

The GAL Process Raises Serious Constitutional Issues

By Thomas F. Coleman
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The appointment of a guardian ad litem in civil litigation is usually done under the radar and therefore avoids public scrutiny. Selecting, appointing, and directing a GAL is a technical process that seems so legalistic that its constitutional implications have mostly gone unnoticed by civil libertarians.

In reality, however, the guardian ad litem process is sometimes a Trojan horse whereby someone can seize control of litigation and steer it in a desired direction. The person initiating the GAL tactic could be an opposing party or even the judge. In either event, a GAL appointment infringes on constitutional rights and in some cases is done without giving a litigant the benefit of an evidentiary hearing into the issue of capacity.

California courts provide individuals an opportunity to be heard in civil cases. Once someone becomes a party in a case, 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 such as confronting adverse witnesses, objecting to the admission of evidence, and presenting evidence.

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 County Superior Court each year. According to the court’s 2018 Annual Report, more than 3,700 conservatorship and trust cases were processed that year. Since the Los Angeles court accounts for about 25% of probate cases in the state, there could be 15,000 such cases processed each year throughout California.

According to the website of the Los Angeles County Bar Association, guardians ad litem, aka GALs, are playing an increasingly frequent role in probate matters. The increasing use of GALs, and the constitutional intrusions they create, call for greater scrutiny of the process by which they are appointed.



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*, 323 F.3d 196, 203 (2d Cir. 2003). “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*, 916 F.2d 1032, 1034 (5th Cir. 1990).

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.

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. ◇ ◇ ◇

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