate code suggest that appointment of counsel for proposed conservatees in general conservatorship proceedings is not mandatory. However, the probate code does not reference state and federal disability nondiscrimination statutes that require courts to take pro-active measures to ensure that litigants with significant disabilities have access to justice in these proceedings. Neither the ADA or corresponding state statutes are on the court's "radar screen" as these cases are being processed. ADA coordinators of the courts are focused on mobility disabilities and providing sign language interpreters for people who are deaf or hard of hearing. ADA assessments are not being done for proposed conservatees to determine what supports and services may be needed to ensure effective communication and meaningful participation in the conservatorship proceeding.

The court appoints attorneys to represent some proposed conservatees but not others. The court has no judicial policy for determining which ones receive attorneys and which do not – except for compliance with state laws requiring appointment of counsel in limited conservatorship proceedings or in a general conservatorship case when dementia powers are being requested.

A significant number of proposed conservatees with developmental disabilities who are respondents in general conservatorship proceedings do not receive an appointed attorney. The same is true for adults with other types of cognitive and communication disabilities. When no attorney is appointed, the court does not order an evaluation or conduct an assessment of the ability of the pro per respondent to have effective communication or meaningful participation in the proceeding. The response of the superior court to the ADA complaint indicates that the court is aware that such individualized assessments are contemplated by state and federal law. An investigation by DFEH would reveal that such assessments are not being conducted by the court. According to the opinions of the professionals who were consulted on the matter, without an attorney these litigants will not have meaningful access to justice in these cases.

The application of the access to justice protections of the ADA, Section 504, and Section 11135 to proposed conservatees is a matter of first impression in California. Washington State has established precedents from which California can learn. Court rules there acknowledge that appointment of an attorney may be a necessary ADA accommodation. Administrative rules in that state require the appointment of an advocate if it appears necessary to secure meaningful participation in administrative hearings. DFEH should interpret Section 11135 in a similar manner.

Duties of the Court

Title II of the ADA applies to services offered by public entities. State and local courts are considered public entities with ADA obligations. Section 504 of the Rehabilitation Act of 1973

contains protections for people with disabilities similar to the ADA. These protections apply to public entities receiving federal funds. Government Code Section 11135 incorporates Title II of the ADA into state law. That section applies to state funded entities, programs, and services.

The Sacramento County Superior Court is subject to the requirements of the ADA, Section 504, and Section 11135. The response of the superior court to the ADA complaint indicates that the court does not contest the applicability of these state and federal laws to the court or to conservatorship proceedings.

Although Rule 1.100 of the California Rules of Court addresses the duties of the court to provide accommodations upon request, the rule is silent as to the sua sponte duties of the court under the ADA, Section 504, and Section 11135. Title II of the ADA does not require a recipient of or participant in government services to request an accommodation or modification. A public entity has a duty to accommodate the special needs of people with known disabilities. An entity, such as a court, can acquire knowledge of a disability in a variety of ways. One way is when a request for accommodation is made. Another is when a third party informs the court that a litigant has a disability that may impair participation in a legal proceeding. Yet another is when the court learns this through pleadings or other court documents, such as a petition, medical capacity declaration, or various reports.

Once a court learns that a litigant has significant disabilities that may impair effective communication in the proceeding or interfere with his or her ability to understand or have meaningful participation in the proceeding, the court must initiate an interactive process or an ADA accommodation assessment. One way to satisfy the court's sua sponte duties under the ADA, Section 504, and Section 11135 would be to appoint an attorney for the litigant. The attorney would have an obligation to assist the litigant in understanding the proceeding and having access to available court procedures, such as ascertaining the wishes of the client, reading and evaluating the petitioner's paperwork, communicating with the capacity assessment professional, seeking appointment of other professionals, vetting the proposed conservator, investigating facts, calling witnesses, cross-examining petitioner's witnesses, filing motions, making objections, filing a notice of appeal, etc. A proposed conservatee without disabilities could perform these functions without an attorney. A proposed conservatee with significant cognitive and communication disabilities could not. The court knows this. And yet, when the court fails to appoint an attorney, it does not conduct an individualized assessment of the ability of the litigant to have meaningful participation in the proceedings. This failure is the nub of the problem and upon which the violations of state and federal disability nondiscrimination laws are based.

The superior court is aware of the nature and severity of the disabilities of the proposed conservatees who are required to represent themselves. The court is aware of its ADA obligations. But despite this knowledge, the court is not taking corrective action. Such action would require either appointing an attorney or conducting an individualized assessment showing that appointed counsel is not necessary to ensure effective communication and meaningful participation.

Authority of DFEH

DFEH has the authority to investigate alleged violations of Section 11135, including those which are based on the failure of a state-funded entity to comply with Title II of the ADA.

The director has broad authority to open an investigation into systemic deficiencies that may be violating the rights of a class of individuals.

A complaint to DFEH or a referral to the department requesting a director's investigation should not have to include evidence sufficient to meet a preponderance of evidence standard. In a case such as this, the referral is being made by an organization that operates through the volunteer efforts of its project directors and advisors. This referral is the result of hundreds of hours of research, investigation, and reporting. The evidence submitted, and the legal authorities cited, should be sufficient to warrant the opening of an investigation. The department has the resources to develop the evidence further, through written inquiries to or requests for records from the superior court.

Such an investigation should not be fact intensive. Most of the matters alleged in the referral and precomplaint inquiry will not be disputed by the court. The litigants who are not provided attorneys have significant disabilities. The disabilities interfere with their ability to have effective communication and meaningful participation in the proceedings. The court is aware of these disabilities. The court is or should be aware of the adverse impact of these disabilities on access to justice in these cases. The court does not appoint an attorney for many proposed conservatees. When no attorney is appointed, the court does not evaluate the ability of the litigant to effectively represent himself or herself in the proceeding. No ADA assessment is done. None of these facts will be disputed by the court.

Unjust Decision

The decision of DFEH not to open a director's investigation and to close the case is unjust. The injustice stems from several factors.

The severity of the disabilities of proposed conservatees makes most of them unable to request an attorney. They do not understand the need for an attorney. Many do not even understand the nature of the proceeding, much less the value of an attorney in such a case. But a request should not be required. The ADA contemplates the duty of a public entity to provide accommodations for known disabilities, even without a request. But when an entity ignores this obligation, it is unjust to require the litigant to file an appeal or lodge a complaint. Again, most of them would not know how to engage in such procedures.

Proposed conservatees are not organized as a political lobby or legal advocacy network. They are unlike other constituencies which have the ability to complain and to petition the government for redress of grievances – women, the LGBT community, racial minorities, and people with physical disabilities. People with cognitive disabilities mostly depend on others to lobby or complain for them. That is why Spectrum Institute, The Arc of California, and CANHR filed the complaints with the superior court. That is why Spectrum Institute filed the precomplaint inquiries and referral to DFEH for a director's investigation.

All other administrative remedies have been explored and pursued, but without avail. DFEH is the last resort by which these classes of people with disabilities can secure relief. An investigation by DFEH could stimulate systemic reform – not only in Sacramento but in courts throughout the state where there is a similar failure to appoint counsel or conduct an individualized ADA assessment of the ability of those without counsel to have access to justice is conservatorship proceedings.

Spectrum Institute has approached the following officials and agencies, through administrative requests, seeking reform of the conservatorship system, including a requirement that competent counsel be appointed to provide effective advocacy and defense services for proposed conservatees: Chief Justice of California, Judicial Council, State Bar, Attorney General, California Senate Judiciary Committee, United States Department of Justice, Los Angeles Superior Court, and the Sacramento Superior Court.

While the Attorney General has the duty to see that laws of the state are properly enforced, that office has a conflict of interest that has prevented its Civil Rights Enforcement Section from becoming involved. Since the Attorney General provides legal advice to state officials and entities, including state courts, the loyalty of that office is aligned with the alleged civil rights violators. As a result, that leaves DFEH as the only civil rights enforcement agency with jurisdiction to intervene on behalf of these two classes of proposed conservatees.

The jurisdiction of DFEH to investigate ADA violations by state-funded entities is relatively new. DFEH supported the bill that created this jurisdiction even though no funding was provided for this expanded authority. DFEH indicated that it did not anticipate a flood of complaints under Section 11135 and therefore existing funding was sufficient to fulfill this new responsibility.

It is likely that there has not been a flood of complaints under section 11135. It is also likely that this may be the first complaint against a superior court for alleged ADA violations. So now that DFEH has the jurisdiction that it sought or supported, it would be unjust for the department to decide that it will not exercise its discretion to assist these vulnerable classes of litigants with disabilities obtain access to justice in legal proceedings they never sought to be a part of in the first place.

The director and the department have evaluated the equities and decided to investigate and advocate for people with disabilities in significant cases in the past. One example is the director's investigation and subsequent litigation against the Law School Admissions Council.

Since there are virtually never any appeals to the Court of Appeal or Supreme Court filed by probate conservatees, due to the nature of their disabilities and lack of effective legal representation, the problem identified here will not be corrected through the normal appellate process. It is therefore necessary to seek intervention by DFEH – the only agency in the Executive Branch with authority to investigate and, if necessary, conciliate or litigate a solution to this problem.

It would therefore be proper and just to reverse the decision to summarily close this case and to open a director's investigation of the matters identified in the precomplaint inquiries and referral.

Some additional comments are warranted regarding the closure of the case insofar as it pertains to the violation of the rights of people with intellectual and developmental disabilities who are involved in probate conservatorship proceedings.

The Legislature has declared: "The State of California accepts its responsibility to ensure and uphold the rights of persons with developmental disabilities and an obligation to ensure that laws, regulations, and policies on the rights of persons with developmental disabilities are observed and protected." (Cal. Welf. & Inst. Code § 4433) It has further been declared: "An otherwise qualified person by reason of having a developmental disability shall not be excluded from participation in,

be denied benefits of, or be subjected to discrimination under any program or activity that receives public funds.” (Cal. Welf. & Inst. Code § 4502)

These rights are parallel to and enforceable through Government Code Section 11135. It is patently unjust for DFEH to be made aware of violations of these code sections by the Sacramento County Superior Court and then not to open an investigation to determine the scope of the problem and to fashion an appropriate remedy. To close the case without a director’s investigation would be to shirk the responsibility entrusted to DFEH by the Legislature.

Section 4433 speaks of a duty to ensure that laws, *regulations*, and policies on the rights of persons with developmental disabilities are observed and protected. The California Code of Regulations (17 CCR § 50510) specifically addresses the right of such persons to “advocacy services” and “access to the courts” to contest a guardianship or conservatorship. (See attached commentary: “Access to the Courts for People with Developmental Disabilities.”)

By failing to appoint an attorney for a significant number of proposed conservatees with developmental disabilities in probate conservatorship proceedings, the Superior Court is denying them the rights specified in this regulation.

To ensure access to justice in these proceedings, the Superior Court should do either of the following: (1) appoint an attorney who will serve as an advocate and ensure access to justice in the proceeding; or (2) conduct an individualized assessment of the proposed conservatee to determine whether he or she will be able to effectively advocate and have meaningful participation in the proceeding without an appointed attorney.

An investigation by DFEH will show that in a significant number of probate conservatorship cases, the Superior Court is doing neither. This failure constitutes a violation of due process, Title II of the ADA, Section 504 of the Rehabilitation Act, Section 11135 of the Government Code, Section 4502 of the Welfare and Institutions Code, and Section 50510 of the California Code of Regulations. Since all of these sections are restatements of the rights guaranteed in and duties imposed on the court by Section 11135, DFEH has jurisdiction to open a director’s investigation into the policies and practices of the Superior Court. Failure to do so would be unjust. As a result, the decision to close the case should be reversed and a director’s investigation should be opened.

The failure to have an attorney to assist a proposed conservatee is not a technicality that can or should be ignored because petitioners have good intentions. The consequences of an order of conservatorship can be devastating. Being placed under an order of conservatorship has been likened to “civil death” due to the loss of fundamental decision-making rights in the areas of medical care, place of residence, control of finances, social contacts, sexual relations, marriage, and education.

The National Council on Disability issued a report earlier this year in which it recognized the severe consequences an order of guardianship (conservatorship) can have on the rights of an American. (<https://ncd.gov/newsroom/2018/federal-report-examines-guardianships>) Appointment of counsel was listed among the various due process procedural protections that NCD recommended should be included in any adult guardianship proceeding.

A press release issued with the report stated: “Former Congressman Claude Pepper famously said

of guardianships, ‘The typical [person subject to guardianship] has fewer rights than the typical convicted felon... It is, in one short sentence, the most punitive civil penalty that can be levied against an American citizen, with the exception, of course, of the death penalty,’” said Phoebe Ball, NCD Legislative Affairs Specialist who worked extensively on the report. “NCD chose to examine this topic at depth given the implications for someone’s civil rights and liberty under guardianship – that an individual is losing the authority to make decisions regarding where to live, whether to work and where, where to travel, with whom to socialize, and how to manage money and property. We need to explore alternatives to guardianship such as supported decision making that enable people to avoid this civil death.”

Without an attorney, the serious disabilities of a proposed conservatee will prevent him or her from effectively utilizing the procedural protections afforded to such litigants under state law – protections that can help reduce the risk of placing his or her life under the control of someone who has been or may be abusive. People with developmental disabilities, for example, are at much higher risk of abuse than people in the generic population. The abuse often occurs at the hands of relatives, household members, or care providers – people who may be associated with a petitioner or proposed conservator. (<http://disabilityandabuse.org/survey/index.htm>) A competent attorney who performs his or her function effectively can play a crucial role in vetting a proposed conservator and thereby reducing the risk of abuse. (<http://spectruminstitute.org/publications/trauma-informed-justice.pdf>)

Without an attorney, it is unlikely that anyone will contest the matter if less restrictive alternatives, such as supported decision-making arrangements, have not been seriously explored and considered. A competent attorney can make sure that petitioners have not just checked the less restrictive alternative box on a form but in fact have truly explored options such as supported decision-making. (<http://spectruminstitute.org/ipp-by-pvp.pdf>)

Appointment of an attorney for a proposed conservatee is not a mere formality. Such an attorney, if he or she is doing a proper job, will engage in advocacy and defense activities during a conservatorship proceeding that are crucial to not only a fair process but to increasing the likelihood of a just result. (<http://spectruminstitute.org/pvp/strategic-guide.pdf>) That is why the failure of the Sacramento Superior Court to appoint attorneys for a significant number of people with serious disabilities is so egregious. That is also why a director’s investigation should be opened by DFEH.

November 26, 2018

Respectfully submitted:



Thomas F. Coleman
Legal Director
Spectrum Institute

555 S. Sunrise Way, Suite 205
Palm Springs, CA 92264
(818) 230-5156