



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, objections, and oral argument. Freedom of speech contemplates effective communication. *United Farm Workers etc. Committee v. Superior Court*, 254 Cal. App. 2d 768, 773 (1967). Making a GAL the spokesperson for a litigant interferes with a litigant's right to control the messaging, thereby rendering the communications to the court ineffective.

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 attorney 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 civil litigation.

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 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.

Once a GAL is appointed in a civil case, a litigant becomes little more than a bystander or observer in the case. 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.

Since the appointment of a GAL is a drastic measure that undermines fundamental constitutional rights, the criteria and procedures for this process should be clearly spelled out in law, including the right to an immediate appeal.

Current law is ambiguous on all of these issues. That is why Spectrum Institute will be submitting a capacity assessment report to the governor, chief justice, and legislature later this year, recommending clarifications to protect the rights of seniors and people with actual or perceived disabilities who become involved in court proceedings. (<https://spectruminstitute.org/capacity/>)

That is also why Spectrum Institute recently filed an amicus curie letter with the Supreme Court asking the justices to grant review in the case of *Bradford Lund. v. First Republic Trust Company* (S261165) to decide the immediate appealability of an order appointing a GAL, in this case one that was entered without an evidentiary hearing on the issue of Mr. Lund's actual capacity.

It's time for officials in all three branches of government to recognize the seriousness of the GAL process and to clarify the law so that unnecessary constitutional intrusions are avoided. ◇ ◇ ◇

*Thomas F. Coleman is the legal director of Spectrum Institute, a nonprofit advocating for the right of seniors and people with disabilities. Email him at: [tomcoleman@spectruminstitute.org](mailto:tomcoleman@spectruminstitute.org)*