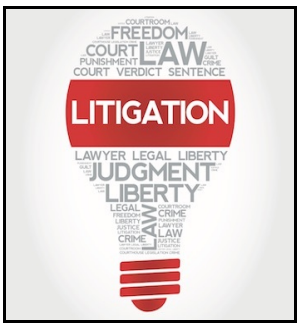
Appointment of a Guardian Ad Litem:
Capacity to Litigate



The Fourteenth Amendment to the United States Constitution provides that no state may deprive an individual of life, liberty, or property without due process of law. Litigation in probate courts sometimes involves potential loss of liberty, such as in a conservatorship proceeding. Other times it may involve the potential loss of property, such as litigation involving trusts or estates. In either event, a litigant in probate court whose liberty or property interests are in jeopardy is entitled to due process of law. Due process requires fundamental fairness in civil proceedings. Thus, a litigant must be afforded an effective opportunity to defend against the loss of liberty or property, including adequate notice of the basis for the potential deprivation and an opportunity to confront adverse witnesses and to present his or her own evidence to the decision-maker. (*Goldberg v. Kelley* (1970) 397 U.S. 254, 266-270.)

The importance of the right to due process in civil proceedings was emphasized by California Supreme Court Justice Stanley Mosk in *Payne v. Superior Court* (1976) 17 Cal.3d 910, 911:

> "Few liberties in America have been more zealously guarded than the right to protect one's property in a court of law. This nation has long realized that none of our freedoms would be secure if any person could be deprived of his possessions without an opportunity to defend them 'at a meaningful time and in a meaningful manner.' (*Fuentes v. Shevin* (1972) 407 U.S. 67, 80 [32 L. Ed. 2d 556, 569-570, 92 S. Ct. 1983].)"

Citing precedents of the United States Supreme Court such as *Boddie v. Connecticut* (1971) 401 U.S. 371, Justice Mosk explained that before someone can be deprived of property interests, the individual must be afforded a *meaningful* opportunity to be heard.

California courts provide individuals an opportunity to be heard in civil cases processed in its probate courts. This includes conservatorship proceedings and litigation involving trusts and distribution of estates. Individuals may appear with or without counsel. Once someone becomes a party to a case in probate court, the individual may make motions, file objections, and demand an evidentiary hearing on the matter in dispute. During such a hearing, the litigant may engage in various procedures, often through his or her attorney, such as confronting adverse witnesses, objecting to the admission of evidence, and presenting evidence and witnesses in support of his or her position.

With the assistance of an attorney of choice, it is the individual litigant who controls the direction and presentation of the case. This right to litigate, however, can be taken away

in a probate proceeding if the court finds the litigant is "an incapacitated person." (Probate Code Section 1003(a)(2).) In other types of civil litigation, a court may take away an individual's right to litigate if the court determines the person is "lacking legal capacity to make decisions." (Code of Civil Procedure Section 373(c).)

Thousands of cases involving seniors and other adults with actual or perceived disabilities are processed through the probate division of the Los Angeles Superior Court each year. According to the court's 2018 Annual Report, more than 3,700 conservatorship and trust cases were processed that year.[1] Since the Los Angeles court accounts for about 25% of probate cases in the state, we estimate that about 15,000 such cases would have been processed that year throughout California. Many of these cases involve seniors and adults with actual or perceived disabilities.

According to the Los Angeles County Bar Association, "Guardians ad litem ("GALs") are playing an increasingly frequent role in probate matters."[2] The increasing frequency of the use of GALs emphasizes the need for clarity in: (1) the criteria for determining incapacity to litigate; (2) the process required for assessing and adjudicating the capacity of an individual to litigate with or without the assistance of counsel; and (3) the appealability of orders authorizing and instructing a GAL.

Replacing a litigant with a GAL infringes on the constitutional right to manage one's own litigation. "Due process considerations attend an incompetency finding and the subsequent appointment of a guardian ad litem" *(Ferrelli v. River Manor Health Care Center* (2d Cir. 2003) 323 F.3d 196, 203.) "The appointment of a guardian ad litem deprives the litigant of the right to control the litigation and subjects him to possible stigmatization." (*Thomas v. Humfield* (5th Cir. 1990) 916 F.2d 1032, 1034.)

An order appointing a GAL also infringes on the First Amendment rights of a litigant. Every person has a constitutionally protected right to petition the government for redress of grievances. This is not limited to seeking redress through the legislative process. The First Amendment also protects an individual's right to have access to the courts to vindicate his or her rights.[3] Foisting a GAL on a litigant also infringes on freedom of speech because, once appointed, it is the GAL and not the litigant and his or her chosen counsel who shapes the messages delivered to the court through pleadings, presentation of evidence, motions and objections, and oral argument. Freedom of speech contemplates effective communication. (*United Farm Workers etc. Committee v. Superior Court* (1967) 254 Cal.App.2d 768, 773) Making a GAL the spokesperson for a litigant interferes with a litigant's right to control his or her own messaging, thereby rendering the communications to the court ineffective from the perspective of a litigant.

For litigants in probate court who are not indigent, the appointment of a GAL also involves the confiscation of assets. A court may order the reasonable expenses of a GAL, including compensation and attorneys fees, to be paid from the assets of the litigant for whom a GAL is appointed. (Probate Code Section 1003(c).) This could require a litigant

to pay tens of thousands of dollars in fees to someone who may be using strategies objected to by the litigant or advocating for a result contrary to the litigant's wishes.

While the Legislature has enacted statutes authorizing courts to appoint a guardian ad litem to control civil litigation for someone determined to be "an incapacitated person" or "who lacks the capacity to make decisions," there are no statutes specifying the criteria or the procedures to be used in making this determination in the context of civil litigation.

This section of the report explores these substantive and procedural issues and makes recommendations for new legislation to provide direction to judges and attorneys as they grapple with these important matters.

In the context of child welfare proceedings, the Supreme Court has stated that if the trial court appoints a GAL without a parent's consent, "the record must contain substantial evidence of the parent's incompetence." (*In re James F*. (2008) 42 Cal.4th 901, 910.) The same should hold true for probate proceedings.

The Court of Appeal has ruled that due process should be followed before a litigant's right to direct his own litigation can be removed. (*In re Joann E*. (2002) 104 Cal.App 4th 347, 361.) This principle should apply to conservatorship proceedings where liberty interests are at stake or other probate proceedings where financial matters are at issue. The confiscation of a litigant's assets to pay for the compensation of a GAL and a GAL's attorney is another reason that due process should apply to proceedings where capacity to litigate is in controversy.

As to the definition of "incapacitated person," an unpublished opinion of the Court of Appeal says this: (*Buwei Shi Xi v. Gong Hau Xi (In re Estate of Yang Hua Xi)* (Aug. 19, 2019, B286213) ___ Cal.App.2d ___ [pp. 17])

> "'Incapacitated person' is not defined by Probate Code section 1003. Black's Law Dictionary defines "Incapacitated Person" as 'Someone who is impaired by an intoxicant, by mental illness or deficiency, or by physical illness or disability to the extent that personal decision-making is *impossible*.' (Black's Law Dict. (11th ed. 2019) p. 1834.)" (Emphasis added)

This standard of decision-making *impossibility* requires a very high degree of incapacity. However, because the *Buwei* decision is an unpublished California appellate opinion, its reasoning has no precedential value for anyone other than the parties to the case. (Rule 8.115, California Rules of Court.) Therefore, we must look to precedents in other states or from federal courts on the standard to be used in evaluating the issue of incapacity to litigate. California has no rule prohibiting reference to such secondary authorities.[4]

Federal law on GAL appointments gives some guidance. Federal court rules require a

court to appoint a guardian ad litem to protect a minor or incompetent person who is not represented by a guardian in a civil proceeding. (Fed. R. Civ. P. §17.)

No universally recognized measure determines a civil litigant's competency. *(Thomas v. Humfield* (5th Cir.1990) 916 F.2d 1032, 1034.) However, just because a person has mental disabilities does not mean the individual "lacks the capacity to litigate." (*Overstreet v. Hancock* (S.D. Miss., Sep. 13, 2012, CIVIL ACTION No. 2:11cv245-MTP) [pp. 1].) The legal standard for lack of capacity to litigate in federal civil proceedings is based on the standards of the domicile of the individual in question. (*Magallon v. Livingston* (5th Cir. 2006) 453 F.3d 268, 271.)

This brings us right back to the question of what standard California uses to determine an individual's capacity to litigate.[5] The answer to this question is important because the appointment of a guardian ad litem deprives an individual of an important right, namely, the right to control the litigation. This includes the power to retain counsel, hire experts and even to settle the case. (*Thomas v. Humfeld, supra*, at p. 1034.)

The issue of capacity to litigate is more fully developed in California in relation to criminal proceedings. Courts exploring or adjudicating the issue of capacity of an individual to litigate in civil proceedings could adopt some of the principles used in criminal law, including the standards and procedures outlined in statutes, court rules, and appellate decisions. Rulings of the United States Supreme Court may also be helpful.

Even though the case was decided in a criminal law context, the United States Supreme Court has defined mental competence to stand trial as a defendant's "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and have "a rational as well as factual understanding of the proceedings against him." (*Dusky v. United States* (1960) 362 U.S. 402.)

The stakes are so much higher in a criminal case than in ordinary civil litigation involving money damages or the administration of a trust. Felony cases also involve consequences that are more harsh than a conservatorship of the person or estate. Therefore, it would be logical for California courts to apply the *Dusky* standard when determining whether an individual in a civil case has the capacity to litigate. Since there are less onerous consequences in civil probate proceedings, it would be inappropriate to require a higher degree of capacity in this context than in a criminal law context.

The California Legislature has essentially adopted the *Dusky* standard for purposes of evaluating an individual's capacity to litigate in a criminal proceeding. Penal Code Section 1367 states: "A defendant is mentally incompetent for purposes of this chapter if, as a result of a mental health disorder or developmental disability, the defendant is unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner." At least one California appellate decision has determined that the standard used in Section 1367 is appropriate to determine capacity to litigate in

civil proceedings for litigants whose capacities are not so significant as to require the appointment of a conservator under Probate Code Section 1801. (*In Re Sarah D*. (2001) 87 Cal.App.4th 661, 667.)

This is a relatively low level of capacity. Much of the onus of this standard focuses on whether defense counsel believes the client can assist in his or her own defense and communicate with counsel rationally about substantive and strategic choices that will be made in the litigation. If a litigant's attorney believes the client has capacity to proceed, it would be a major intrusion into the attorney-client relationship for a court to sever the relationship without substantial evidence contrary to the attorney's own experience with the client.

In a civil context, the issue of a party's capacity to litigate may come to the court's attention in a variety of ways. A judge may observe behavior in the courtroom or read pleadings with information that causes a concern about the mental abilities of a party. An opposing party may present evidence suggesting incapacity. Perhaps the attorney for the party in question may advise the court that communications with the client are impossible due to a mental condition or disability. In any of these scenarios, a judge may feel obliged to inquire further into the issue of an individual's capacity to litigate.

In the criminal law context, there are two levels of inquiry. The first is when a judge has a concern about a defendant's competency that does not rise to the level of a "reasonable doubt based on substantial evidence." That amount of concern may trigger one set of procedures. Procedural formalities escalate when a judge has a reasonable doubt based on substantial evidence. Both procedural paths are explained in an Advisory Committee Comment to Rule 4.130 of the California Rules of Court.[6]

In civil cases, Evidence Code Section 730 authorizes a court to appoint an expert on its own motion to submit a report and testify on any matter as to which expert evidence may be required. The issue of capacity to litigate may be such a matter if the court has received or observed evidence concerning a party's incapacity to litigate. However, the statute does not authorize a court to compel a party to submit to a mental examination by an expert. An expert appointed under the authority of Section 730 might review documentary evidence or interview witnesses but in order to compel a mental examination of a party in a civil case, other statutory requirements must be met.[7]

Furthermore, the California Constitution protects the right of privacy of all individuals. A person is not compelled, as a condition of entering a courtroom, to discard the right of privacy. (*Vinson v Superior Court* (1987) 43 Cal.3d 833, 841-842.) The California Supreme Court has ruled that a person's mental state is protected by the constitutional right of privacy: "If there is a quintessential zone of human privacy it is the mind. Our ability to exclude others from our mental processes is intrinsic to the human personality." (*Long Beach City Employees Ass'n v. City of Long Beach* (1986) 41 Cal.3d 937, 944.)

The normal rules of civil discovery do not apply when a party subject to a discovery order raises a constitutional objection under the right of privacy protected by Article I, Section 1 of the California Constitution. A mental exam cannot be allowed as part of a fishing expedition by an opposing party or even by the court itself.[8]

"[E]ven when discovery of private information is found directly relevant to the issues of ongoing litigation, it will not be automatically allowed; there must then be a 'careful balancing' of the 'compelling public need' for discovery against the 'fundamental right of privacy.'" (*Board of Trustees v. Superior Court of Santa Clara County* (1981) 119 Cal.App.3d 516, 525.)

California law does not specify the degree of evidence of incapacity to litigate that must exist before a court may order a party to submit to a mental examination. The constitutional right of privacy would seem to require a strong evidentiary showing of a compelling need before such an examination could be ordered. On the other hand, a litigant has the right to a fair trial and the court has a duty to ensure such. If a party truly lacks the capacity to litigate, a fair trial cannot be had. The question, therefore, is how much evidence of incapacity to litigate should be required before a court may order a party to undergo a mental exam in order to determine whether the party has such capacity.

It is recommended that the Judicial Council direct its Probate and Mental Health Advisory Committee to review the issue of capacity to litigate, in view of the constitutional rights of privacy and due process, for the purpose of developing evidentiary and procedural standards to be used in evaluating and adjudicating the issue of capacity to litigate. The review should include an evaluation of the constitutional privacy rights that should be considered before a court may order a party to submit to a mental examination in order to determine whether such incapacity exists.

If the court believes there is reasonable doubt based on substantial evidence of incapacity to litigate, then due process requires the court to give notice to the party of the court's concern and to provide a meaningful opportunity to be heard on the matter. This issue would generally arise when the court on its own motion or on request of another party is considering the appointment of a GAL to litigate on behalf of a party who lacks the capacity to litigate for himself or herself even with the assistance of counsel.

When the issue of appointing a GAL arises, the court has two issues to determine. One is substantive and the other is procedural. The substantive issue is what level of incapacity must exist to deprive an individual of the right to control and direct litigation and to communicate to the court through retained counsel. The procedural issue involves the methods to be used in making this substantive determination.

As explained above, the Legislature has not defined incapacity to litigate in either the Probate Code or the Code of Civil Procedure. California probate case law does not offer

assistance. It is therefore necessary to turn to federal and state civil cases[9] and to California criminal cases which have significant discussions on standards to determine the capacity to litigate.

It is recommended that the Legislature enact a statute defining the standard to be used by courts in determining the issue of capacity to litigate in civil cases. The statute should state: "For purposes of Probate Code Section 1003 and Code of Civil Procedure Section 373, a party lacks the legal capacity to make decisions in civil litigation, thus authorizing the appointment of a guardian ad litem, when a mental health disorder or developmental disability renders the party unable to understand the nature or consequences of the proceedings or to assist counsel in the conduct of the litigation in a rational manner."

The adoption of such a law would provide clarity to judges and attorneys on the substantive part of capacity to litigate. Clarification is also needed with respect to the procedural part of this matter.

California case law recognizes that a litigant must be afforded due process before a court appoints a GAL due to an individual's lack of capacity to litigate. However, those cases talk about an informal procedure.[10] In contrast, federal courts have ruled that the United States Constitution requires more than a pro-forma inquiry. Some cases indicate that when a litigant objects to appointment of a GAL, an evidentiary hearing is required.[11]

An individual has a protected liberty interest in pursuing a lawsuit as a principal. (*Thomas v. Humfeld, supra,* at pp. 1033-1034.) A declaration of incompetence endangers a person's good name, honor, and integrity and deprives the individual of the power to control the lawsuit. Therefore, before a GAL is appointed over objection, the federal constitution requires an evidentiary hearing.

A person whose capacity to litigate is challenged must be given notice, an opportunity to review and rebut the allegations of incapacity, and to introduce written and testimonial evidence on the issue. (*Thomas, supra*.)

It is recommended that the Legislature enact a statute requiring that before a GAL may be appointed in civil litigation over a party's objection, the party must be given notice of the right to an evidentiary hearing at which the party may contest evidence of alleged incapacity, cross examine witnesses, and present evidence to the court on the matter.

Once a GAL is appointed in a civil case, the GAL takes control of the litigation, thereby rendering the party to be little more than a bystander or observer. While California law may allow the party to appeal from an order appointing a GAL, statutory and case law are ambiguous as to whether the order is immediately appealable or only after a final judgment is rendered.[12]

It is recommended that the Legislature enact a statute clarifying that an order appointing

a GAL may be appealed from immediately. The law should require the court to notify the party who has been adjudicated to lack the capacity of the right to an immediate appeal from this determination. Since a GAL can make decisions affecting the financial interests and personal rights of a party, it would be unjust to require the party to wait to appeal until a final judgment is entered in the matter. Irreparable harm could be done between the time a GAL is appointed and a final judgment is entered, often many months or even years after the GAL's appointment. One of those harms would be the payment of compensation to the GAL and his or her attorney from the assets of the litigant prior to an appellate court ruling on the validity of the GAL appointment in the trial court. Further harm could also occur as a result of the inevitable delays, often years, in having an appeal decided.

End Notes

1. "2018 Annual Report," Los Angeles County Superior Court, p. 29. (https://spectruminstitute.org/2017-18-probate-filings.pdf)

2. "Guardian ad Litem Mandatory Training," Website Announcement, Los Angeles County Bar Association, Feb. 6, 2018. (https://spectruminstitute.org/lacba-program.pdf)

3. "The right to petition the government for redress of grievances is protected by both the federal and state Constitutions. (U.S. Const., 1st Amend.; Cal. Const., art. I, § 3.)" (*Vargas v. City of Salinas* (2011) 200 Cal.App.4th 1331, 1342 (*Vargas*).) "[T]he right to petition extends to all departments of the Government. The right of access to the courts is indeed but one aspect of the right of petition. [Citations.]" (*California Motor Transport Co. v. Trucking Unlimited* (1972) 404 U.S. 508, 510 (*California Motor Transport*).) "The right includes the right to petition the executive or legislative branches directly." (*Vargas*, *supra*, 200 Cal.App.4th at p. 1342.)

4. "Citation to Unpublished Cases: A Brief Comparison of Federal And California Practices," McManis Faulkner Blog, November 29, 2018. https://www.mcmanislaw.com/blog/2018/citation-to-unpublished-cases-a-brief-comparison-of-federal-and-california-practices

5. Standards for determining capacity to litigate vary from state to state. In Colorado, for example, appointment of a GAL is not appropriate for a person with a mental disability, if the person "understands the nature and significance of the proceeding, is able to make decisions in her own behalf, and has the ability to communicate with and act on the advice of counsel." *(People in Interest of M. M.* (Colo. 1986) 726 P.2d 1108, 1120.) Alabama law suggests a different standard, namely, whether there is sufficient evidence in the record showing that the litigant "is mentally impaired to the extent that he cannot understand the nature and effect of this litigation." (*United States v. 9607 Lee Rd. 72* (M.D. Ala. 2012) 915 F. Supp. 2d 1270, 1272.)

6. The Advisory Committee comment explains: "The case law interpreting Penal Code section 1367 et seq. established a procedure for judges to follow in cases where there is a concern whether the defendant is legally competent to stand trial, but the concern does not necessarily rise to the level of a reasonable doubt based on substantial evidence. Before finding a reasonable doubt as to the defendant's competency to stand trial and initiating competency proceedings under Penal Code section 1368 et seq., the court may appoint an expert to assist the court in determining whether such a reasonable doubt exists. As noted in *People v. Visciotti* (1992) 2 Cal.4th 1, 34-36, the court may appoint an expert when it is concerned about the mental competency of the defendant, but the concern does not rise to the level of a reasonable doubt, based on substantial evidence, required by Penal Code section 1367 et seq. Should the results of this examination present substantial evidence of mental incompetency, the court must initiate competency proceedings under (b)."

7. Any party may obtain discovery by means of a mental examination of another party whose mental condition is in controversy in the legal proceeding. (Code Civ. Proc., § 2032.020(a).) A motion for a mental exam may only be granted for good cause. (Code Civ. Proc., § 2032.320.) In order to obtain such an order, there must be a demonstration of specific facts justifying the discovery. (Weil & Brown, California Practice Guide, Civil Procedure Before Trial, Chap. 8, section 8:1557, p. 81-16.) These statutes, however, do not authorize a court to order a mental examination on its own motion. Furthermore, for a party's mental condition to be "in controversy," the condition must be "'directly involved in some material element of the cause of action or defense.'" *Id.* at 448 (citation omitted). When the pleadings have not put a party's mental condition at issue, it must be affirmatively shown that the party's mental condition "'is really and genuinely in controversy and that good cause exists for ordering each particular examination.'" *Brooks v. Brown*, 744 S.W.2d 881, 882 (Mo. App. 1988) (quoting *Schlagenhauf v. Holder*, 379 U.S. 104, 118 (1964)). The rule requires a "greater showing of need than relevancy." *Id.*

8. "Your Client's Privacy is Not a Myth: How to Protect Your Client's Privacy – And Your Case – In Discovery," Law Office of Jeremy Pasternak. https://pasternaklaw.com/publications/your-clients-privacy-is-not-a-myth-how-to-protect-your-clients-privacy-and-your-case-in-discovery/

9. Citing *In re Jessica G.* (2001) 93 Cal.App. 4th 1180, 1186, one federal court ruled that a party lacks the capacity to litigate if he or she does not have the ability to understand the nature or consequences of the proceeding, or is unable to assist counsel in the preparation of the case. (*AT&T Mobility, LLC v. Yeager* (E.D. Cal. 2015) 143 F. Supp. 3d 1042, 1050)

10. Especially in situations where a litigant's assets will be confiscated by the court to pay for the fees of a GAL and the GAL's attorney, an informal hearing would not cut the muster for due process purposes. The loss of thousands of dollars in assets should require a formal evidentiary hearing to determine whether the triggering factor, i.e., incapacity to litigate, is supported by substantial evidence.

11. These two approaches can be reconciled. An informal interaction between the court and a litigant would be sufficient when the process satisfies the court that a GAL is not needed because the individual understands the nature of the proceedings and potential consequences and has the ability to cooperate with counsel. However, if the result of such an inquiry is a tentative decision by the court to appoint a GAL over the party's objection, then a formal evidentiary hearing should occur at which evidence is presented, witnesses testify, resulting in a finding based on substantial admissible evidence.

12. In the context of a juvenile dependency proceeding, one appellate decision states that an order appointing a GAL can be challenged in an appeal from a final judgment in the matter. *(In re Joann E*. (2002) 104 Cal.App.4th 347.) One problem with this procedure is that if the GAL order is reversed, it undoes the entire case and requires the parties to start litigating from scratch. This is not an effective way to preserve judicial resources. Nor it is fair to the parties who may have extended months or even years in trial court litigation and considerable financial resources in the process. Making a GAL order immediately appealable makes more sense. In fact, such an order already may be immediately appealable but statutes and case law are somewhat ambiguous on this point. Spectrum Institute filed an amicus curiae letter with the California Supreme Court on this issue in April 2020, asking the court to grant review to clarify the matter. *(Lund v. First Republic Trust Company*, California Supreme Court, Case No. S261165.) https://disabilityandabuse.org/S261158.pdf